1992


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Victory By Surrender:
The Voting Rights Amendments of 1982 and
The Civil Rights Act of 1991

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The Civil Rights Act of 19911 and the Voting Rights Amendments of 19822 stand as the two most significant pieces of civil rights legislation of the past ten years. Like their predecessors, the Civil Rights Act of 19643 and the Voting Rights Act of 1965,4 they are cornerstones of the movement to achieve equality through the law. In an era when increasing numbers of strategists and academics have encouraged civil rights advocates to take their cause to legislatures, not courts, these laws represent the triumph of political savvy and popular sovereignty. By passing these laws, the people’s representatives have overturned a number of restrictive Supreme Court rulings that narrowed the scope of voting rights and employment discrimination law.

At the same time, however, there is a darker side to these legislative triumphs. While both pieces of legislation constituted successes for the civil rights movement, they were also defeats. The debates surrounding both the Voting Rights and Civil Rights Acts were about more than discrete pieces of legislation. They were also debates about the appropriate vision of civil rights, about the definitions of discrimination and equality, and most fundamentally, about what steps the nation needs to take in the struggle for racial and gender justice. In this broader sense, the civil rights leadership lost more than it gained.

This Article will examine the debate surrounding the Voting Rights and Civil Rights Acts. In both legislative debates the civil rights forces were presented with the challenge of articulating and defending their vision of civil rights. The Voting Rights Act required a commitment to an effects test over an intent test, a race-conscious model over a race-blind model, and to outcome as a means of measuring opportunity. The Civil Rights Act required the endorsement of race-based preferences in employment, government imposed

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restraints on the managerial prerogative of corporate America, and an active judiciary equipped to defend victims of employment discrimination. While the logic of the two legislative proposals required an endorsement of such a civil rights vision, the civil rights lobby failed to provide it. As I will argue, the most notable aspect of both debates was the consistency with which the civil rights leadership undermined itself and the civil rights struggle with its unwillingness to articulate and defend the vision underlying each legislative package. In the process of winning the passage of these pieces of legislation, the civil rights forces repudiated much of their civil rights vision.

This Article proceeds in three parts. Part I addresses the legislative process leading to the passage of the Voting Rights Amendments. It argues that despite ultimate legislative success, the debate took a form that led the civil rights leadership to believe that it could prevail even without fully articulating the principles underlying its demands. Part II will provide a similar examination of the legislative history of the Civil Rights Act, arguing that the Act's supporters were again unwilling to present the true nature of their claims, and were thus unable to effectively respond to attacks by the Act's opponents. My analysis of both the Voting Rights Amendments and Civil Rights Act will focus on the House and Senate debates, particularly the Committee testimony, as well as the debates that took place in the popular press. Part III will compare the success of the Voting Rights and Civil Rights Acts. It argues that notwithstanding the passage of these pieces of legislation, the rhetorical and ideological tactics adopted by the civil rights leadership have done little to further, and may even have damaged, the civil rights movement.

I. THE VOTING RIGHTS AMENDMENTS OF 1982

The passage of the Voting Rights Amendments was a two-stage process. While identical bills were introduced in the House and Senate on April 7, 1981, the legislation proceeded through the two houses on different tracks.5 The legislation was first considered by the House of Representatives, as its sponsors concluded that its chances of success would be greater in the House, which was controlled by the Democrats, rather than in the Senate, controlled by the Republicans.6

Over 18 days of hearings were devoted to the House bill (H.R. 3112). In all, over 100 witnesses testified before the House Judiciary Committee's Subcommittee on Civil and Constitutional Rights.7 The debate before the

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Subcommittee focused almost exclusively on two issues: 1) whether to extend the Section 5 pre-clearance requirements, which mandated that selected jurisdictions submit to the Justice Department any proposed modifications of electoral procedures, and 2) what, if any, mechanism would be available for covered jurisdictions to escape, or "bail-out" of, the Section 5 pre-clearance requirements. H.R. 3112 was reported out of the Subcommittee by an unanimous vote without amendment. After three days of consideration by the full Judiciary Committee, the bill was reported to the House. The floor debate, like the debate before the Subcommittee, centered on the preclearance and bail-out provisions. Eventually, the bill passed by a wide margin.

While the House debate was lengthy and vigorous, there was virtually no discussion of the proposed provisions altering Section 2. While Section 5 mandates Justice Department review of selected jurisdictions, Section 2 establishes the standards for challenging the electoral procedures of any jurisdiction in the country, regardless of whether it is covered by Section 5. It is here that the debate over the intent and effects standards would take place. The question of intent versus effects was a critical one because it forced into focus two visions of civil rights. The first measures progress by better results and views discrimination as pervasive, systemic and often unintentional. The other measures progress by increased opportunity and sees discrimination as the occasional actions of ill-intentioned actors. While the House debate was by no means a foregone conclusion, it failed to focus on these issues and therefore did not present the bill's sponsors with the challenge of articulating and defending their civil rights vision. That challenge would come in the Senate.

A. The Conservative Critique

Supporters of the bill were brimming with confidence as they introduced it in the Senate. Although President Reagan continued to oppose a number of the provisions in the House bill, he had indicated that he endorsed an extension of the Voting Rights Act, stating that "The right to vote is the crown jewel of American liberties, and we will not see its luster diminished." Sixty-one senators introduced a bill identical to that passed in the House. The principal

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8. Id.
9. Id.
11. Robert Pear, Reagan Backs Voting Rights Act But Wants To Ease Requirements, N.Y TIMES, Nov. 7, 1981, § 1, at 1. Reagan opposed the effects test, saying "I believe that the act should retain the 'intent' test under existing law, rather than changing to a new and untested 'effects' standard." Id.
sponsors were Senators Kennedy and Mathias. Hill watchers noted that
passage of the Amendments seemed probable. The Christian Science
Monitor reported that the large number of cosponsors for the bill “will make renewal
difficult to oppose. And it shows that even in its conservative mood, Congress
is reluctant to turn its back on the Voting Rights Act, widely acclaimed as the
most important civil rights legislation ever passed.”

Some in the Senate opposed the legislation on the grounds that it unfairly
singled out the South and that it did not allow covered jurisdictions sufficient
opportunity to escape Justice Department review. Senator Jesse Helms argued,
“The act is no longer needed . . . . It is unfair to single out certain areas of
the country . . . for federal intervention.” And Senator Strom Thurmond
said that “this federal law, just as others, should apply to everybody and at
the same time give everybody an equal chance to seek relief from the unusual
requirements of federal preclearance of state laws.”

Despite the comments of Senators Helms and Thurmond, by the time the
Voting Rights Amendments got to the Senate, the contentious issues had been
narrowed considerably. Senator Hatch, who would lead the Senate conserva-
tives, indicated in his opening statement before the initial hearing on the Act,
that “there seems to be little disagreement that the provisions of the Voting
Rights Act ought to be extended. That is certainly my view, and, I believe,
the view of a substantial majority of the Senate.” Satisfied with the manner
in which the House had resolved the majority of questions regarding the
Amendments, the Senate would limit its discussion to one issue: whether
challenges under Section 2 should be governed by an effects test or by an
intent test.

According to Hatch, the results test embodied in the House bill was at odds
with the way America defined civil rights. It would transform the Voting
Rights Act from a provision “designed to insure equal access and equal
opportunity in the electoral process to [a] provision designed to insure equal
outcome and equal success.” Moreover, the results test is
totally at odds with everything that the Constitution has been directed at since the
Reconstruction amendments, Brown v. Board of Education, and the Civil Rights
Act of 1964. It is at odds with the notion that Representatives owe their allegiance
to individual citizens, not to racial or ethnic blocs. It is at odds with the most
fundamental ideas of federalism and local self-government. Indeed, the very term

15. Id.
17. Id. at 3.
"discriminatory results" is purest Orwellianism in radically transforming the concept of discrimination from a decisionmaking process into an end or an outcome in and of itself.\(^{18}\)

By providing a concise summary of how the bill’s opponents defined equality Hatch’s comments set the stage for the debate on the bill. Professor James Blumstein of Vanderbilt law school added the final nuance to the conservative’s definition of discrimination. Blumstein said,

If you will indulge me in an anecdote, there is the old story about the Mississippi registrar that is lining up a bunch of farmers, three whites and one black, and they are administering the old literacy test. The registrar asks the white farmers to read from the U.S. Constitution; they do, and they are all registered. The black farmer comes up and the registrar shows him a copy of the Peking Daily and says, "Can you read that?" The farmer, much to her surprise, says, "Well, yes I can." She says, in utter shock, "Well, what does it say?" He says, "Well, it says that blacks ain't going to vote in Mississippi this year."\(^{19}\)

"That," concluded Blumstein, "is discrimination. When you see that kind of disparate treatment where there is a clear distinction based upon race, that is what I see as discrimination."\(^{20}\)

Hatch and Blumstein had ably outlined one vision of civil rights. Their vision of equality emphasized individuals over groups, states’ rights over national power, process over results. Their vision of discrimination emphasized the overt discriminatory actions of individuals and institutions with evil motives. Moreover, according to Hatch, their vision was not simply one of many competing visions: it was the consensus vision of the nation as a whole. Referring to the civil rights leadership’s definition of discrimination, Hatch contended that he did not “believe that you [could] find 1 person in 100 in Boston, Baltimore, or Cleveland, black or white, who would define discrimination in this manner.”\(^{21}\)

The vision of civil rights, discrimination, and equality put forth by Hatch and Blumstein at the opening of the proceedings continued to motivate the conservative critique of the effects test throughout the course of the hearings. Using language remarkably similar to the language they would use eight years later when attacking the Civil Rights Act, the opposition claimed that an effects test would result in quotas and proportional representation for minorities. According to Representative Thomas Briley, if the effects test were maintained, “you’re going to have quota systems set up throughout much of the country . . . .”\(^{22}\) Similarly, the Assistant Attorney General for Civil Rights, William Bradford Reynolds argued that the effects test will produce “quotas

\(^{18}\) Id. at 5.
\(^{19}\) Id. at 1333.
\(^{20}\) Id.
\(^{21}\) Id. at 5.
\(^{22}\) Id. at 477.
in the electoral process.”

In his testimony before the Senate, Attorney General William French Smith said that the results test will produce “proportional representation” or “quotas.” He elaborated further in a column in the New York Times: “[T]he [effects] test would be triggered whenever election results did not mirror the population mix of a particular community, and could gradually lead to a system of proportional representation based on race or minority language status—essentially a quota system for electoral politics.”

This quota system would be “inconsistent with the democratic traditions of our pluralistic society” for it “is based on and would foster the abhorrent notion that blacks can only be represented by blacks and whites can only be represented by whites.”

The bill itself contained no endorsement of quotas or proportional representation. Its opponents argued, however, that even if such quotas were not explicitly mandated by the bill, governments would turn to quotas rather than face voting rights suits alleging a disproportionately low number of minority elected officials. The bill’s opponents contended that local governments would redraw their districts to ensure that the number of minority elected officials closely mirrored the number of minority citizens. For example, one opposition witness argued that “the effects test will have an inevitable tendency to lead to racial quotas,” because “human beings are remarkably quick to find the shortest way to avoid trouble with the authorities.” Under the effects test, local officials “will note that an elected body with a racial composition unproportional to that of the voting population may well be taken by the authorities as proof of discrimination . . . .” Because these officials want to avoid conflict, “the proper course will instantly spring to mind: Contrive matters so as to assure an elected body with a racial composition proportionate to that of the voting population.”

Such action should not be encouraged, because “[h]owever explained, however disguised, however rationalized, that is a quota system . . . .”

The bill contained a disclaimer provision which said that the lack of proportional representation would not “in and of itself” constitute a violation. However, this provision would do little to prevent quotas, said the bill’s opponents, because it would only have relevance “after election systems had been restructured to guarantee as nearly as possible that proportional represen-
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tation would result." According to Attorney General Smith, the entire Act created such strong pressure to ensure quota representation that the disclaimer provision would have little meaning.

The bill’s opponents also criticized the effects test because it focused on race. They complained that in order to determine whether a violation had occurred, a judge would have to examine the racial composition of the legislature and compare it to the racial composition of the community. The bill’s opponents opposed such an emphasis on race. Professor Henry Abraham criticized the results test on the grounds that it “would exacerbate race consciousness, not any particular race per se, necessarily, but certainly race consciousness.” Another critic indicated that the results test “assumes that there is no escape from race.” The results test would “institutionalize racial division” and encourage Americans “to cleave to some organized faction . . . .” Moreover, in implementing a remedy, a judge would have to redraw districts to ensure that some contained large numbers of minorities. Attorney General Smith objected to such race-conscious assumptions about the voting habits of black and white voters: “I think the concept, the idea, or the institutionalizing of a system which would be based upon the premise that blacks are going to vote for black candidates and whites are going to vote for white candidates is a very unfortunate scheme.”

In addition to its emphasis on race, numbers, and results, the effects test angered many opponents because it did not require proof of an evil motive to sustain a violation. The test was criticized on the grounds that it simply assumed discriminatory intent without requiring any proof. The proponents of the results test “presume that all effects which are adverse to the political interests of minority group citizens are rooted in some impure motive. I do not believe such a presumption to be valid.” Moreover, because discriminatory motive was assumed without proof, “even if there was no intent nor any shred of evidence that there was an intent to discriminate, a whole community or political subdivision could be branded as a discriminatory political community, subdivision, or division.” Before you start “calling whole communities racist or discriminatory,” said Senator Hatch, “it seems to me that you have

31. Smith, supra note 25.
32. Id.
35. Id. at 752.
37. Id. at 521-22 (testimony of Rep. Caldwell Butler).
38. Id. at 600 (statement of Sen. Orrin Hatch).
got to have somebody who at least acted with the intent to discriminate."\textsuperscript{39}

The final element of the opposition's criticism of the bill concerned the role of the courts. This critique took two forms. The predominant criticism was that the bill would put too much power in the hands of judges. William Bradford Reynolds complained that a government found to have violated the Voting Rights Act faced severe consequences: it means that "jurisdictions [are] required to restructure their governmental systems, not at the insistence or behest of the electorate but rather at the whim and wish of a Federal judge . . . ."\textsuperscript{40} Another witness noted that a federal district court judge had recently struck down at-large districts and replaced them with single-member districts. He criticized this "rather astonishing exercise of judicial power," which was likely to occur even more frequently if the Voting Rights Amendments were passed.\textsuperscript{41} Such judicial law-making was especially inappropriate, according to Senator East, in light of the fact that the 1980 elections indicated that "there was some desire in this country among the American people that perhaps, as regards bureaucratic elitism and judicial elitism having usurped the legislative process, it was about time that the Congress tried to reclaim its fundamental policymaking role in the American system."\textsuperscript{42} A secondary criticism of the bill was that, by making it easier for plaintiffs to prove voting rights violations, it would overburden the already heavily burdened federal docket. Representative Hyde noted that the bill would add to the "tidal-wave of litigation that's inundating the present Federal court system."\textsuperscript{43}

At first blush it may appear that the rhetoric of the bill's opponents was significantly more sweeping than was the likely impact of the bill. While this disparity is attributable in part to the nature of lobbying, testifying, and the legislative process, this explanation is only a partial one. The broad rhetorical assault was due principally to the opposition's awareness that more was at stake than simply the Voting Rights Amendments. Throughout the debate, conservatives exhibited an awareness that the debate over the nature of equality and discrimination would have an impact on future legislative battles as well as an impact on the way America thought and talked about civil rights.

Witness after witness for the opposition drew parallels to other areas of equality law, and indicated that opposition to Section 2 of the Voting Rights Amendments was linked to opposition to other civil rights developments. The attempt to institute an effects test, said one witness, is a significant departure from the traditional definition of equality. "The old assumption that equal access to the ballot would ineluctably lead to political power for minorities has

\textsuperscript{39} Id. at 619.
\textsuperscript{40} Id. at 1691.
\textsuperscript{41} Id. at 232 (testimony of Walter Berns).
\textsuperscript{42} Id. at 30-31.
\textsuperscript{43} Id. at 410.
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given way to the proposition that the political process must produce something more than equal access."44 The witness continued, "[t]he new demand is that the political process, regardless of equal access, must be made to yield equal results."45 The new emphasis on results "parallels other demands that have been pressed so assiduously upon the political system, especially in the area of affirmative action . . . ."46 Another witness testified that he opposed a results test in voting rights for the same reasons he opposed other changes in antidiscrimination law. When discrimination is defined "by some numbers standard," society begins to stop looking for the "best qualified person" and instead provides "preferential treatment on the basis of race or sex."47 Doing this runs counter to the "general ethic that individuals should be treated as individuals irrespective of their origins, sex, and background."48 Finally, Senator Hatch candidly admitted that the debate was about much more than voting rights. "The proponents want the effects test knowing that if they can get it here, then they could have similar success in other areas of civil rights."49

Following the lead set by Senator Hatch in his opening statement, the conservatives had forcefully argued their case against the Voting Rights Amendments. They argued that the bill would force proportional representation upon local governments, would define equality by outcome rather than result, would pressure society into thinking in terms of race, would allow local communities to be branded as racist without proving the allegations, and would give more power and an increased workload to the judiciary, the least accountable branch of government. Moreover, the opposition made their arguments with an eye to future civil rights battles.

B. The Proponents Respond

In articulating their vision of civil rights, equality and discrimination, the opposition had challenged the proponents of the Voting Rights Amendments to put forward an alternative vision. The Hearings on the bill were an opportunity for the civil rights leadership to take up that challenge. Unfortunately, they did not do so.

The first argument advanced in favor of the effects test was that it was

44. Id. at 489 (testimony of Dr. Edward Erler).
45. Id.
46. Id. See also statement of John Bunzel, id. at 652 ("Originally, Mr. Chairman, the Voting Rights Act was clear that it was directed to remedying disenfranchisement. Now there is considerable talk of dilution. Again, this parallels the language of the new equality in affirmative action, where proportionate results become the test of discrimination.")
47. Id. at 649 (statement of John Bunzel).
48. Id.
49. Id. at 405.
simply a restoration of the law before the Supreme Court’s decision in Mobile v. Bolden. 50 “The original intent of Congress in enacting section 2 of the Voting Rights Act was not to require an intent standard, but rather to require an effects standard,” argued Frank Parker, a leading voting rights litigator. 51 “[Mobile] itself was the change. The amendment restores the original intent of Congress and would also restore the legal standard applied by the courts prior to the Mobile decision.” 52 This point was repeated consistently throughout the testimony. 53

However, the claim that the Amendments were simply restoring the law to its previous state was subject to criticism on the grounds of both veracity and relevance. Attorney General Smith contested the accuracy of the claim, testifying that “the Mobile case did not change the law. As a matter of fact, the Mobile case was the first U.S. Supreme Court case to pass on Section 2.” 54 Smith had the advantage of Mobile itself on his side, for the Supreme Court had expressly claimed that its decision was consistent with precedent. 55 Ultimately, this debate was unresolved, with the proponents of the bill claiming that the cases before Mobile endorsed an effects test, while the opponents of the bill argued that the earlier cases used an intent test.

An exchange between Senator Leahy and Mr. Reynolds is indicative of the character of the debate. Leahy, who supported the results test embodied in the House bill, asked Reynolds: “You do not think that [the hearings on the House bill] make it crystal clear that Congress is trying to reinstate a sizable body of case law . . . like White v. Regester and Zimmer v. McKeithen?” 56 Reynolds, who endorsed the intent test, responded that, “those cases are fully consistent with my testimony and with my statement and do not at all suggest the kind of test that would be required under the amendment to the House bill.” 57

52. Id.
53. See, e.g., id. at 245, 250 (statement of Benjamin Hooks).
54. Id. at 73. Smith also maintained that it was the intent of Section 2’s framers to “paraphrase the 15th Amendment” which “has been long held to require an intent test.” Id. at 96.
55. Mobile, 446 U.S. at 62, 67-68 (plurality opinion of Stewart, J.). The Mobile dissenters, like the bill’s supporters, maintained that the Supreme Court’s decision was contrary to settled law. See, e.g., id. at 112 (Marshall, J., dissenting) (“The plurality’s approach requiring proof of discriminatory purpose in the present cases is, then, squarely contrary to White and its predecessors.”).
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The fundamental weakness with the argument that the bill did nothing more that restore the law to its pre-Mobile state was that it ignored the question of whether such a restoration was desirable. Senator Hatch, for example, pointed out that those who opposed the effects standard did so for reasons more fundamental than the fact that they believed it changed the law. “From my own perspective I would oppose the results test and I would oppose overturning the Mobile decision, whatever the state of the law 5, 10, or 50 years ago. I would guess that proponents of the results test would feel similarly.”

Forced to explain the policy justifications for the effects standard, the supporters of the bill offered the argument that the effects standard was desirable because the alternative, the intent standard, was too difficult to prove. According to Benjamin Hooks, Chairman of the Leadership Conference on Civil Rights and one of the bill’s principal supporters, the primary difference between the Administration proposal, which included an intent standard, and the House version, which used an effects test, “is that the Administration [proposal] would make it difficult, if not impossible, to ever win a case. . . .” Professor Archibald Cox of the Harvard Law School argued that “to continue to require proof of subjective purpose in the form prescribed in the plurality opinion of the City of Mobile case is to erect and maintain an almost insuperable obstacle to securing [the right to vote].” According to the bill’s opponents, the intent test was problematic because of the difficulty in determining the collective intent of a group of individuals such as a legislature. In addition, legislatures can maintain a law with a nondiscriminatory purpose for discriminatory reasons, and proving the intent of such legislative inaction is virtually impossible.

Like the assertion that the intent test was a break from precedent, the argument that the intent test made it more difficult to win cases was subject to straightforward contrary assertions as well as criticisms regarding its relevance. Reynolds, for example, argued that discriminatory intent is not impossible to prove because a smoking gun is not required. Instead, circum-

58. Voting Rights Hearings I, supra note 16, at 644. The only advantage gained from the argument that the bill was a restoration of law to it’s pre-Mobile status was that the proponents of the results test were able to claim that their proposal would not raise any unforeseen problems (e.g., quotas). For example, the Judiciary Committee report argued that, “there is, in short, an extensive, reliable and reassuring track record of court decisions using the very standard which the Committee bill would codify.” S. Rep. No. 417, 97th Cong., 2d Sess. 32 (1982).
60. Id., at 1417.
61. Frank Parker of the Lawyers Committee for Civil Rights argued that the intent standard is almost impossible to meet because it requires proving “what is in the minds of legislators or voters who adopted or maintained a discriminatory electoral system.” CONG.Q., Jan. 9, 1982, reprinted in Voting Rights Hearings II, supra note 34, at 766. The Washington Post added that the effects test is preferable because the intent standard “is virtually impossible to meet since the legislators in question have all been dead for years.” Voting Rights Be Strong, supra note 57.
stantial evidence could be used to prove intent.63 Similarly, the bill’s opponents argued that intent cannot be impossible to prove given that voting rights cases had been won after Mobile.64 More importantly, however, the opponents pressed the point that no legal standard should be adopted on the grounds that it “facilitates successful prosecutions.”65 The bill’s opponents complained that “there has been no principled opposition to the intent standard; the opposition really comes on the basis of pragmatism, that is, the problem of proof.”66

The proponents of the bill had argued, somewhat unsuccessfully, that the effects standard should be instituted because it had been the law before Mobile v. Bolden and because it made it easier to prove voting discrimination. While these arguments were important, the proponents of the bill had yet to respond to the heart of the opposition critique. They had yet to respond to the challenge that the Amendments sought proportional representation, that they gave racial considerations undue prominence, and that they focused on outcome instead of process.

Charges that they were seeking proportional representation angered the bill’s supporters. According to Benjamin Hooks, the proportional representation criticism is a “red herring.” He said, “I know of no civil rights group . . . seeking proportional representation. We are not seeking a mirror image of the ethnic classifications of neighborhoods or cities. We are simply seeking the unfettered right to vote without having to prove that which is sometimes not susceptible to proof.”67 Similarly, the ACLU’s Southern Regional Director, Laughlin McDonald, argued that under an effects standard, “[t]here is no way the court . . . can insure proportional representation. All the court can do is establish a system of access.”68 The New York Times editorialized that quotas were not imposed in one case “[f]rom 1965 to 1980, when the law favored civil rights lawyers . . . .”69

While civil rights advocates were correct in their assessment that it was essential to respond to the charges of quotas and proportional representation, they ignored the fact that these terms were simply code-words used by conser-

63. Letter to Editor, supra note 57.
65. Id. at 393-94 (statement of Rep. Henry Hyde).
66. Id. at 1333 (testimony of Prof. James Blumstein, Vanderbilt Law School). Fortunately, the Committee Report did not take the stance taken throughout the debate by the proponents of the bill. While it noted that the intent standard is a difficult one, it asserted that the principal reason the Committee rejected intent was because “the test asks the wrong question.” The Report continued, “if an electoral system operates today to exclude blacks or Hispanics from a fair chance to participate, then the matter of what motives were in an official’s mind 100 years ago is of the most limited relevance.” S. Rep., supra note 58, at 36.
67. Voting Rights Hearings I, supra note 16, at 246. See also id. at 632 (testimony of Michael Walpert, Esq.).
68. Id. at 373.
vative congressmen and witnesses as proxies for a more fundamental critique. When Senator Hatch argued that the results test would produce quotas he was really arguing that the results test would produce a race-conscious, outcome-oriented legal regime. As he indicated in his opening statement, focusing on results would transform "the concept of discrimination from a decisionmaking process into an end or an outcome in and of itself." 70 While Hatch may have overstated his case, he was correct. The amendments did require a focus on outcome, if not as an end in and of itself, at least as the starting point in determining whether the decisionmaking process was flawed. Such a transformation in the definition of equality was precisely what was required by the results test and the vision of civil rights that served as its foundation. Such a transformation was precisely what the civil rights leadership was implicitly demanding. However, when challenged to articulate their alternative principles, the civil rights leadership not only declined the opportunity, they repudiated much of their underlying vision.

That the civil rights community had a vision of voting rights that measured equality by results was indisputable. Black leaders throughout the South had been demanding for years that their representation in government approximate their numbers in the population. Dr. Willie Gibson of the South Carolina NAACP, for example, opposed a recent redistricting plan, saying, "[U]nless we see a plan that has the possibility of blacks having the probability of being elected in proportion to this population, we will push for a new plan." 71 He added that "South Carolina’s population is approximately 30 percent black, and 30 percent of the senate should be black." 72 Similarly, Rev. Jesse Jackson told the Columbia Sun, "Blacks comprise one-third of the State of South Carolina’s population and deserve one-third of its representation. We believe that taxation without representation is tyranny." 73 Moreover, the rhetoric of the civil rights leadership indicated it measured the fairness of the process by examining results. A paper published by the Lawyers Committee for Civil Rights Under Law indicated that "[i]n some areas of the country, black and Hispanic voters are denied equal access to the political process by racial gerrymandering, discriminatory at-large elections, and other electoral devices which minimize and cancel out minority voting strength." 74 To demonstrate the denial of access the Lawyers Committee pointed to the fact that "[i]n Mobile, Alabama, for example, blacks constitute 35 percent of the population, but no black person has been elected to the all-white city council since at-large voting

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71. Id. at 252 (Sen. Hatch quoting Dr. Willie Gibson).
72. Id. at 255.
73. Id. (Sen. Hatch quoting Rev. Jesse Jackson).
was adopted in 1911."\textsuperscript{75}

A number of members of the House made it clear that they believed disparate results were an indication of inequality. Representative Don Edwards, the floor manager of the House bill, argued that an effects test was needed because \"[t]he impact of the Mobile decision has been devastating. The U.S. Justice Department abandoned its suit against South Carolina, 30 percent black, the sole remaining state in the Deep South with an all-white legislative body—the state senate. Indeed, a black has not been elected to the South Carolina state senate in this century.\"\textsuperscript{76} Representative Robert Garcia said, \"[t]he proof of discrimination under the amended Section 2 is the number of people who get elected.\"\textsuperscript{77} Similarly, a U.S. Commission on Civil Rights report criticized the fact that \"[i]n none of the Southern States covered under the preclearance provisions of the Voting Rights Act were blacks elected to public office at a rate approaching their proportion in the population.\"\textsuperscript{78}

Given the tendency of civil rights leaders, and even a number of government officials, to use equal electoral results as a measure of voting rights equality, and given the fact that the bill's proponents were advocating a standard that would allow disparate results to be used to prove discrimination, it was somewhat surprising that not one supporter of the bill attempted to articulate or justify this outcome-based vision of civil rights. Not one supporter of the bill attempted to explain why it made sense to evaluate whether the process was nondiscriminatory by first determining whether the results were nondiscriminatory. Instead, the bill's supporters relied on the two aforementioned arguments—that the effects test was only a restoration of settled law and that the effects test was an easier standard to meet than the intent test.\textsuperscript{79}

When pressed on the question of proportional representation, the bill's supporters retreated to one of two positions. First, they argued that even a results-oriented approach that attempted to create majority black districts did not achieve proportional representation because black voters often elected white candidates. This analysis was typified in the testimony of the ACLU's Laughlin McDonald, who said that blacks were still losing elections even in areas in which successful voting rights litigation had been brought. McDonald testified that \"we have never gotten proportional representation\"—that in case after case, even after the court restructures districts to create majority black districts, those districts continue to elect white representatives.\textsuperscript{80}

The second line of response was typified by the testimony of Benjamin

\begin{footnotes}
\item[75] Id.
\item[76] \textsc{Christian Sci. Monitor}, Apr. 14, 1982, at 27.
\item[77] \textit{Voting Rights Hearings II}, supra note 34, at 3.
\item[79] The Senate Judiciary Committee report was the one exception. \textit{See supra} note 66.
\item[80] \textit{Voting Rights Hearings I}, supra note 16, at 373.
\end{footnotes}
Hooks, who, in an effort to escape the proportional representation criticism, ended up repudiating the outcome-based vision of civil rights. In his testimony before the Senate, Hooks was confronted by Hatch on the question of whether the bill’s supporters were attempting to replace a definition of equality which focused on process with one that focused on results. Believing this to be the case, Hatch asked Hooks how the comments of Dr. Willie Gibson could be interpreted as meaning anything other than a call for equal outcome. Senator Hatch asked if requesting a districting plan providing blacks with the probability of being elected in proportion to the population is anything but a call for proportional representation. Hooks did not point out that America’s long history denying the vote to black citizens and the South’s elaborate mechanisms to evade the Fifteenth Amendment’s mandate had made clear to many that the only way to evaluate whether access was equal was to measure results. Hooks did not explain that Willie Gibson represented a large percentage of voting rights lawyers, and of the black population generally, who believe that equality in voting means the creation of districts with enough of a black majority to give black voters the potential to elect representatives of their choice. Instead, he said, “I think there is a big difference between proportional representation and representation in proportion to their population.”81 When Hatch asked how you can tell the difference, Hooks responded, “We have never been able to come up with any precise definition . . . . Like the Supreme Court Justice said about pornography, ‘I may not be able to define it, but I know it when I see it.’ . . . . [W]e know it when we see it in a given case.”82 Not surprisingly, this response did not satisfy Hatch, who continued to press, referring Hooks to Gibson’s other statement that thirty percent of the population should have thirty percent of the representation. At this point, Hooks repudiated Gibson’s arguments altogether, responding that “there are many statements that we make in the heat of battle out on the lines and in the trenches that do not have anything to do with the results we seek.”83

So concluded the debate. The drafters of the Voting Rights Amendments had included a provision to institute an effects test and overturn the Supreme Court’s decision in Mobile v. Bolden. Through the course of the hearings the opponents of the Amendments had vigorously criticized the effects test; more importantly, they had criticized the vision of civil rights which provided the theoretical underpinnings of the test. Forced to support their definition of civil rights and equality, their claim that results are the best indicator of opportunity, and their decision to make race and racial consciousness a central feature of all future legislative districting decisions, the supporters of the Voting Rights Amendments conceded. They chose not to join the debate. When they did

81. Id. at 252.
82. Id. at 253.
83. Id. at 255.
respond they avoided the fundamental civil rights questions which their legislation had placed on the table.

C. The Results

Despite the performance of the civil rights lobby, the Voting Rights Amendments continued to advance through the Senate. There were a few impediments. The bill suffered a temporary setback when the Subcommittee on the Constitution of the Senate Judiciary Committee voted for a straightforward extension of the Act. This differed from the House bill and the Kennedy-Mathias Senate bill principally in that the Subcommittee bill left intact the intent test while the House bill and the Kennedy-Mathias bill instituted an effects test.84 The Subcommittee vote was not surprising—it was chaired by Senator Hatch and was composed of three conservative Republicans and two Democrats. The vote was 3-2 along party lines. The true measure of the bill’s support would become clear when the full Committee on the Judiciary acted.

Meanwhile, the bill’s supporters were having little success determining President Reagan’s position. After declining to take a position on the proposed Amendments during the time the House bill was being debated,85 then hinting that he opposed the effects provision but was willing to negotiate,86 Reagan was still unforthcoming regarding whether he would sign the House version.87

After postponing a vote on the bill, and while Senator Robert Dole attempted to work out a compromise that would ensure the support of the administration and key Senate Republicans, the Senate Judiciary Committee met to take final action on the bill.88 At mark-up, the Dole compromise was approved. The compromise incorporated an effects test to be determined by the “totality of the circumstances,” added a stronger disclaimer clause—“nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population”—and placed a twenty-five year cap on the preclearance requirement. In addition to accepting the compromise, the Committee rejected a number of amendments, including one by Senator East to amend the Act to prohibit discrimination on the basis of sex as well as race and color.89 While labeled a compromise, the decision was truly a full victory for the civil rights coalition and its supporters.

85. N.Y. TIMES, supra note 2.
89. Voting Rights Hearings II, supra note 34, at 102-05.
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The Administration had indicated it would agree to the compromise, so there was little that could stop the bill. Still, some continued to oppose it. Hatch had not been persuaded by the Dole compromise. As his fellow Subcommittee members voted to accept it, he chastised them for "forsaking the great historical goals of equal protection and a color-blind society and establishing new goals in which racial balance and color-consciousness are primary," and for giving "legal and constitutional sanction to a restoration of separate but equal." Later, on the Senate floor, Hatch warned that "racial gerrymandering and racial block voting will become normal occurrences" if the bill were enacted. East, sounding the themes he had emphasized during the hearings, said that the bill would "introduce a quota concept" into elections. "The bone of contention is," said East, "should we guarantee election results?"

Senator Jesse Helms provided the opposition with a spark of hope when he threatened to filibuster "until the cows come home." However, the filibuster lasted only six days; it ended when the Senate voted to invoke cloture. The 86 to 8 vote for cloture was the largest ever recorded to limit debate. While Helms could have continued delaying for some time after cloture, at the urging of Senate Republicans, he did not. Helms had threatened to delay further by attempting to add abortion rights and school prayer to the debate. He had rallied pro-life forces to begin converging on the Hill when, according to Dole, "a number of rather restless Republicans made it clear" to Helms that they wanted to debate a voting rights bill unencumbered by abortion amendments. Helms "was apparently mollified by promises to take up some of his pet projects later . . . ."  

The Senate then considered a number of amendments, the majority of them aimed at weakening the Act. For example, East continued to try to eliminate the effects provision, but his floor amendments were soundly defeated. The Senate also defeated an East amendment that would have allowed courts in addition to D.C. District Courts to hear bail-out requests, as well as one

90. In a letter to Senator Thurmond from Attorney General Smith, the Administration indicated that Reagan would sign the Senate version, as modified by the Dole compromise. Smith wrote that "the express provisions of the compromise amendment foreclose the possibility of an interpretation requiring proportional representation." Voting Rights Hearings II, supra note 34, at 119. The Administration adopted its compromise stance under pressure from Congressional Republicans who believed that the Administration's position was further alienating blacks and liberal whites. Steven V. Roberts, Senators Debate Voting Rights Act, N.Y. TIMES, June 10, 1982, at A27.
93. Id.
97. Id.
which would have shortened the life of the extension.99

The bill was passed on June 18, 1982 by a 85-8 vote, with Senators Thurmond and Hatch both voting in favor. Meanwhile, House leaders had indicated that they would accept the Senate version in its entirety and send it directly to President Reagan. Reagan, who had earlier indicated he would sign the Senate version, hailed the vote as a "statesmanlike decision."100

The civil rights community had gotten almost exactly the bill it requested. In trying to explain the overwhelming success of the legislative struggle, many lawmakers concluded "the vote was also a sign that the Voting Rights Act had worked effectively and that lawmakers must respond to the growing power of minority voters, even in the South."101 According to Senator Mathias, the floor manager of the bill, "[w]e said 17 years ago that the Voting Rights Act would transform this country. Today we have evidence of that."102 William Taylor, a civil rights lawyer, concurred: "Clearly we couldn't have this kind of vote before people were enfranchised."103 The statements of Mathias and Taylor capture much of the celebratory mood which followed the passage of the Amendments. The civil rights community was proud of its success and delighted that its strength was acknowledged by the press, which ran headlines such as "Voting Rights Act: Even Conservative Senate Heeds Civil-Rights Groups."104

The observations of Mathias and Taylor and the confidence of the civil rights leadership, while grounded in reality, tended to overstate the case. That is, while bills like the Voting Rights Amendments were much more difficult to pass before black voters were enfranchised, the act of enfranchisement hardly guaranteed passage. However, the principal lesson they took from the voting rights struggle was that they could prevail without providing a principled and coherent defense of the civil rights vision which supported their legislative initiatives. The full meaning of this lesson would not become clear until almost a decade later, when Congress considered the Civil Rights Acts of 1990 and 1991.

II. THE CIVIL RIGHTS ACTS OF 1990 & 1991

As the civil rights leadership prepared to introduce the Civil Rights Act of 1990, there were many reasons to be confident. First, Democrats controlled

99. Omang, supra note 96.


101. Id.

102. Id.

103. Id.

both houses of Congress, which had not been the case in 1981 and 1982 when Congress considered the Voting Rights Act. Second, the White House was occupied by an individual who had indicated an interest in distancing himself from the hostility towards civil rights issues that his predecessor had demonstrated. Notwithstanding George Bush’s campaign advertisements featuring Willie Horton, many civil rights leaders, and a significant percentage of the black population, believed that the promise of a kinder and gentler nation would redound to their benefit. Finally, and perhaps most importantly, the civil rights community had demonstrated its ability to exert influence on Capitol Hill throughout the 1980’s, despite the conservative agenda which dominated that decade. Civil rights organizations had lobbied effectively against the confirmation of Robert Bork to the Supreme Court and for the Voting Rights Amendments of 1982.

This part will examine the history of the Act, arguing that the civil rights leadership failed to offer a coherent response to the conservative critique of the Civil Rights Act and the vision of civil rights underlying it. Conservatives assailed the Act on the grounds that it would lead to race-conscious preferences, undermine traditional definitions of merit, interfere with the managerial prerogative of employers, and increase the role of federal courts in protecting civil rights. Adopting the strategy used during the voting rights debate, the civil rights leadership did not defend the legislation by explaining why each of these results was necessary. Instead, it simply denied that the bill would have these effects. Civil rights advocates thereby conceded what little ideological terrain had not been already been appropriated by conservatives, further impoverishing the civil rights discourse.

The negotiations over the proposed bill had a rocky start. Shortly after introduction of the bill, Attorney General Richard Thornburgh distributed a letter threatening that Bush would veto the bill unless significant changes were made. While Thornburg’s letter identified a number of offending provisions, the vast majority of the ensuing debate would focus on two issues. First, in a case where a plaintiff has demonstrated that an employment practice (e.g. a diploma requirement, standardized test, or height and weight requirement) has the effect of discriminating against a protected class, what burden must the employer meet to justify such a practice? In *Griggs v. Duke Power*,

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107. *Id.* at 431.

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Court held, in *Wards Cove v. Atonio*,\(^{108}\) that an employer could meet the business necessity standard by demonstrating that the "practice serves, in a significant way, the legitimate employment goals of the employer."\(^{109}\) In response to *Wards Cove*, the Civil Rights bill proposed language that would have required that an employer demonstrate that a practice was "essential to effective job performance."\(^{110}\) Most of the debate turned on this language.

The second issue of importance was the attempt to add a damages remedy to Title VII. While it has long been possible to recover monetary damages for intentional racial discrimination under Section 1983, a reconstruction era statute, Title VII had no damage provisions, meaning that a victim of intentional sex discrimination could not recover damages. The Civil Rights bill proposed to change that by allowing damages under Title VII, which, unlike Section 1983, covers sex discrimination as well as race discrimination.

### A. The Conservative Critique

While much of the debate in Congress and the press was technical in nature, the narrow issues were rarely discussed without some reference to larger questions concerning the nature of civil rights, equality, and discrimination. As they had during the debate over the Voting Rights Amendments, conservatives appeared aware that the debate over the Civil Rights Act would be a debate over competing visions of equality. During the debate over the Voting Rights Amendments conservatives had made clear that in their opinion civil rights meant equal opportunity, equality meant color-blind, discrimination meant evil motive, and federal courts were not needed. Although the employment context was different from the voting one, conservative Congressmen and witnesses would sound many similar themes throughout the Civil Rights Act hearings.

The primary criticism launched by conservatives concerned racial preferences. This criticism would be a central component of the opposition's argument. As one House Republican indicated, "much of the ensuing debate may eventually turn on the proper role of preferential treatment based on race or sex under our civil rights laws."\(^{111}\) Just as the Voting Rights bill contained no provisions explicitly calling for electoral quotas, the Civil Rights bill contained none demanding employment quotas. However, just as the opponents of the Voting Rights bill had argued that the effects test would coerce govern-

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109. *Id.* at 659.
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ments into redrawing boundaries to ensure proportional representation, the opponents of the Civil Rights bill argued that its stringent language would force employers into adopting quotas. Senator Hatch, again a key opposition figure, argued that making an employer demonstrate the essential nature of a policy with an adverse impact would "end up creating a situation where employers are going to say, 'Gee, we don't want to fuss with this. We will just hire by quota.'" Representative Harris Fawell, one of the principal opponents on the House side, argued that the employers' burden was so stringent that employers will "come back and say we can't meet that kind of burden. If you're going to throw that on us, we will opt out, take safe harbor, go with quotas . . . ." Similarly, conservative scholar Thomas Sowell indicated that "the bottom line is that this law will make racial, sexual, and other group quotas virtually inevitable for employers across the country." Race-based preferences were antithetical to the civil rights vision of the bill's opponents. Racial preferences produced race consciousness in a society which, in their view, needs to move beyond race. In the words of one senator: "A truly color-blind society is not an unreachable ideal or outdated utopia, existing only in naive civil rights rhetoric of the past . . . . It is the substance of equal treatment under the law. Purchasing any goal, no matter how noble, at the price of race-based preference is not compassion, it is injustice." Not only would racial preferences move society further away from the color-blind goal, they would produce racial animosity and victimize the supposed beneficiaries because affirmative action "engenders resentment and insults those who refuse to be patronized." The bill's opponents also claimed that race-based preferences were antithetical to a meritocracy. James Paras, for the U.S. Chamber of Commerce, testified that the bill would "substitut[e] quotas for merit." Assistant Attorney General Donald Ayer indicated that "[w]e are much more worried about the unfairness to everybody out there who wants a job and most of all, wants to be judged on their own merit, on their own abilities." While preserving a meritocracy was an important principle in and of itself, it took an a sharper edge when the bill's opponents indicated that if the meritocracy were disturbed, the losers would be innocent white men. One such victim testified before the Senate Committee on the Judiciary. Jim Henson, a

113. House Civil Rights Hearings I, supra note 111, at 222. See also id. at 361 (testimony of Donald Ayers, Dep. Atty. Gen., Dept. of Justice).
115. Senate Civil Rights Hearings, supra note 112, at 541 (statement of Senator Coats).
116. Senate Civil Rights Hearings, supra note 112, at 541 (statement of Senator Coats).
117. Id. at 283.
118. House Civil Rights Hearings I, supra note 111, at 388.
white Birmingham firefighter and a plaintiff in *Martin v. Wilks*,\(^1\) testified that he had been wronged by an affirmative action plan. While the testimony focused on the provision that attempted to limit a nonbeneficiary's ability to attack an affirmative action plan,\(^2\) the testimony came to stand for much more. Henson explained that pursuant to an affirmative action program, he was turned down for a promotion. The spot was given to a black man who had less experience, less education, and a lower score on the exam. In fact, asserted Henson, out of 100 people who took the test, he scored sixth, while Carl Cook, the black who received the promotion, scored eighty-fifth.\(^3\) Following Henson's testimony, he had the following exchange with Senator Hatch:

> Sen. Hatch: [T]o be replaced by somebody else, regardless of color or whatever, who was No. 85, that was pretty hard to take wasn't it?

> Mr. Henson: It was very hard to take, Senator.

> Sen. Hatch: And especially since he did not have the 2 years of education that you had with regard to firefighting, right?

> Mr. Henson: Right, yes, sir.

> Sen. Hatch: And he didn't have some of the other training that you had.

> Mr. Henson: That's correct. I felt that obviously I was denied an opportunity because this consent decree puts more emphasis on racial issues, or on the race of the applicant, than on qualification. And I didn't—

> Sen. Hatch: And you didn't care about race yourself.

> Mr. Henson: I wasn't concerned about that.

> Sen. Hatch: In other words, if he were No. 6 and you were No. 85, you'd expect him to get the job, right, or the promotion?

> Mr. Henson: That's true, that's certainly true. I would have had no objections at all, and didn't to those who were higher on the list than myself . . . .

> Sen. Hatch: [W]hen they told you that they were going to enter a consent decree, or they were going to litigate to try and resolve discrimination matters, you

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thought that was a good idea, didn't you?

Mr. Henson: That's correct. I did not realize that they were going to resolve discrimination by discriminating against me.122

Jim Henson's testimony was referred to frequently by the bill's opponents. His testimony came to symbolize the manner in which affirmative action victimizes innocent whites. As one witness testified, "there comes a time in our society where . . . the innocents are the victims. At some point we have to balance that again. We can't keep treading on those people who had nothing to do with it."123 Representative Fawell spoke for many of the bill's opponents when he concluded, "I guess [white males are] the only ones that aren't a protected class anymore."124

While the opposition's attack on the bill centered on the question of racial preferences, the opponents did not rest there. The second important criticism of the bill was that it would restrict an employer's freedom to make business decisions. Harvard Law Professor Charles Fried, a key opposition witness, said "the thing that troubles me is that by talking about essentiality, you are telling every business, nonprofit organization, school, museum, hospital, that the Courts will decide what the essential way to run their business is . . . . And I think that is very serious. That is a very serious intrusion."125 Lawrence Lorber, testifying for the National Association of Manufacturers, indicated that the companies he represented opposed congressional interference with their business practices: "I don't believe any of the employers I represent would willingly want to have an industrial psychologist standing behind every supervisor when that supervisor is filling out a performance appraisal to make sure that the [appraisal] comports with some psychologist's notions of fairness."126

The criticism that the Civil Rights Act unduly impinged on managerial prerogative was closely linked to the criticism that it mandated race-based employment preferences. The bill's opponents opposed race-based employment preferences for several reasons. Opponents believed that preferences disadvantaged whites and imposed restraints on an employer's business and personnel prerogative. At the same time, they opposed interfering with an employer's prerogative both because it subjected the employer's hiring and promotion

122. Senate Civil Rights Hearings, supra note 112, at 537.
124. Id. at 446.
125. Senate Civil Rights Hearings, supra note 112, at 87.
126. House Civil Rights Hearings I, supra note 111, at 720.
practices to increased scrutiny and because it coerced employers into hiring greater numbers of minorities and women. The link between the argument against quotas and the argument against interfering with employers' prerogative was illustrated by Charles Fried's assertion that "[n]ow, I know that the proponents of this bill find that forcing quotas on employers who are innocent of any wrong . . . is as deplorable as I do and as the American people do."\(^{127}\)

The opposition's final objection to the Civil Rights Act concerned the provision for damage awards for intentional sexual discrimination. The bill's opponents argued that this provision would lead to larger numbers of civil rights claims, with more plaintiffs winning larger damage awards. The targets of the criticism were lawyers, who, the bill's opponents alleged, would encourage plaintiffs to press charges in the hopes of winning a large damage award. David Maddux, testifying for the National Retail Federation, the retail industry's principal trade and lobbying organization, argued that California's experience with compensatory and punitive damages for employment discrimination has produced a situation where employment discrimination litigation has become driven by the plaintiff's lawyers who are "in turn driven by hopes of a large jury verdict, large punitive damage verdict, and a contingent fee coming into their pocket."\(^{128}\) In a similar vein, the Chamber of Commerce asserted that "the prime and perhaps only beneficiaries of the bill would be the lawyers who would reap potentially vast monetary rewards from expanded incentives for litigation which the bill provides."\(^{129}\) The bill's opponents estimated that the damage provisions would triple the cost of Title VII litigation from .775 billion dollars to 2 billion dollars.\(^{130}\) Lawyers would not be the only ones to benefit from the litigation bonanza. Assistant Attorney General Donald Ayer said the act would create a "bonanza not only for lawyers but also for plaintiffs."\(^{131}\)

Moreover, argued the bill's opponents, Title VII was intended to encourage conciliation through administrative agencies, not litigation in federal courts. "When the Congress enacted Title VII, it wanted rapid resolution of employment concerns," Lorber argued. "It wanted minorities and women on the job, not languishing in the courts," he contended. He concluded that "there was no thought then of creating a national employment lottery where individuals, indeed aggrieved individuals, would await their turn to get into hopelessly crowded courts for a chance at a windfall while they give up the job or

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128. *Id.* at 196.
129. *Id.* at 283 (testimony of James Paras).
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promotion they actually wanted."\(^{132}\) The final component of the anti-litigation argument was that federal courts would be overburdened by the increased litigation the damage provisions would engender. Under the bill, a high percentage of the 40,000 complaints the E.E.O.C. received in 1989 would land in federal court: "It is crystal clear that neither the [E.E.O.C.] nor the Judiciary are presently equipped to handle the onslaught of additional cases that plaintiffs certainly will pursue in hopes of winning a big jury award."\(^{133}\)

As they had during the voting rights debate, the Civil Rights Act's opponents made explicit their objection to the proposed bill. They rejected race-based preferences, limits on an employer's prerogative, and expanded judicial oversight. In sum, as they had during the battle over the Voting Rights Amendments, the bill's opponents completely rejected the vision of civil rights underlying the Civil Rights Act.

B. The Proponents Respond

If the opposition's tactics were similar during the debates over the two legislative initiatives, the approach of the supporters was even more similar. The civil rights leadership argued in 1982 that *Mobile v. Bolden*\(^{134}\) had changed the law and the Voting Rights Amendments were a restoration; in 1990 it argued that *Wards Cove* changed the law and the Civil Rights Act would simply change it back. According to John Jacob, the Civil Rights bill "restores the status quo that existed before the Supreme Court's regressive rulings."\(^{135}\) Moreover, the proponents argued, just as voting rights law before *Mobile* had not produced proportional representation, employment law before *Wards Cove* had not produced quotas: "I know of no employer who has been forced to adopt a quota because of the *Griggs* decision."\(^{136}\) While the

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132. Id. at 208. See also House Civil Rights Hearings I, supra note 111, at 715-716 (testimony of Lawrence Lorber); House Civil Rights Hearings II, supra note 123, at 87 (testimony of Victor Schacter).
133. House Civil Rights Hearings II, supra note 123, at 89 (testimony of Victor Schachter). The two parts of the anti-litigation argument seem like an odd match. On the one hand, the argument runs, the court system should not be open to plaintiffs attempting to exact large damage awards from employers. Alternatively, there are not enough courts to handle the cases. However put, the upshot of the opposition argument was, in the words of one of the bill's opponents, "[t]he path to equal employment does not run through the courthouse door." Adams Clymer, *Battle Over Civil Rights Emphasizes Sexual Bias*, N.Y. TIMES, MARCH 4, 1991, AT A14 (quoting Zachary Fasman).
135. House Civil Rights Hearings I, supra note 111, at 591; see also Senate Civil Rights Hearings, supra note 112, at 14 (testimony of William Coleman, O'Melveny & Myers).
136. Senate Civil Rights Hearings, supra note 112, at 183 (testimony of Hon. William Brown III, Schneider, Harrison, Segal & Lewis); see also id. at 50 (testimony of William Coleman, O'Melveny & Myers), House Civil Rights Hearings II, supra note 123, at 580-81, (testimony of Alfred Blumrosen, Professor, Rutgers Law School), House Civil Rights Hearings III, supra note 130, at 355 (testimony of Ben Reyes, Houston City Council).
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bill's opponents conceded that the *Griggs* standard was acceptable, they maintained that the bill did not return the law to *Griggs*. According to Hatch, "whether or not *Griggs* has led employers in the past to use quotas is totally irrelevant to this bill. This bill does not codify *Griggs*. It twists *Griggs* completely out of shape."  

Just as the voting rights debate was not resolved by fighting over whether *Mobile* changed the law, the civil rights debate would not be resolved by haggling over whether the bill was a restoration of *Griggs*. All the parties understood that more fundamental questions were at stake. The civil rights leadership agreed with the analysis of one of the bill's opponents, who remarked "if the issue is drawn as quotas, we win . . . . If the issue is drawn as civil rights, we lose." The opposition had done its job in drawing the issue as quotas. Accordingly, the bill's supporters worked desperately to rebut the opposition's quota charges. For example, when Attorney General Richard Thornburg characterized the bill as a "quota bill," Ben Hooks wrote a letter to Representative Augustus Hawkins, Chairman of the Committee on Education and Labor, saying "this bill has nothing to do with quotas and it is irresponsible and divisive to make such statements."  

It was not enough, however, simply to reject the quota charges. The opposition had not merely asserted that the bill would produce quotas. It had crafted a full-fledged assault on race-based preferences. It provided a vision of civil rights that failed to include or allow for such preferences, explained how the bill's logic would encourage such preferences, and pointed to the Jim Henson's of the world as examples of the evil such preferences could produce. Unfortunately, rather than attempt to respond to this critique, the bill's supporters backpedaled. In their haste to say the bill did not require quotas, the civil rights leadership repudiated affirmative action generally. John Jacob, for example, said, "[a]nother misleading critique of this bill is the suggestion that it is an affirmative action bill." He did not attempt to draw a distinction between permissible and impermissible racial preferences programs. Rev. Jesse Jackson tried an alternative approach, arguing that affirmative action had no costs: "[A]ffirmative action does not negate whites . . . ."  

137. See, e.g., *Senate Civil Rights Hearings*, supra note 112, at 234 (testimony of David Maddux, Esq., Shepard, Mullin, Richter & Hampton).

138. *Id.* at 240.


140. *Id.* at 240.


142. *House Civil Rights Hearings I*, supra note 111, at 591.

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The rejection and obfuscation of affirmative action indicated by these statements is startling and problematic.144 First, the notion that the legacy of Title VII and Griggs was not a legacy of affirmative action is certainly wrong. Legal scholars and employment discrimination lawyers have long believed that the logic of Griggs supported affirmative action. In fact, the reasoning of affirmative actions supporters in the 1970’s is almost identical to that of its opponents in 1990. As one left-of-center scholar concluded writing in the 1970’s, the “third outstanding feature of Griggs is that it virtually coerces employers . . . into adoption of affirmative action programs.”145 Because a prima facie defendant case can only be established with a showing of disparate impact, “a potential defendant who wishes to avoid litigation, or who wishes to avoid the adoption of different or more cumbersome selection procedures, need only negate the disproportionate impact by adopting different procedures for the minority groups disproportionately excluded.”146 In sum, “Griggs implicitly offers a choice: either make the meritocracy work on its own terms or make up for its flaws through affirmative efforts.”147

Given this interpretation of the logic of Griggs, it is not surprising that one corporate attorney testified that ninety percent of his clients “currently engage in some form of quota selection processes . . .”148 This understanding of Griggs also explains why a study conducted by the Conference on Mayors found that 136 of 153 cities had equal opportunity or affirmative action programs.149 The survey also found that these cities had thoroughly revamped their hiring and promotion practices: testing or screening procedures had been changed in one half of the cities; hiring procedures had been changed in over half of the cities; promotion procedures had been changed in 32% of the cities, and affirmative action goals and timetables for hiring minorities and women had been established in 72% of the cities.150 Furthermore, the study found that the affirmative action policies had been well received. Officials in 93% of the cities believed that the results of the plans were positive, while only two cities reported that the programs had a negative effect.151 Of course, the

146. Id.
147. Id.
149. See Senate Civil Rights Hearings, supra note 112, at 265 (testimony of Bill Hudnut, Mayor of Indianapolis). Hudnut provided a rare defense of affirmative action. He asserted that “[m]ost mayors support . . . affirmative action programs” because they believe “that without positive, proactive Government action, there will be very little change.” Id. at 264. According to Hudnut, “[t]he system will not correct itself. If we don’t have policies in both the public and private sectors which provide opportunities for women and minorities, the unfortunate fact of the matter is that they will continue to be excluded and white males will be favored in the hiring and promoting decisions.” Id. at 266. For additional evidence of the impact of Griggs on affirmative action see Gertrude Ezorsky, Racism and Justice, 38-41, 48-49 (1991).
150. Id. at 268.
151. Id. at 268-69.
overall success and acceptance of these programs does not alone justify
Jackson’s assertion that affirmative action does not negate whites. As Jim
Henson or Alan Bakke could aptly explain, affirmative action does have losers.
That doesn’t make it unjustifiable, but it certainly makes it unjustifiable on the
grounds that it harms nobody.

As noted in Part I, a close link existed between opposition to the bill on
the grounds that it would require race-based preferences and the grounds that
it would intrude on an employer’s right to control the workplace. The response
of the bill’s supporters to the two arguments was also related. Just as the civil
rights leadership failed to defend race-based preferences in their response to
the opposition’s quota charges, so too did they reject the notion that the Civil
Rights Act would interfere with an employer’s managerial prerogative.

The supporters’ principal response to criticism that the bill would interfere
with an employer’s right to control his workplace was that the bill would be
good for business. First, the supporters argued, antidiscrimination laws had
historically enabled business to “make more profit” and be “more productive,”
because “they have been forced to hire and promote people based on real
qualifications and the real important elements of the job.” 152 According to
William Coleman, a key supporter of the bill, large corporations liked anti-
discrimination laws. 153 The bill’s supporters also argued that employment
discrimination hurt productivity. Particularly in light of the increasing competi-
tiveness of the world market and America’s changing demographics, they
argued, the nation could no longer afford to ignore the potential of its female
and minority workers. “[T]he elimination of discrimination is an absolute
necessity,” for America to “reestablish our competitive position in the
world.” 154 Moreover, “we are not likely to be able to develop our people,
our women and minorities, as long as we permit discrimination and unless we
make the most effective use of people who will be the largest, overwhelming
proportion of the growth of our workforce.” 155 Restoring America’s competi-
tive position would help big business, as well as the nation as a whole. As one
congressman argued, “not only women and minorities are the beneficiaries of
the civil rights laws. The Nation benefits even more . . . 85 out of every 100
members of the work force by the year 2000 will be women and minorities.
It only makes sense, therefore, that we offer women and minorities fair

152. House Civil Rights Hearings III, supra note 130, at 160-61 (testimony of Kerry Scanlon, Esq.,
NAACP Legal Defense Fund).
153. Senate Civil Rights Hearings, supra note 112, at 50.
154. Id. at 41 (testimony of F. Ray Marshall, professor, LBJ School of Pub. Affairs, Univ. of Texas).
155. Id.
The bill’s supporters were not fazed by the tension between their argument that the changing nature of the world economy and the American workforce would make antidiscrimination an even greater economic imperative and the fact that business groups and corporate America overwhelmingly opposed the law. As Professor F. Ray Marshall explained, it was necessary to have a civil rights law to induce employers to do something which was in their economic interest. “The reason that this legislation is important is you can’t expect employers necessarily to do what is in even their own interest to do,” he said. “And I think one of the main reasons for us having legislation is to be able to remove a lot of social barriers and to create a climate to make it possible for employers to do what is in their own interest to do.”\footnote{157} Notwithstanding one or two attempts by a Congressman or witness to argue that restraining business was a necessary element of employment discrimination law,\footnote{156} the overwhelming position of the civil rights leadership was that profit maximization was a worthy goal, one which the Civil Rights Act would help produce.

The third prong of the opposition’s assault on the bill’s civil rights vision concerned the role of the courts. The bill’s opponents argued that raising the burden an employer must meet to rebut a prima facie case and providing for damages for intentional sex discrimination would encourage more people to file civil rights suits. They argued that this increased caseload would further federal judiciary oversight upon the employer-employee relationship. In response, the civil rights leadership chose not to argue that litigation had been and would continue to be one of the principal mechanisms used by minorities and women to remedy wrongs or that federal court oversight of the relationship between employers and employees was necessary and desirable. Instead, the bill’s supporters argued that litigation was not central to their vision of civil rights.

This argument had two components. First, the bill’s supporters argued that historically individuals brought very few employment discrimination cases. Antonia Hernandez, President of the Mexican-American Legal Defense and Education Fund, asserted that litigants had great difficulty finding lawyers in private practice who would take their cases because the cases are often complex and expensive.\footnote{159} Another witness testified that when the Civil Rights
Attorney's Fee Awards Act of 1976 was being considered, many thought it would encourage litigation. However, in the eight years following the passage of the Act, civil rights claims of the type covered by the Act dropped as a percent of the federal docket by 31%. In fact, the witness claimed, only 3.9% of those who believe they are victims of employment discrimination ever file suit.\footnote{160}

The second component of the supporters' argument was that even when victims of discrimination sue for damages, they recover very little. The bill's supporters made repeated reference to a study which examined every Section 1981 suit brought in the 1980's and found that plaintiffs prevailed in only 118 out of 576 (20%).\footnote{161} Moreover, the court awarded damages in only 68 of those victories.\footnote{162} In 1987, the average award was slightly under $40,000 and only three awards exceeded $200,000.\footnote{163}

While there was an occasional defender of the litigation process,\footnote{164} the civil rights leadership largely repudiated litigation. Rather than defending federal court litigation as a mechanism for civil rights enforcement, the bill's supporters stressed the futility of the litigation process. This strategy was especially startling given the centrality of litigation to the Civil Rights Act, as well as the opposition's denunciation of court interference. However, the decision not to forcefully defend the role of litigation as a central element in the fight for equal employment opportunity is less surprising when viewed in light of the leadership's approach to the questions of race-based preferences and restraining business' decisionmaking authority. Perhaps imitating its successful strategy during the Voting Rights Act, the civil rights leadership believed it could get the bill it desired without responding to the conservative critique and without advancing an alternative civil rights vision.

\section*{C. Racial Politics}

The problems created by the civil rights leadership's failure to respond forcefully to the conservative critique of the bill were compounded as Republicans began to realize they could reap political benefits from opposing the Civil Rights Act. While early press reports indicated that opposition to a civil rights

\footnotesize\begin{itemize}
\item \footnotetext[160]{160. House Civil Rights Hearings II, supra note 123, at 137-38 (testimony of Prof. Ted Eisenberg, Cornell Law School).}
\item \footnotetext[161]{161. See, e.g., House Civil Rights Hearings III, supra note 130, at 60 (testimony of Ellen Vargyas, attorney, National Women's Law Center).}
\item \footnotetext[162]{162. Id. at 66.}
\item \footnotetext[163]{163. Id. at 66.}
\item \footnotetext[164]{164. See, e.g. House Civil Rights Hearings I, supra note 111, at 419. (statement of Representative Hawkins: "I would agree with you that it is possible that a proposal of this nature may increase litigation. However, I say, as between the litigation and whether or not a person has a right to have their civil rights protected and to secure sufficient remedy for it [sic], including damages, monetary damages for it, I think that is a risk we run.")}
\end{itemize}
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measure would constitute a political liability for Bush, over the summer increasing numbers of Congressmen, lobbyists, and reporters were beginning to discuss the political gains that could result from opposition to the Civil Rights Act. Democratic political strategist Robert Beckel noted, “It’s in the best interests of the Democrats to have Bush sign this bill” to prevent the Republican party from “playing the race card.”

Liberal congressmen admitted that the Civil Rights Act could serve to drive white voters further away from the Democratic party. “There is a perception on the part of whites—working-class whites, ethnic groups, white Southerners—that the Democratic Party is the party of the blacks,” said Representative John Lewis. “I think there is in some cases a perception that blacks are taking jobs away . . . making it impossible for white males, working-class whites, to advance, to be promoted.” Moreover, pollster Stan Greenberg conducted a series of focus groups in working-class white suburbs and found a well-spring of hostility toward the Democratic party for favoring blacks. “The special status of blacks is perceived by almost all these individuals as a serious obstacle to their personal advancement.”

At the same time, conservatives reminded the President that a veto was very important to them. According to Republican political strategist Clint Bolick, “I think that Bush can not only get away with the [veto], but at this point he has much more to worry about on his right flank than on his left. This bill is a litmus test for conservatives.” Some believed that Bush owed it to his conservative white support to veto the bill. One administration official argued that “[Bush] ought to go with the veto because we have expended all

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167. Id.
168. Id. One did not need to participate in a focus group to encounter the type of hostility to which Greenberg referred. USA Today ran a column which was ostensibly a criticism of the Civil Rights bill; however, the author’s real theme was that frequent complaints by blacks regarding racism could not stand up in light of the favored status granted blacks.

Society’s overwhelming abhorrence of race prejudice against minorities is graphic: Al Campanis, Jimmy the Greek Snyder and Andy Rooney are ostracized or sanctioned for racially derogatory remarks. Politician David Duke is shunned by the Republican Party. Bill Cosby and Oprah Winfrey earn nationwide kudos and fortunes. Miss America, the House Democratic whip and the chairman of the Democratic National Committee and the chief justice of the Florida Supreme Court are black. Tawana Brawley’s fabrication of rape by white policemen is indulged until thoroughly discredited. Hundreds of laws give racial minorities preferences in college admissions, public employment and contracting.

According to this writer, rather than request further protection, blacks should recognize they are already the law’s special favorite. Bruce Fein, This Civil Rights Law Creates Discrimination, USA TODAY, April 10, 1990, at 10A.
our efforts to get new voters into the coalition [and] for once we ought to do something to keep what we've got, the Reagan Democrats. These are the issues, the social issues, that brought them to us.”

Over the course of the legislative session, supporters of the bill began to sense that the game of racial politics was being played, and that they would be the losers. Columnist William Raspberry complained bitterly that “[Bush], sir, you appear to be using ‘quotas’ the way you used Willie Horton during your campaign: as a coded message to the bigots who oppose the very things you say you want to achieve.” Columnist Dorothy Gilliam argued that Bush’s retrograde position on civil rights emboldened David Duke to come to Capitol Hill and take credit for helping defeat the legislation, while Duke’s success running on a white supremacy campaign encouraged George Bush to believe that he too could win votes by opposing the demands of blacks and women.

D. The Results

The House Committee on Education and Labor passed H.R. 4000 by a vote of 23 to 10 on May 8, 1990. The revised bill contained significant compromise language intended to defuse the quota issue. However, President Bush still argued that the bill was a quota bill and said simply, “I will not sign a quota bill.” Similarly, Attorney General Thornburgh said that the compromise language did not address the White House’s concerns because it “would still permit the quota camel to get its nose under the tent in an indirect way.”
The Administration’s position hardened over the summer. Even Vice-President Dan Quayle joined the debate: “The Administration is not going to have a quota bill crammed down its throat disguised as a civil rights bill.”

In the fall, the Administration made clear that the two sides were too far apart to achieve a compromise. On October 12, Chief of Staff John Sununu presented a proposed substitute bill that would have allowed employers to defend practices with a discriminatory impact on the grounds of “community or customer relations.” However, as civil rights advocates were quick to point out, phrases such as Sununu’s were code words that had been struck down by courts when the airlines used them to justify restricting flight attendant jobs

174. Id.
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to young, single women.\textsuperscript{176}

The battle lines had been drawn, and the bill’s supporters in the Senate and the House attempted to achieve sufficient votes to override a presidential veto. The Senate approved the bill on October 16, 1990, but the 62-34 vote was 5 short of the 67 needed to override a veto.\textsuperscript{177} The House approved the bill on Oct. 17, 1990, but the 273-154 vote was seventeen short of the 290 needed to override.\textsuperscript{178} One week later President Bush vetoed the bill, arguing that “despite the use of the term ‘civil rights’ in the title of S. 2104, the bill actually employs a maze of highly legalistic language to introduce the destructive use of quotas into our nation’s employment system.”\textsuperscript{179}

The ensuing Senate override effort fell one vote short—66 to 34, with all 55 Democrats, joined by 11 Republicans, voting to override.\textsuperscript{180} The Civil Rights Act of 1990 had been defeated.

E. The Civil Rights Act of 1991

The rhetorical positioning on the Civil Rights Act had taken place by the conclusion of the 1990 debate. 1991 largely consisted of both sides restating their positions while jockeying for advantage and waiting for a breakthrough in the legislative logjam. For their part, the bill’s opponents continued to argue that the legislation constituted an endorsement of quotas,\textsuperscript{181} exacerbated racial and ethnic differences,\textsuperscript{182} encouraged needless litigation,\textsuperscript{183} and discouraged

\textsuperscript{178} \textit{Id.}
\textsuperscript{182} According to Rep. Hyde, the Democrats’ bill would “institutionalize color, ethnic and gender preferences under the false flag of civil rights.” If the bill were enacted, he would “recommend all help-wanted signs revert to the old ‘Irish need not apply’ signs in 19th century Boston, and perhaps advertisements can specify: ‘Help wanted: four women, two African-American males, and one Hispanic required.’” Tom Kenworthy, \textit{House Clears Way for Vote on Civil Rights Bill, Alternative Measures Decisively Defeated},
minorities from achieving the necessary qualifications through education.\textsuperscript{184}

The bill’s proponents continued to assert that the legislation would not produce quotas,\textsuperscript{185} increase damage awards,\textsuperscript{186} or foster an adverse economic climate.\textsuperscript{187} However, the brunt of the proponent’s attack was on the President and his use of racial politics. According to Peter Edelman, law professor at Georgetown University Law Center, “I think [the Bush administration] sees a politics they can play into, appealing to the lowest common denominator. It gets them votes and keeps people from focusing on their lack of a domestic policy. It is sheer demagoguery.”\textsuperscript{188} Congressman Richard Gephardt agreed: “Who can forget some of the tactics of the 1988 campaign? Or the veto of the Civil Rights Act? Or the Jesse Helms smear campaign that libeled the Civil Rights Act with the label of a ‘quota bill’?” Gephardt concluded, “The President is attempting to exploit working people’s fear of losing their jobs in order to justify pitting white working people against black working people. As we enter the 1992 campaign, the President who preaches racial harmony is practicing racial division.”\textsuperscript{189}

\textsuperscript{183} According to Bush, “The Democratic bill invites people to litigate, not cooperate. This is no way to promote harmony.” \textit{House Civil Rights Law Should Be Law.} USA TODAY, June 5, 1991, at A2A.

\textsuperscript{184} Use of disparate impact analysis in employment discrimination law has “removed incentives for minority children to achieve well in schools. . . . [M]inority youth have little incentive to discipline themselves to acquire a high school diploma, if employers hiring for an entry-level job cannot require one for fear of having ‘disparate impact’ litigation brought against them.” Evan Kemp, \textit{To Measure Up In The World; Educating To Even the Odds}, WASH. TIMES, May 23, 1991, at G1 (article by chairman of E.E.O.C.).

\textsuperscript{185} House Speaker Thomas Foley said, “The President is incorrect; this is not a quota bill.” John Dillin, \textit{Rights Leader Rips Bush Tactics}, CHRISTIAN SCI. MON., June 6, 1991, at 6.

\textsuperscript{186} Ellen Vargyas, of the Women’s Law Center, said, “We’re talking about a really small number of awards that are really limited.” Leslie Phillips, \textit{Rights Bill May Limit Sex Bias Awards}, USA TODAY, May 20, 1991, at 4A.


\textsuperscript{189} Michael K. Frisby, \textit{Democrats Set New Strategy: Aim At Bush: He Exploits Race, Gephardt Charges}, BOSTON GLOBE, May 14, 1991, at 3. Democratic National Committee Chair Ron Brown also accused the Republicans of manipulating racial resentment: “Have the Republicans managed to distort the issue to the extent where the American people have been misled (about quotas)? Yes, they have. And because of that distortion some compromises are probably necessary.” Richard Benedetto, \textit{GOP, Democrats Scramble For Advantages On Civil Rights}, USA TODAY, May 22, 1991, at A4. Jesse Jackson added, “In the last 50 years, no American president has been quite so bold in the use of race-manipulative language to divide this country.” John Dillin, \textit{Rights Leader Rips Bush}, CHRISTIAN SCI. MON., June 6, 1991, at 6. “Other than including an appropriation for placing a cement black jockey on the White House lawn, there doesn’t seem to be anything Congress can do to make the civil rights bill acceptable to George Bush,” concluded columnist Robert Reno. He added:

“\textit{This week the Democrats watered down their civil rights bill for the 77th time, and, once again, the White House . . . threatened a veto . . . . What you’re seeing is good old watermelon politics served up not by some raving Southern redneck but by a good old Connecticut boy who learned his manners at Greenwich Country Day School.}”


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Unlike the bill’s opponents, who could be content with restating arguments, it was clear to the civil rights lobby that it would have to change its tactics to avoid another legislative defeat. The leadership chose a series of compromise tactics, most of which involved the further repudiation of a civil rights vision already seriously compromised in the 1990 debates. The fundamental premise from which the civil rights lobby appeared to operate was that it could only answer the Republicans’ quota charge by outflanking the conservatives from the right. That is to say, the civil rights lobby and its congressional allies would insulate themselves from charges of endorsing race-based preferences by abandoning public endorsement of such preferences and by lacing the bill with anti-affirmative action provisions.

The first step that civil rights leaders took in distancing themselves from racial preferences was an attempt to distance themselves from race. This entailed renaming the bill the “Civil Rights and Women’s Equity in Employment Act,” an attempt to focus attention on gender, and away from race. As one columnist concluded, “This bill is not about race. It’s about paying working wives and women heading households what they ought to be paid.” In a second step, civil rights advocates placed a provision in the bill limiting “race-norming.” In “race-norming,” the federal government, in an effort to remedy the fact that blacks and Hispanics score lower as a group than whites and Asians, boosts the scores of black and Hispanic test-takers. Opponents of affirmative action, buoyed by their success in labelling the bill a “quota” bill, had broadened their attack in 1991, introducing measures to ban race-norming in federal standardized testing. While some civil rights advocates indicated a desire to defend race-norming on the merits, the civil rights lobby chose to avoid the issue by introducing an anti-race norming provision in the bill, stealing the conservatives’ thunder. In a third step, civil rights advocates inserted language into the bill indicating that quotas were “not encouraged, required, or permitted.” Finally, the civil rights lobby agreed to relax the standard by which an employer could justify the use

193. Id.
194. Steve Ralston, of the NAACP Legal Defense and Education Fund, defended the practice, explaining that the tests are not accurate predictors of job performance for blacks and Hispanics. Accordingly, race-norming does not result in the hiring of less-qualified job applicants, but assures that tests which are not accurate indicators of job qualifications do not unfairly screen out qualified blacks and Hispanics. Id. As Ralston’s defense made clear, only if one accepts the validity of standardized tests as accurate predictors of job performance does the rejection of those tests constitute a rejection of the meritocracy. Unfortunately, Ralston’s defense of race-norming was the exception, not the rule.
195. Schram, supra note 181.
of a discriminatory hiring standard, an issue which had long been a critical element of the opponent's claim regarding quotas.

These concessions were included in the compromise proposal unveiled by the Democrats in May.\footnote{Id.} Yet, the civil rights lobby quickly learned that its modifications were unlikely to make much difference in terms of garnering additional support. The Democrats wanted to add to the 273 votes garnered in the House in 1990, with the goal of getting the 290 votes necessary for a veto override. But many congressmen indicated that their votes would not change. "I think the bill does indirectly call for quotas," said Representative Ed Jenkins. "It does not appear I will be able to support a bill."\footnote{Edsall, supra note 181.} Jenkins was not alone, for on June 5, the House passed the compromise bill supported by the Democratic leadership by a vote of 273-158, still short of the 290 votes necessary for a veto override. In fact, the number of votes for the 1991 bill was precisely the same as that received by the final House version of the 1990 bill, notwithstanding the additional compromises.

While the bill's opponents spoke of victory in light of Bush's promise to veto,\footnote{Id.} the civil rights coalition did its best to explain the vote was not a defeat, or even a temporary setback. According to Ralph Neas, executive director of the Leadership Conference on Civil Rights, "It was a good strong vote that continues the momentum of the past two weeks and positions the bill well for the Senate."\footnote{White House spokesman Marlin Fitzwater concluded that "[t]he vote indicates strong support for sustaining a presidential veto." Steve Daley, House Dems OK Rights Bill, But Bush Calls It a Win, Chi. TRIB., June 6, 1991, at C1.} However, "[d]espite the brave face they put on today's outcome, it was a setback for the Democrats, who had expected to show gains over last year to give the bill momentum."\footnote{Adam Clymer, Rights Bill Passes in House But Is Not Veto-Proof, N.Y.TIMES, June 6, 1991, at A1.} The weak showing in the House persuaded the civil rights forces that further compromises would be necessary to win either Bush's approval or sufficient votes to override a veto.

The Civil Rights Act remained stalled throughout the summer, despite efforts by moderate Republicans such as John Danforth to forge a compromise.\footnote{Id.} According to Senator Danforth, the key issue remained the disparate impact standard. On September 20, Danforth and the Democratic leadership

\footnotesize{\begin{flushright} 196. Id. 197. Edsall, supra note 181. 198. White House spokesman Marlin Fitzwater concluded that "[t]he vote indicates strong support for sustaining a presidential veto." Steve Daley, House Dems OK Rights Bill, But Bush Calls It a Win, Chi. TRIB., June 6, 1991, at C1. 199. Adam Clymer, Rights Bill Passes in House But Is Not Veto-Proof, N.Y.TIMES, June 6, 1991, at A1. 200. Id. 201. Danforth first attempted to negotiate with the Administration to achieve White House support for compromise civil rights legislation. However, after a week of negotiations, Danforth indicated that the President had rejected his efforts. The Senator vowed to attempt to forge a compromise with Congressional Democrats in order to develop a bill with sufficient votes to override a presidential veto. Danforth warned, "it is a serious mistake for the president, for his administration, for the Republican Party to try and turn the clock back on civil rights." Michael Frisby, Danforth Pledges Fight On Rights Bill; Says Bush Rejection of His Bill An Effort 'To Turn Clock Back' On Rights, BOSTON GLOBE, August 2, 1991, at 3.\end{flushright}}
announced a compromise bill that included new language to address the disparate impact standard. The new version, which lifted language from the Americans with Disabilities Act, prohibits using hiring criteria with a disparate impact unless the criteria “is shown to be job-related for the position in question and is consistent with business necessity.” Supporters of the compromise bill expressed hope that the new language would insulate it from the quota charge in light of the fact that the Americans with Disabilities Act was not challenged as a quota bill. However, as it had rejected previous compromise efforts, the Administration rejected this too. “Senator Danforth’s tireless efforts on this important matter are deeply appreciated, but regrettably have not bridged the crucial differences that have persisted throughout the negotiations,” deputy White House press secretary Judy Smith said. Danforth responded that “[i]t is absolutely incomprehensible to me how anyone could argue the same civil rights protections available to the disabled should not be available to blacks and women.”

Finally, on Wednesday, October 24, and Thursday, October 25, the legislative logjam broke. During that period of time Republican Senators confronted the White House, making it clear that some sort of compromise was necessary to avoid an embarrassing battle within Republican ranks. Key Republicans negotiated a compromise among themselves on the language used to define business necessity, and they elicited an additional Administration concession regarding the upper-most limit of the damages cap. The compromise bill achieved Bush’s approval, clearing the way for passage.

204. Frisby, supra note 203.
205. Helen Dewar, Administration Rejects Danforth’s Rights Plan, WASH. POST, Sept. 25, 1991, at A4. According to E.E.O.C. chairman Evan Kemp, Jr., Danforth’s proposal represented “no change at all.” Id. According to a statement of Administration policy issued one month later, the Danforth compromise would “overturn two decades of Supreme Court precedent, replacing this settled body of law with novel rules of litigation that will drive employers to adopt quotas and other unfair preferences.” Eaton & Jehl, supra note 203. Some conservative commentators were quite critical of Danforth’s efforts. “Only last week Missouri Sen. John Danforth rode point for the Republican Party cavalry that saved Justice Clarence Thomas from a ‘high-tech lynching’ . . . . But this week, as Mr. Danforth’s so-called ‘Civil Rights Act’ is debated on the Senate floor, it appears the good senator merely lifted a noose from around the neck of a good friend to slip it over the heads of every employer in America” Standing By the Danforth Standard, WASH. TIMES, Oct. 24, 1991, at G2.
208. According to some, Bush could not lose by signing the bill. “White House acceptance on Friday of a compromise on civil rights legislation it long attacked as a ‘quota bill’ has some analysts wondering whether Mr. Bush had pulled off yet another deft move in racial politics. He presented himself Friday as both the opponent of quotas and the defender of civil rights, a comfortable place to be in American politics.” Robin Toner, Having Ridden Racial Issues, Parties Try To Harness Them, N.Y. TIMES, Oct. 27, 1991, § 1 at 1.
announcing his support for the compromise, Bush said, “we have reached an agreement with Senate Republican and Democratic leaders on a civil rights bill that will be a source of pride for all Americans. It does not resort to quotas, and it strengthens the cause of equality in the workplace.”209 Both sides contended that the other had made the significant concessions.210 The Senate passed the Civil Rights Act of 1991 by a vote of 93-5 on Oct. 30, 1991,211 and the President signed it on Nov. 21, 1991.212

III. THE CIVIL RIGHTS LOBBY: SUCCESS OR FAILURE?

Parts I and II examined the deliberations over the Voting Rights Amendments and the Civil Rights Act, focusing on the similarities between the civil rights leadership’s approach in both cases. The debates make clear the extent to which, in both legislative battles, the civil right lobby avoided the articulation of its civil rights principles and thereby undermined the vision underlying the legislative proposals. Whether the issue was intent versus effect, opportunity versus outcome, or color-blind versus color-conscious remedies, the civil rights lobby backpedaled, hedged, and side-stepped the conservative critique. From beginning to end, the ideological right defined the terms of the discourse.

And yet, both bills passed. From a bottom line perspective, the strategy employed by the civil rights leadership should perhaps be emulated, rather than criticized. The legislative ring is often no-holds-barred, and the civil rights leadership, like any other lobbying organization, should be allowed to employ any ethical means necessary to achieve its legislative goals. Intellectual honesty should not stand in the way of legislative accomplishment.

But more than intellectual honesty is at stake. As this part will discuss, the subterfuge and obfuscation by the civil rights leadership has its consequences. Moreover, it is not self-evident that the Voting Rights and Civil Rights Acts passed because of, rather than despite, the tactics employed. Accordingly, this part will first address other factors which help explain the passage of the legislation.

A. Comprehending Success: Extrinsic Factors

In the fall of 1991, David Duke concluded an almost successful run for Governor of Louisiana and Anita Hill levied sexual harassment charges against her former boss, then Supreme Court nominee Clarence Thomas. The impact

of these two events on the passage of the Civil Rights Act of 1991 was apparent to observers at the time. According to the Chicago Tribune, “Ever since professor Anita Hill’s allegations against Thomas raised the issue of sexual harassment to the peak of public attention, senators have been tripping over themselves in a rush to express abhorrence of such behavior. The civil rights bill gives them an opportunity to vote against it.” As one Republican told Senator Paul Simon during the vote to confirm Thomas, “[t]his will pass the civil rights bill.” The momentum from the public awareness regarding sexual harassment was not lost on the civil rights leadership. According to Ralph Neas, “The public education over the issue of sexual harassment has served as a catalyst for this renewed interest in the law. There is a dramatically changed political landscape. What the coalition is asking some senators to do is match their actions with their rhetoric.”

After the Senate voted 93-5 to pass the compromise legislation, Judith Lichtman, president of the Women’s Legal Defense Fund, concluded that the Thomas-Hill fight had helped make clear the necessity for damages in sexual harassment cases: “The dynamic changed for the White House as well as the Senate, which felt the wrath of very angry American women and men.” Indeed, final testament to the impact of the Thomas/Hill hearings on the process was the speed with which the Senate took the virtually unprecedented steps of applying the civil rights law to members of Congress and providing that individual Senators, not the taxpayers, would be liable for the damages.

While Hill’s allegations made it difficult for legislators to be seen as standing against damages for victims of sexual harassment, David Duke’s campaign caused many Republicans to wonder whether they had exhausted the benefits from running against quotas, at least in the short term. Republicans had gotten significant political mileage out of the use of the quota label, but the specter of former Klansman David Duke, running under the Republican banner, worried many Republicans who feared being associated with Duke’s unrepentant racism. For their part, many Democrats were eager to focus on the connections between Bush and Duke. “David Duke has found this bed very comfortable, but it’s the bed that Bush and Reagan made,” said Representative Mike Espy. Accordingly, as one Administration official commented, the time had come “to clearly distinguish Republicans from Duke.”

Commentators were unequivocal in making clear the link between Bush’s
change of heart regarding the civil rights bill and the publicity accorded David Duke. "President Bush has cleared the way for a compromise civil rights bill . . . . My guess is that the reason could be stated in two words: David Duke," said columnist William Raspberry.220 Bush's use of quotas was "a way of claiming to support civil rights without signing a civil rights bill, while also signalling to economically frightened whites that he was their guy."221 However, when David Duke rose to prominence on a virtually identical message, "the similarities between [Bush] and Duke frightened him into principled action."222 In the end, "George Bush may have decided he'd rather have a civil rights bill he could sign than to hitch his political wagon to hard-core bigots."223 Another columnist concluded that "Bush feared Senate Republicans would join Democrats to override a civil rights bill veto—leaving him isolated with Duke and the bedsheet brigade."224

While the influence of David Duke and Anita Hill on the passage of the Civil Rights Act is evident, less attention has been given to extrinsic factors that facilitated the passage of the Voting Rights Amendments. Most notable among these is the extent to which the Voting Rights Amendments benefitted not just minorities, but also the Republican Party. The following exchange during the hearings on the Amendments illustrates how the Amendments would help Republicans:

Mr. Walter Berns: Incidentally, if you were, Mr. Chairman, a partisan Republican, a very narrowly partisan Republican, you ought to support this legislation.

Senator Hatch: That is right.

Mr. Berns: You are not, but if you were—

Senator Hatch: I agree.

Mr. Berns: You would want to support this legislation because its tendency will be to build black districts, and the more black districts you can build, or—to put it this way—the more blacks you can pack into one electoral district, the more Democratic that district will become, and the more Republican will become the surrounding districts. It is a plain case of gerrymandering.

Senator Hatch: And that is certainly the way it is going to be used if section 2 is

221. Id.
222. Id.
223. Id.
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passed in its present form. So the very people that this law is supposed to help are ultimately going to wind up being hurt as far as electoral influence in this county is concerned, if the proposed changes are made. Am I correct in saying that?

Mr. Berns: Yes indeed, sir.225

Berns' analysis has proven correct, as the Republican Party has joined with civil rights organizations to bring litigation aimed at creating more minority-dominated voting districts.226 Specifically, the Republican Party has created plans to allow civil rights groups to use multi-million dollar computer programs that make it significantly easier to create redistricting plans to present to courts.227 The joint projects are underway in a number of states. In New Jersey, for example, the NAACP and the Republican Party recently argued before the State Apportionment Commission that it should create at least two majority black districts in Newark and Elizabeth.228 The reasons Republicans might join in this project are clear. "You remove black and Hispanic voters and give them their own district, that is going to make other districts white, pure and simple," remarked Stuart Rothenberg, editor of the Political Report, a Washington-based political newsletter.229 "And Democrats have more trouble with white voters."230 Some Republicans object to this strategy. Senator Trent Lott, for example, indicated that "[a] lot of us think it is blatantly unfair when you say a district has to be carved out" to create minority representation.231 On the other hand, the practice is Party policy, principally because of the recognition, even among those who are critical of the policy, that "there is no question that over the long run, it will redound to the benefit of Republicans."232

B. Comprehending Failure: The Unseen Costs of Subterfuge

Even if these extrinsic factors indicate that the passage of the Voting Rights and Civil Rights Act was not entirely dependent upon the strategies employed by the civil rights leadership, those strategies might arguably be viewed as

227. Id.
229. Id.
230. Id.
231. Paul Taylor, supra note 226.
232. Id.
successful in that they made the legislative victories possible, if not certain. However, this conclusion, while partially correct, ignores the costs inherent in an approach to civil rights that lacks a coherent vision.

As we have seen, during the debates over the Voting Rights Amendments, the bill’s supporters refused to endorse a vision of civil rights that focused on equal outcome as a measure of equal opportunity, emphasized race-consciousness rather than color-blindness, and defined discrimination as systemic, pervasive, and without regard to motive. Almost ten years later, in the debates over the Civil Rights Act, the civil rights leadership was again challenged to defend its vision of equality. “The average white American believes civil rights legislation is preference legislation,” said Representative Vin Weber. Moreover, he continued, “increasing numbers of Democrats believe that they are perceived as the party of the federal giveaway, of desegregation busing, affirmative action programs, and a host of issues many white voters view as unfair and detrimental to their interests.” Again, the civil rights leadership failed, refusing to endorse a civil rights vision that called for expanding race-based employment preferences, repudiating traditional definitions of merit and qualifications, restraining the employer’s managerial prerogative, and broadening federal court protection for employees. In both cases the civil rights leadership assumed that they need not explain why their legislative program and their civil rights vision were necessary and appropriate.

The rush to define the Civil Rights bill as anti-preference legislation had implications for the content of the bill. For example, rather than defend race-norming and affirmative action as necessary remedial measures, and criticize the civil service test and tests like it as inadequate measures of qualification, the civil rights lobby chose to introduce language limiting race-norming and prohibiting quotas. The consequences of the civil rights lobby’s approach can also be seen in the aftermath of the fight over the Civil Rights Act. Due in significant measure to the civil rights lobby’s approach, affirmative action legislation has become anathema in national politics. Accordingly, for Democrats who supported the Civil Rights bill, it is important to define the legislation as anti-preference. “I’m going home and say I voted

233. Legislative initiatives are hardly the only area in which those of us committed to civil rights must be sure to evaluate the hidden costs of tactics which are inconsistent with our ultimate goal. Similar issues confront civil rights litigation. See, e.g., Lisa Daugaard, “It’s Not Quite Dark Yet: ’’ The Lessons of Clark v. Committee for Creative Non Violence (on file with author) (critique of litigation strategy employed by attorneys for Committee for Creative Non Violence).
234. Daley, supra note 198.
235. Id.
236. One of the few voices to challenge the traditional definition of merit was Randall Kennedy, who noted, “All too often in debates about the regulation of racial and gender relations, equality concerns are pitted against meritoratic claims, as if the two are inevitably antagonistic. But the struggle for social justice in America has largely been a struggle to make authentic meritocracy possible.” Randall Kennedy, It Doesn’t Have To Be Intentional To Be Wrong, NEWSDAY, June 16, 1991, at 35.
237. See supra p. 35.
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for a bill that outlaw's quotas," said Representative William Ford, Chairman of the House Education and Labor Committee. "And that's going to please many white voters in my district in suburban Detroit."²³⁸

Moreover, the decision by the civil rights lobby to indulge the anti-preference rhetoric of conservatives gave further fodder to conservative politicians across the nation. Faced with the absence of forceful opposition on the national level, these candidates were able to parlay their anti-black message into political office. In North Carolina, Jesse Helms got significant mileage out of an infamous commercial. On the screen, a pair of white hands crumple a job rejection letter. "You needed that job and you were the best qualified," says the narrator, "but they had to give it to a minority because of a racial quota. Is that really fair?"²³⁹ The quota issue was also used successfully by Pete Wilson in his defeat of Dianne Feinstein for the California governorship.²⁴⁰ And in Mississippi, Republican Kirk Fordice upset incumbent Ray Mabus, using a campaign advertisement that featured a photograph of a young black woman holding a baby and called for "workfare, not welfare."²⁴¹

Finally, the civil rights leadership's repudiation of the only vision of civil rights capable of supporting significant progressive reform measures has serious implications for future legislative battles. Meaningful legislative demands have costs. The costs may be the job opportunities of would-be white firefighters in Birmingham, the independence of corporate managers, or a larger federal bench to hear civil rights claims. In any case, pretending that the demands are free will fool few. The costs must be justified. Civil rights legislation will only succeed if its supporters are willing and able to articulate why it is necessary, despite the costs. The success of civil rights legislation turns on whether the civil rights community is able to convince Congress and the nation that the moral claim being lodged is sufficiently compelling to justify the costs to society. Justifying legislation and providing a civil rights vision to support it will not always be easy, but the failure to do so may well produce hollow victories.

Moreover, by failing to articulate the true nature of their demands and underlying vision, civil rights advocates demobilize supporters while encouraging the forces of opposition and retrenchment. In the aftermath of the defeat of the Civil Rights bill, black leaders congregated in Atlanta to commemorate the assassination of Martin Luther King Jr. and to plot strategy for the future. Many wondered what could be done to recapture the moral authority held by the civil rights movement in the 1950s and 1960s. Reverend Joseph Lowery,

²³⁸ Id.
²⁴⁰ Id.
president of the Southern Christian Leadership Conference, looked back with fondness on the days when the civil rights movement was able to mobilize its troops behind a program that was “very simple—whether you sit in a restaurant or whether you can vote.” But Lowery and his compatriots ignored the fact that the inability to gather support for their cause is directly linked to their unwillingness to push for a transformative vision of civil rights that challenges the vision being offered by Republicans and increasing numbers of Democrats.

IV. CONCLUSION

In passing the Voting Rights Amendments of 1982 and the Civil Rights Act of 1991 the civil rights forces have many reasons to be proud. The legislative victories will translate into votes for blacks and jobs for blacks and women, no small feats in an era of conservative domination of the national political process. However, civil rights supporters have reason to be concerned as the nation approaches the beginning of the 21st century, for in fighting these legislative battles the civil rights leadership was unwilling or unable to articulate and defend a progressive vision of civil rights. The most severe consequences of this failure may yet be in the offing. Those committed to civil rights would do well to consider carefully the errors of the past, not for the purpose of apportioning blame or assigning guilt, but rather for the purpose of making plans for the future.