BAR NONE

A defiant little ranch girl's
refusal to give in
takes her from the mountains
of Colorado to the bench
of the Supreme Court.

A True-Life Pioneer Story

Val Orr

BAR NONE

CHAPTER TEN
Equally Stifled

"Without affirmative action my opportunities may not be the same as my Caucasian peers."

NICOLE RETLAND, 7TH-GRADE HONOR STUDENT. BLACK.

"These programs stamp minorities with a badge of inferiority."

CLARENCE THOMAS, SUPREME COURT JUSTICE. BLACK.

All three major television networks led with the same story on June 12, 1995. Dan Rather at CBS: "The Court set new restrictions on federal affirmative action programs." Tom Brokaw at NBC: "Those standards make it much more difficult for affirmative action." Peter Jennings at ABC: "The power of the federal government to encourage the hiring of minorities will be quite severely limited."

We won. Sort of.

In a nuanced, complex opinion, the Court determined that federal programs needed to conform to the same "strict scrutiny" standards that already applied to state and local programs. This is the most exacting level of judicial review, and means that any law must meet a "compelling government interest" and must be "narrowly tailored" to accomplish its goal.

I wanted the Court to abolish preferences altogether, but Justice Sandra Day O'Connor, writing the opinion for the 5-4 majority, made clear that she was not ready to go that far: "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minorities in this country is an unfortunate reality and government is not disqualified from acting in response to it."

As a majority—and thus as law—the Court left in place its race- conscious programs, but tightened the standards. For our case, this meant that it was remanded back to the Tenth Circuit to determine whether the federal program under which we lost the San Juan National Forest contract could survive this new, tougher standard.

Although all we wanted to do was go back to work, we were instead going back to court.

I wished that five Justices had the backbone of Justices Clarence Thomas and Antonin Scalia. Their concurring opinions reflected a clear sense of how wrong these programs were. From Justice Thomas: "Under our Constitution, the government may not make distinctions on the basis of race. These

programs stamp minorities with a badge of inferiority. . . In my mind, government-sponsored racial discrimi- nation based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. . . . In each instance, it is racial discrimination, plain and simple."

Justice Scalia was equally forceful in calling for the end of recognizing race in public policy: "Government can never have a 'compel- ling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction. . . . under our Constitution, there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution's focus upon the individual . . . . To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American."

Even Justice Scalia did not go far enough. The race we all are is human.

"Randy, we have to go back."

"I'm done with this case. I just want to work."

"You may want to quit, but this is our mission. This is what we are."

"I've had enough. This is what you are. You and your Val's Fucking Crusade."

Our Supreme Court ruling came during Bill Clinton's months-long review of over 160 federal race preference programs. I hoped our decision would cause him to scrap the review and issue a blanket statement ending race preferences, or at least dramatically limit them. A political realist, he had been nudging to the center on topics such as balancing the budget and school prayer. Instead, one month after Adarand v. Peña was decided, he issued his "Mend it, don't end it" stance, and by executive order reaffirmed the principle of affirmative action across the country. He told all of his agencies that government preference pro- grams would continue, but needed to comply with four new provisions: no quotas, no preferences for unqualified people, no reverse discrimi- nation, and no continuation once a program's purpose has been met.

In reality, this did nothing more than make agencies create cosmetic and transparent adjustments, in effect changing the rules while the game was being played. Those rule changes complicated matters for our team.

"It's messy," said Todd. "The administration keeps squirming, throwing up delaying tactics, doing all they can to avoid seeing us in the courtroom."

"What else do you need from us?" I asked. Todd had already spent even more time with Randy confirming the role that government bribes continued to play in Adarand losing business.

"Nothing yet. They are asking for more time—six months more— to find examples of discrimination. Randy and I have done enough talking to the other companies to know that the feds won't find what

they want, no matter how many more depositions they take. And we have a good district judge. Kane. He's not putting up with their delays.

But even speeding things along, it will still be months."

In those months, progress occurred in California, where Ward Connerly was making a difference. A University of California Regent, he had led a bitter struggle to eliminate race preferences in school admissions, state contracting, and public employment. In the face of enduring and vociferous prejudice, Connerly spearheaded the fight to pass Proposition 209, an affirmative action killer.

And won.

On November 5, the California voters amended their state constitution with this straightforward text: "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."

While we were fighting on the national stage to change federal laws, Proposition 209 was to become the model at the local level to get government out of the race-preference business. In time, Ward's beachhead legislation would become the model for numerous states, including Colorado.

But that was still a decade away.

On Dec 20, 1996, we appeared before District Judge John Kane.

An ally in procedure—he had expedited this appearance over volumi- nous objections—he kept his biases on the case merits well concealed.

Only a short time into the proceedings, the U.S. Attorney shocked the court with his assertion. "Your Honor, we conducted depositions all over Colorado, and they show that there is racism in the contracting industry statewide."

Perry and Todd looked at each other. All four eyebrows went up.

"These contractors will not hire a minority unless the government forces them to do it. All of those contractors said the only reason they ever give a job to a minority subcontractor is because of these preferences. That's the kind of racism that exists out there."

Perry shot to his feet. "Your Honor, that is a lie."

He leaned over to Todd and whispered, "Is he telling the truth? Is there any fact in this at all?"

Todd was immediate, "None." He and Randy had put enough hours and miles together to know.

"Are you sure? I'm going out on a limb here."

"Absolutely."

Perry turned back to the microphone and to Judge Kane. "Your honor, that is a lie; it's a damnable lie. I will step away from the micro- phone and I will allow counsel to point to the record where anyone said that they would not award a contract to a qualified minority bid, because it doesn't exist."

And he stepped back.

Nothing else mattered in the case.

"I need to practice looking up," I said to my son.

The Reflecting Pool on Washington D.C.'s National Mall is over a third of a mile long, connecting the Lincoln Memorial on the west to the current site of the World War II Memorial on its east. But in 1997, with the World War II Memorial still years from completion, that east expanse offered not solemnity but rest. After a long morning of muse-

ums, including an extended stop at The Star-Spangled Banner, Ted and I had one stroll remaining against the chill wind of a February after- noon. I used it to practice.

"It's Newt Gingrich. And Oliver North, and lots of others. I can't just read this speech," I said. Not at the Mayflower Hotel, not to honor Ward Connerly. Three weeks prior, Perry Pendley asked me to speak at the Lincoln Leadership Awards, passing on an invitation from House Speaker Gingrich.

"Let's start walking while you read," Ted said. "That way if you look down too much you'll probably land in the pool."

We walked west, toward the Lincoln Memorial, and I read. "In August 1989, the small family business that my husband Randy and I started lost yet another Federal highway subcontract on which we had submitted the lowest bid."

Ted watched me practice simultaneous oration and walking. I watched Lincoln grow larger with each paragraph.

Ted coached. "You're sounding good. I can tell you mean it. Don't forget to look up."

I found my place in the text. "I was told many times that we should be certified as a women-business-enterprise, and so qualify for our piece of the quota pie. I refused to do that because I believe quotas are wrong."

We walked towards the setting sun, towards the Great Emancipator. I spoke and walked and felt every word, summoning the proper authenticity for an event to be held on Lincoln's birthday.

Ted said, "Look up."

I looked up. ". . . we will not pass racial guilt along like a baton, from our generation to the next."

We walked up the broad steps, only a few words remaining in my prepared text. I left the navigation to Ted, my arm hooked in his, but my thoughts on the evening to follow.

"Look up."

". . . and we thank you on behalf of our children, Kendra and Ted.

God bless you."

"Now look around."

I turned.

"Look where you are standing."

The Washington Monument seen past the Reflecting Pool is the same vista I saw on my tiny set, in fuzzy grays, when I was eight. I remembered the crowds filling the mall, surrounding the shallow water, and standing together for one message: character, not color.

Ted and I returned to the same spot six years later, soon after Coretta Scott King dedicated a new inscription there on the fortieth anniversary of her husband's most famous speech.

Newly etched in the polished pink and black granite underfoot, dim and subtle for not being painted, eighteen steps below Lincoln's statue, were the following words:

I HAVE A DREAM

MARTIN LUTHER KING, JR.

THE MARCH ON WASHINGTON

FOR JOBS AND FREEDOM

AUGUST 28, 1963

We're getting closer, Dr. King. We're getting closer.

Inspired by the success of Ward Connerly's Proposition 209 ballot initiative, Colorado lawmakers attempted to pass a similar bill through the legislature. When House Bill 1299, the "Equal Opportunity Act of 1997" came to the state senate for committee hearings in March, one month after my Lincoln Awards speech, I stood in support. Alongside me were Perry Pendley and long-time family friends Ray Hart, black appraiser, and Jeff Buerger, rugged cowboy.

The Supreme Court Chamber—chosen for its capacity—was nonetheless packed, standing room only for hours. The printed list of citizens signed to speak on the bill included only four in support: Col- orado's Attorney General Gale Norton, and my cadre, the three amigos. "NAACP" appended many names on the list.

After an hour of testimony supporting race preferences, Perry took the microphone. Against the room's sentiment even his cogency found little purchase. "The question is not," he testified, "'Will racial discrimination by private individuals when in violation of the law be permitted?' It will not be permitted. The question really ought to be,

'How long will government continue to do what we tell private individuals they can never do, which is make decisions on the basis of race?'"

An hour after Perry spoke, and following another half-dozen race hustlers, Nicole Retland broke my heart.

Petite, composed, pretty, and black, she sat before the panel and lowered the microphone. "My name is Nicole Retland. I am a 7th- grader in the IB program at Hamilton Middle School, and an honor roll student. I plan to attend college and go on to medical school."

This eloquent and accomplished young lady had the world before her.

With her poise and drive she represented the best of our youth's promise.

"—but without affirmative action my opportunities may not be the same as my Caucasian peers. My grandparents and parents have benefited from affirmative action. My grandparents struggled that I too may have better opportunities and not be judged by the color of my

skin, but by my qualifications."

But affirmative action means just the opposite of that. Instead of seeing your qualifications, future classmates and workmates will wonder if skin color is the reason for your progress. As long as affirmative action is in place, you'll never be judged solely on your qualifications, and you'll never know the legitimate esteem that comes from advancing in a color-blind environment.

After another hour of people testifying that the system owed them something, I had my chance to rebut, decrying the injustice of a spoils system based on race and sex. Many watched closely, most with squints and set jaws. Ray followed me, a man so dear to my family that my father calls him his other son, and my brothers and I all call him our other brother.

From their outcry just after he began, it was apparent the crowd expected him to be another preference seeker. Ray's invocation of Dr. Martin Luther King, with "Sometimes silence is betrayal," provoked a cry of "Traitor!" from a mass near the door, suddenly a mob of anonymity. Over the years Ray had told us enough stories of verbal abuse (although usually from redneck whitey) that we knew his "sticks and stones" armor to be strong.

Our last lone ranger pressed on. "Affirmative action is broken. It has outlived its usefulness." The other speakers dissented.

"There is a certain stigma." The crowd dissented. "We've lost our pride." The blacks dissented.

Ray rejoined us: my cowboy, my lawyer, my black brother, and me. We had been resisting the crowd's flow, holding our ground inside the chambers, isolated advocates and fully outnumbered. But there were no more speakers on our behalf, and a queue of twenty more in opposition milled at demonstration ready, their indignation and sense of entitlement having spilled into the chamber as catcalls during Ray's time at the microphone.

We trickled into the hall, now its own echo chamber: Ray and Jeff first; I followed; Perry was caught in the net of bodies. I drew a flash crowd—eight women, all Hispanic, all angry. All loud.

"Traitor!" One behind me shouted.

That word again. As if by standing for self-reliance I had violated some women's code of solidarity in subjugation.

Then from every side: "Women deserve better than you! You're a traitor to your gender! You don't represent any of us!"

I certainly didn't. Their only strength was in numbers and in embracing their weakness, their values polluted by an incestuous dependency on handouts and set-asides. I had had enough. My breath came fast in the same way it had when Grandpa Ted demanded that I not talk to my black friend Gary, the same way it had when I woke to a burning cross in Jim Crow Louisiana. This was wrong. Too wrong for pity.

I wheeled on my heels like standing in a saddle, taller than myself, and looked each in the eye. "I'm really sorry for all of you that you don't believe enough in yourself. When you want to grow up and be real women, let me know, because real women don't have to use government programs to show they're worthy."

During their passing moment of surprise, this perplexing viola- tion of their code, commotion further down the hall rose to an angry spike. I elbowed past their resurging resentment to close on Jeff, his stance wary, where beyond him a funnel of incoming people filled the capitol hall—save for a clearing near the door, ringed like a schoolyard confrontation.

Ray stood at its center, his egress blocked.

Never in all the high-country brawls and schoolyard slap-fights had

I heard so many shouts of "Nigger!" and "Uncle Tom!" and "Nigger!" some more. All from black men, four of whom converged on Ray, the closest with chin high, chest out, palms upturned. His voice thick with Black Pride: "What the fuck are you—Clarence Thomas' poster boy?"

I saw Jeff tense. He was closer to Ray than I was, but still yards away from the confrontation. His fists clenched and his weight shifted forward, a college athlete's ready stance.

Ray surveyed his aggressor, appraised his demeanor, evaluated his worth. He said, "I don't think you need to step too much closer to me."

I had never heard Ray's don't fuck with me tone, a resolution backed by imminent threat. Its message could not have been clearer, not to the crowd who quieted, sensing volatility, nor to the Alpha Negro, who invited it.

One step further into Ray's space, the race thug spat his dominance: "You. My. Nigger." A claim of ownership, not fellowship.

EQUA L LY S T I F L E D

On the ranch, lesser men fought over half a bottle of skid-row hooch or a pack of mislaid chaw. My friend Ray was not a lesser man.

"Get . . . out of my way," from him was enough.

Together Jeff and I closed on Ray as he stepped towards the narrow clearing now before him—a parted Black Sea likely to crash back in momentarily. The two of us linked Ray's arms, one on each side, and hastened to the exit, taunts ringing behind.

Not every philosophical opponent heckled. Some, even in the same halls we had just left, merely misunderstood ends and means.

Colorado Senate Republican patriarch Ray Powers served over twenty years in the state legislature, a gentleman leader and deal- maker. Like my dad, he left school as a teen to run his family's ranch, the Powers' dairy farm in eastern Colorado Springs. I thought he would understand the value of hard work, having spent decades raising cattle before entering politics.

At the state capitol, trying to gain the support of any legislator who would listen, I found him in his office, and explained our case. "Gee, Val. What's the problem?" he said, with fractionally too much condescension. "Just play the game. The company is in your name; you hold most of the stock. Apply for the DBE status and get those contracts based on gender."

I was insulted. "DBE. Listen to the words. Disadvantaged business enterprise. I'm not disadvantaged, and I won't claim it. What about my brains? My talent? My competitive spirit?"

The Republican icon from my city took off his glasses and looked me straight in the eye. "I've been here a long time. I'm telling you it's not worth the fight. Play the game."

"I thought you would understand," I said. "I do payroll and clean the office. I'm not out pounding in posts. I'm a director, but I work mostly from home. I can't represent that I'm at the office every day, or on the trucks every day. Randy does that."

His shrug ended the conversation. Closing the door I recalled one of my proudest moments as a parent. My daughter, Kendra, excelled at hockey throughout high school—too much for the girls her age: their leagues presented no challenge for her talent and aggression.

When the head coach weighed her application for the boys' division, he suggested she play down a level. "These boys are sixteen and seventeen," he said, sizing her up. "You'll get smashed. We'll put you in bantam."

"No," she said, dismissing the opportunity to play against boys no smaller but a year or two younger than she was. "I'll play my age. Just

because I'm a girl doesn't give me a right to cheat the system."

Coach looked at me, his eyebrows suggesting tears and injuries. "You heard her," I said.

No pink saddles on the ranch. No pink helmets on the rink.

Exiting the capitol, I considered the message we send to our daughters and our granddaughters when we say, "You get a preference because you're a girl," how it robs a parent of the chance to tell her child, as I did, how proud I was of her, and how it demeans a girl to play along with a system that expects less because of her gender.

I will not perpetuate such slurs on half the human race.

On June 2, 1997, almost two years after the case was remanded from the Supreme Court, Colorado District Court Judge John Kane ruled that the set-asides we initially opposed, eight years prior, were, under the new strict scrutiny standard, unconstitutional. He stopped the minority preference program cold. Dead. Done.

Finally we could just get to work.

Eleven weeks later the United States appealed Kane's ruling.