Congress and Civil Rights:
The Battle Over Title VII Enforcement, 1965-1991

Jeffery A. Jenkins
Price School of Public Policy
University of Southern California
jajenkins@usc.edu

Justin Peck
Department of Government
Wesleyan University
jcpeck@wesleyan.edu

In this paper, we contribute to the rich literature on Title VII of the 1964 CRA. We focus first on congressional efforts to strengthen the EEOC's enforcement powers under Title VII. Examining different proposals in Congress from 1965-1972, we illustrate the political obstacles faced by those who wanted to enhance the employment discrimination features of Title VII. In so doing, we provide evidence to suggest that by the mid-1960s, the Second Civil Rights Era's most ambitious endeavors had plateaued, and that "second best" outcomes were what could be achieved (at best) thereafter. While civil rights advocates sought to endow the EEOC with cease-and-desist authority (and thus make the EEOC a powerful regulatory body like the NLRB), they had to be satisfied with the EEOC gaining the authority to pursue discriminatory claims in federal court (and thus accept the EEOC as more of a quasi-judicial body). We then move ahead in time to the late 1980s when a series of Supreme Court decisions overturned precedents related to Title VII that had been in place for decades. These rulings motivated civil rights liberals in Congress to spend a year writing and debating a new law aimed at reversing what the Court had done. While the 1990 Civil Rights Act passed with some bipartisan support, President George H.W. Bush vetoed it and the Senate failed to override by a single vote. A compromise measure passed in 1991, but it failed to achieve much of what had been hoped for the previous year. This defeat, we argue, suggests the emergence of a political movement seeking to roll back what had been achieved 35 years earlier.

Prepared for presentation at the 2024 annual meeting of the Midwest Political Science Association, Chicago, IL.

Introduction

The 1964 Civil Rights Act is the foundation of America's "Second Reconstruction."[1] This law offered new voting rights protections for Black citizens, prohibited discrimination in public accommodations, called for the desegregation of schools, and banned discrimination in hiring and employment, among other things. While its most ardent advocates in Congress were civil rights liberals, the CRA could not have passed absent the emergence of a bipartisan, interregional coalition of lawmakers who were willing to upend the white supremacist political order. With southern Democrats voting as a bloc against any legislation that challenged Jim Crow's institutional supports, northern Democrats championing legal protections for Black citizens could only succeed by winning support from moderate and often conservative Republicans who represented constituencies across northern and western portions of the country. With success hinging on such a politically fragile coalition, lawmakers at times relied on vaguely written provisions, or left out any mention of how the goals of the 1964 CRA would be achieved.[2]

In other work focused on fair housing legislation and federal support for school busing programs, we explore the political and policy consequences of the 1964 CRA after enactment.[3] We find that bureaucratic action and Supreme Court decisions expounding on the law were not simply accepted by lawmakers in Congress. Instead, a bipartisan and interregional "color-blind"

---

[1] C. Vann Woodward invokes the term "Second Reconstruction" in "The Political Legacy of Reconstruction," *Journal of Negro Education* 26 (Summer 1957): 231-240. Richard Vallely treats the 1965 Voting Rights Act as the "turning point" in the "Second Reconstruction." See Richard M. Vallely, *The Two Reconstructions: The Struggle for Black Enfranchisement* (Chicago, IL: University of Chicago Press, 2004), 3.

[2] For example, Title IV outlaws school segregation. Yet the law provides no specific plan for actually integrating schools or even a standard for determining when a school has successfully integrated. As a consequence of how the law was written, the Courts and the administrative state played a central role in deciding what the law meant and how it would be applied.

[3] Jeffery A. Jenkins and Justin Peck, "Foreshadowing the Civil Rights Counter-Revolution: Congress and the Fair Housing Act of 1968," *Du Bois Review* 14 (2022): 329-56; Jeffery A. Jenkins and Justin Peck, "The Collapse of the Civil Rights Coalition: Congress and the Politics of Anti-Busing Legislation, 1966-1986," Paper Presented at the 2023 Meeting of the Midwest Political Science Association.

coalition emerged to try and either reverse or obstruct the efforts of judges and administrators. Members of the color-blind coalition pushed legislation aimed at preventing Congress from appropriating federal money to states and localities to support local busing initiatives. Not all of their efforts were successful. But they did signal the end of the "Second Civil Rights Era." Lacking the administrative capacity to force integration on communities, and now lacking the political support needed to implement Court rulings, civil rights liberals found themselves unable, for example, to reverse school segregation nation-wide. The Court and the administrative state, therefore, had not simply issued decisions that were difficult to enforce. By interjecting themselves into the policymaking process the debate, these unelected policymakers motivated a counterattack against one of the 1964 CRA's central goals. In this case, the "weak American state" did result in "weak" policy.

Scholarship focusing on Title VII of the 1964 CRA comes to a different conclusion. This provision of the law banned discrimination by employers or unions based on race, color, sex, religion, or national origin. By 1968, it applied to organizations with 25 or more employees or members. The Act also established the Equal Employment Opportunities Commission (EEOC) but granted it only investigatory powers to conciliate cases of alleged discrimination. Aggrieved persons could bring private civil suits to obtain a federal court order to cease the unlawful practice and to gain reinstatement or re-hiring with or without back pay. The Attorney General was authorized to bring suit when he determined that a "pattern or practice" of discrimination existed.

By the early 1970s, however, the EEOC's enforcement authority looked very different. Beginning in 1965, a pro-enforcement civil rights coalition pushed for greater formal powers for the EEOC, and seven years later – via the Equal Enforcement Opportunity Act of 1972 –

succeeded in converting the EEOC into a quasi-judicial entity that could pursue discrimination in the federal circuit and appeals courts. Around the same time, favorable Supreme Court decisions and sophisticated political organizing outside of Congress helped created an unexpectedly strong anti-discrimination enforcement regime.[4] More specifically, in *Griggs v. Duke Power Co.* (1971) and *McDonnell Douglass Corp. v. Green* (1973), the Court "fashioned two theories of discrimination—disparate treatment and disparate impact."[5] Disparate treatment, the Justices explained, occurs when an employer "uses race, color, religion, sex, or national origin" as a reason to view an applicant less favorably. Disparate impact occurs when a "facially neutral employment practice … adversely effects a protected group."[6] Applied broadly, the disparate impact standard meant that "if an employment practice has a disparate impact on members of minority groups and there is no proven 'business necessity' for the practice, that suffices as a violation of Title VII … even if no discriminatory intent is alleged or proved."[7] In these cases the Court fashioned a capacious interpretation of discrimination, thereby aiding potential plaintiffs.

Title VII also gave rise to a strong "private enforcement regime." As Farhang explains, lawmakers responsible for writing this part of the CRA wanted to avoid a "bureaucracy-centered" enforcement. Senator Everett Dirksen (R-IL) and other conservative Republicans whose support was needed to build a majority did not want to invest the federal administrative state with sufficient power to investigate and prosecute discrimination cases.[8] Instead, Title VII

---

[4] Nicholas Pedriana and Robin Stryker, "The Strength of a Weak Agency: Enforcement of Title VII of the 1964 Civil Rights Act and the Expansion of State Capacity, 1965-1971," *American Journal of Sociology* 110 (November 2004): 709-760; Robert C. Lieberman, "Ideas, Institutions, and Political Order: Explaining Political Change," *American Political Science Review* 96 (December 2002): 697-712.

[5] Cynthia L. Alexander, "The Defeat of the Civil Rights Act of 1990: Wading Through the Rhetoric in Search of Compromise," *Vanderbilt Law Review* 44 (April 1991): 596-640; 598.

[6] Alexander, "Defeat," 599.

[7] Roger Clegg, "Introduction: A Brief Legislative History of the Civil Rights Act of 1991," *Louisiana Law Review* 54 (July 1994):1459-1471; 1460.

[8] As Byron C. Hulsey documents: "Dirksen won an agreement that stripped the EEOC of its authority. Though the commission could make recommendations, only the Justice Department had the power to initiate a suit. To Dirksen,

was to be enforced through individual lawsuits brought by those who believed themselves to be victims of discrimination. Yet the "private enforcement regime" created by Title VII was bolstered by a provision written into the law allowing successful plaintiffs to recoup attorney's fees when their lawsuits were successful. By writing the law this way, members of Congress took some of the financial burden off of those who might want to pursue a discrimination case. In so doing, they incentivized the emergence of "legal advocacy groups and … a for-profit civil rights bar."[9] These groups and law firms further encouraged people to sue for their rights. Private enforcement was intended as a "substitute for administrative power," but this did not doom Title VII to irrelevance. The "weak state," in this case, produced "strong policy."

In this paper, we contribute to the rich literature focused on Title VII of the 1964 CRA. Section II examines congressional efforts to strengthen the EEOC's enforcement powers under Title VII after enactment of the law. By focusing on congressional proceedings and by highlighting votes on different proposals to enhance the employment discrimination features of Title VII from 1965 through 1972, we make clear the political obstacles faced by those who wanted to press for additional civil rights protections for Black citizens. In so doing, we provide evidence to suggest that by the mid-1960s, the Second Civil Rights Era's most ambitious endeavors had plateaued, and that "second best" outcomes (at best) were what could be achieved thereafter. While civil rights advocates wanted to endow the EEOC with cease-and-desist authority (and thus make the EEOC a powerful regulatory body like the NLRB), they had to be

---

this arrangement eliminated the excessive litigation without jeopardizing necessary federal enforcement in the South. His proposal also reflected his lingering dislike for ballooning executive agencies like the New Deal's National Labor Relations Board, whose broad enforcement powers had grown through the years and fueled long-hold conservative opposition to a power-hungry White House." Byron C. Hulsey, *Everett Dirksen and His Presidents: How a Senate Giant Shaped American Politics* (Lawrence, KS: University Press of Kansas, 2000), 194-95

[9] Sean Farhang, 'The Political Development of Job Discrimination Litigation, 1963-1976," *Studies in American Political Development* 23 (April 2009): 23-60; 27.

satisfied with the EEOC gaining the authority to pursue discriminatory claims in federal court (and thus accept the EEOC as more of a quasi-judicial body). In Section III, we move ahead in time to the late 1980s when a series of Supreme Court decisions overturned precedents related to Title VII that had been in place for decades. These rulings motivated civil rights liberals in Congress to spend a year writing and debating a new law aiming to reverse what the Court had done. The 1990 Civil Rights Act passed with bipartisan support, though as we explain it was overwhelmingly backed by Democrats. Yet George H.W. Bush vetoed it and the Senate failed by one vote to override the veto. A compromise measure did pass in 1991, but it failed to achieve much of what had been hoped for one year earlier. For us, this defeat suggests the emergence of a political movement aiming to roll back what had been achieved 35 years earlier.

II. Early Attempts to Strengthen the EEOC's Enforcement Powers, 1965-1972

Almost immediately after the passage of the Civil Rights Act of 1964, civil rights groups sought to increase the EEOC's Title VII enforcement powers. Per the 1964 Act, the EEOC only possessed "soft authority" to deal with disputes arising under the title and EEOC guidelines. Specifically, per the language of Title VII, the EEOC was "to endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." Strengthening EEOC enforcement, however, would be difficult, as the American public's views on the scope of federal civil rights policy shifted in 1966.

89th Congress (1965-66)

To strengthen the EEOC's enforcement powers and authority, civil rights groups initially pinned their hopes on a bill (H.R. 10065) introduced on July 26, 1965, by Rep. Gus Hawkins (D-

CA).[10] The bill – "to more effectively prohibit discrimination in employment because of race, color, religion, sex, or national origins, and for other purposes" – was referred to the House Education and Law Committee, which reported it out without amendment and referred it to the Committee of the Whole House on the State of the Union on August 3, 1965.[11]

H.R. 10065 sought to repeal Title VII of the Civil Rights Act of 1964 and reenact its provisions as the Equal Employment Opportunity Act of 1965. The bill would move beyond the "soft authority" in Title VII and empowered the EEOC to initiate charges of unlawful discrimination, to issue cease and desist orders, and to order hiring or reinstatement with or without back pay; extended coverage of Title VII to employers of 50 or more persons after July 2, 1966, and of eight or more persons after July 2, 1967, exempting religious organizations and educational institutions;[12] and extended the nondiscriminatory requirements to labor unions having eight or more members, effective upon enactment of the bill.[13]

The House Rules Committee was opposed to H.R. 10065 and refused to provide it with a rule to move forward. But thanks to a change to the House rules at the beginning of the 89th Congress, which, after 21 days of inaction by the Rules Committee, allowed the Speaker to permit the committee of record to call up the rule for adoption by a majority of the House, H.R. 10065 was afforded new life.[14] On September 13, 1965, per the allowance of Speaker John W. McCormack (D-MA), Rep. Adam Clayton Powell (D-NY) moved to call up H. Res. 506, the rule providing for consideration of H.R. 10065. Rep. Gerald Ford (R-MI) asked for the yeas and nays,

[10] *Congressional Record*, 89th Congress, 1st Session (July 26, 1965): 18167.
[11] *Congressional Record*, 89th Congress, 1st Session (August 3, 1965): 19296. For the bill's provisions, see "Equal Employment Opportunity Act of 1965," 89th Congress, 1st Session, House of Representatives Report No. 718.
[12] This provision would have accelerated the schedule in Title VII, as enacted in 1964, which initially covered employers of 100 or more and lowered that figure to 75 on June 2, 1966, to 50 on June 2, 1967, and to 25 on June 2, 1968.
[13] Title VII, as enacted in 1964, covered unions in the same progression as employers.
[14] For more on this rule change (and others), see "House Rules Changes Enhance Majority Rule." In *CQ Almanac 1965*, 21st ed., 585-90 (Washington, DC: Congressional Quarterly, 1966).

and the House voted 259-121 to agree to the resolution. Rep. McCulloch (R-CA) quickly moved to reconsider the vote (and called for the yeas and nays), and Rep. Carl Albert (D-OK) countered with a motion that it be laid on the table. Albert's tabling motion was agreed to, 194-181.[15]

The first two columns of Table 1 illustrate the party breakdown on these two procedural roll calls. On the vote to agree to H. Res. 506, majorities of northern Democrats and Republicans opposed a majority of southern Democrats. Republicans, though, were somewhat split, with 76 voting yea and 50 voting nay. On the vote to table the motion to reconsider, the coalitions changed: all but one northern Democrat opposed majorities of southern Democrats and Republicans. This, then, proved to be a "conservative coalition" vote.

[Table 1 about here]

The year would pass without further movement on H.R. 10065. While floor action was schedule for October 13, 1965, it was ultimately postponed until the following year "because of the controversial nature of the bill and the [Democratic] leadership's desire to adjourn Congress as soon as possible."[16]

Northern Democrats picked up H.R. 10065 again in April 1966. Some opposition emerged within the Republican Party to the bill, as the House Republican Policy Committee on April 26, 1966, released a statement that warned that H.R. 10065 would transform the EEOC into an agency akin to the National Labor Relations Board (NLRB), which would lead ultimately to the states losing authority to decide on unfair employment practices within their boundaries.[17] Indeed, Rep. Charles Goodell (R-NY) offered an amendment (in the nature of a substitute) the following day to make this transformation of the EEOC into a NLRB facsimile explicit, but it

---

[15] For these procedural dynamics, see *Congressional Record*, 89th Congress, 1st Session (September 13, 1965): 23607-09.
[16] "Equal Employment." In *CQ Almanac 1966*, 22nd ed., 481-83 (Washington, DC: Congressional Quarterly, 1967).
[17] Ibid.

was voted down on a voice vote.[18] Another amendment was offered by Rep. Glenn Andrews (R-AL), which would have eliminated any language in the bill that would have allowed the EEOC to initiate any unlawful discrimination charges on its own. This also was defeated via a voice vote.[19] Finally, Joe Waggonner (D-LA) sought to recommit the bill (and thus kill it), which was also defeated on a voice vote.[20]

Any and all amendments out of the way, the House immediately turned to the passage of H.R. 10065. Yeas and Nays were ordered, and the bill passed, 300-93.[21] As the third column of Table 1 illustrates, large majorities of northern Democrats and Republicans opposed a majority of southern Democrats. The next day, April 28, 1965, President Johnson spoke in favor of combating discrimination in employment in his broad civil rights message to Congress. Specifically, he urged "that the Senate complete action on the Bill passed by the House of Representatives yesterday."[22]

Unfortunately for Johnson and his allies, the national mood on expanding federal civil rights protections had cooled by mid-1966. Urban riots throughout the country in the summer of 1966 altered the attitudes of white citizens. A pre-election Gallup poll showed a majority of whites believed the Johnson Administration was pushing rational integration too quickly (the highest percentage since 1962), while a Harris poll showed that 75 percent of whites believed that Blacks were pushing too fast (up from 50 percent in 1964).[23] Johnson and his allies responded by throwing all their weight behind the Civil Rights Act of 1966 – embodied

---

[18] *Congressional Record*, 89th Congress, 2nd Session (April 27, 1966): 9145.
[19] *Congressional Record*, 89th Congress, 2nd Session (April 27, 1966): 9149.
[20] *Congressional Record*, 89th Congress, 2nd Session (April 27, 1966): 9153.
[21] *Congressional Record*, 89th Congress, 2nd Session (April 27, 1966): 9153-54. After the vote, a motion to reconsider was immediately considered and laid on the table.
[22] "Message to Congress: Johnson Proposes Broad Civil Rights Law." In *CQ Almanac 1966*, 22nd ed., 1252-55 (Washington, DC: Congressional Quarterly, 1967).
[23] "1966 Civil Rights Act dies in Senate." In *CQ Almanac 1966*, 22nd ed., 450-72 (Washington, DC: Congressional Quarterly, 1967).

principally by an open (fair) housing provision – and (relatively speaking) mostly ignored the equal employment bill.[24] As a result, when H.R. 10065 was received in the Senate on April 29, 1966, Minority Leader Everett Dirksen (R-IL) asked unamimous consent that it be permitted to lie on the table, and – being there was no objection – it was so ordered.[25] And there the bill died, as the 89th Congress came to a close.

<u>90th Congress (1967-68)</u>

The 1966 midterms were not kind to the Democrats. The urban riots – combined with rising inflation and pushback against the Johnson Administration's Vietnam policy – led to the Democrats losing three Senate seats, 47 House seats, and eight governorships.[26] These electoral losses cost the Democrats their two-thirds supermajorities in each chamber. This made further civil rights policies difficult; indeed, the "fierce urgency of now" that the Johnson Administration had pursued in the 89th Congress, knowing their supermajorities were not permanent, could not produce key policy victories in 1966, as fair housing and equal employment did not make their way into law.[27]

Yet Johnson and his allies did not give up – on fair housing or on equal employment. On February 15, 1967, he once again addressed Congress and asked for (essentially) the same set of policies that he had pursued in 1966. But a different strategy would be pursued, where the broad "ask" would be split into individual bills. Only a five-year extension of the U.S. Civil Rights Commission was adopted in 1967. As for equal employment, Johnson had initially proposed that

---

[24] For more on the politics of the Civil Rights Act of 1966, see Jenkins and Peck, "Foreshadowing the Civil Rights Counter-Revolution."
[25] *Congressional Record*, 89th Congress, 2nd Session (April 28, 1966): 9298.
[26] "1966 Elections–A Major Republican Comeback." In *CQ Almanac 1966*, 22nd ed., 1387-88 (Washington, DC: Congressional Quarterly, 1967).
[27] For more on the "fierce urgency of now," see Julian E. Zelizer, *The Fierce Urgency of Now: Lyndon Johnson, Congress, and the Battle for the Great Society* (New York: Penguin Press, 2015).

Title VII be revised to empower the EEOC, after hearings, to issue cease-and-desist orders. This had initially been part of the Administration's 1967 omnibus civil rights bill (S 10626) – but, as noted, supporters decided to pull this provision out and seek passage on its own (believing it would have a better chance of passage as a separate piece of legislation). Individual bills (S. 1308 and S. 1667) would also be introduced in the Senate by Joseph Clark (D-PA) and Jacob Javits (R-NY), respectively, and these (along with the president's bill) would be considered in hearings held by the Senate Labor and Public Welfare, Subcommittee on Employment, Manpower and Poverty (May 4-5, 1967). The subcommittee would eventually approve an amended version of the Clark bill. But no further action was had in 1967.[28]

Entering 1968, Johnson continued to push for new civil rights legislation. On January 24, he outlined his ambitious policy vision once again in a message to Congress. Equal employment would continue to receive his support. He stated:

> The legislation that I submitted last year would empower the Equal Employment Opportunity Commission to issue, after an appropriate hearing, an order requiring an offending employer or union to cease its discriminatory practices and to take corrective action. If there is a refusal to comply with the order, the Government would be authorized to seek enforcement in the Federal courts. I urge the Congress to give the Commission the power it needs to fulfill its purpose.[29]

The Senate once again took up the mantle. The Senate Labor and Public Welfare Committee began consideration of the Clark bill on February 15, 1968, and approved a clean bill (S. 3465) on April 25. The committee vote was 13-2, with only Committee Chairman Lister Hill (D-AL) and Paul Fannin (R-AZ) voting in opposition.[30] S. 3465, which authorized the EEOC to hold

---

[28] "Broad Enforcement Powers Proposed for EEOC." In *CQ Almanac 1967*, 23rd ed., 04-789-04-790 (Washington, DC: Congressional Quarterly, 1968). Rep. Gus Hawkins (D-CA) introduced a bill in the House (which was identical to H.R. 10065 from the previous Congress), which was sent to the House Education and Labor Committee. But the General Labor Subcommittee, to which it was referred, scheduled no hearings in 1967.

[29] "Message to Congress: Johnson on Civil Rights." In *CQ Almanac 1968*, 24th ed., 20-36-A-20-39-A (Washington, DC: Congressional Quarterly, 1969).

[30] "Equal Employment." In *CQ Almanac 1968*, 24th ed., 05-646-5-646 (Washington, DC: Congressional Quarterly, 1969).

hearings on charges of discrimination by employers or unions, determine the truth of such charges, and, if the charge was supported by evidence, issue a cease-and-desist order against the unlawful practice and seek enforcement of the order in a Circuit Court of Appeals,[31] was reported out on May 8.[32]

But the bill made no futher progress. On June 26, Sen. Javits asked Majority Leader Mike Mansfield (D-MT) whether "he has any thoughts about when [S. 3465] might be brought up." Mansfield responded that he had no thoughts "at this time," and more importantly would not "unless the House shows that it intends to do something, to be frank about it."[33] Moreover, Minority Leader Dirksen made it known that he would pursue a filibuster, should the legislation be pursued on the floor.[34]

So, once again, equal employment died in Congress – this time without any roll-call votes. And while President Johnson was able to get a weakened fair housing bill enacted into law (the Civil Rights Act of 1968), those seeking legislation to combat employment discrimination would have to wait for another chance. And the 1968 elections created a different scenario, as Republican Richard Nixon was elected president.

<u>91st Congress (1969-70)</u>

While some might have worried that a Republican president would put a halt to the advancement of civil rights policy, Richard Nixon had other plans. While he would take the side of suburban Whites (North and South) on the busing issue,[35] for example, Nixon was strategic in navigating the race issue. His modal position on civil right was center-right, but he also looked

---

[31] See "Equal Employment Opportunities Enforcement," 90th Congress, 2nd Session, Senate Report No. 1111. The order could also require reinstatement or hiring, with or without back pay.
[32] *Congressional Record*, 90th Congress, 2nd Session (May 8, 1968): 12332.
[33] *Congressional Record*, 90th Congress, 2nd Session (June 26, 1968): 18853.
[34] "Equal Employment." In *CQ Almanac 1968*, 24th ed., 05-646-5-646 (Washington, DC: Congressional Quarterly, 1969).
[35] Jenkins and Peck, "Foreshadowing the Civil Rights Counter-Revolution."

for opportunities to show that he was supportive of Black progress (and the Black middle class) when it served his needs. For example, he chose early in his administration to support the Philadelphia Plan, a federal affirmative-action program developed during the Johnson Administration to racially integrate the building construction trade unions through mandatory goals for nonwhite hiring on federal construction contracts.[36] It was declared illegal under existing procurement law in 1968 by Comptroller General of the United States Elmer Staats. Nixon's support for a revised Philadelphia Plan ran afoul of Staats again in 1969, but he fought back and in late-1969 successfully lobbied Republicans in Congress to limit the Comptroller General's authority. Underlying Nixon's unwavering support, however, was a more political incentive. As Hugh Davis Graham notes: "Meeting with congressional leaders … Nixon emphasized the importance of exploiting the Philadelphia Plan to split the Democratic constituency and drive a wedge between the civil rights groups and organized labor."[37]

Nixon's position on the broader equal employment opportunity enforcement would also surprise racial conservatives. He would be pushed into developing an administration position by Congress, as Rep. Gus Hawkins and Sen. Harrison Williams would each introduce strong equal employment opportunity enforcement bills (H.R. 6228 and S. 2453, respectively) in 1969 and subcommittees of the House and Senate Labor committees would hold hearings on the bills throughout the year.[38] On February 13, Nixon instructed Attorney General John Mitchell to work on the issue, along with Domestic Policy Advisor John Ehrlichman. In August, their working

---

[36] The politics of the Philadelphia Plan is covered extensively in Hugh Davis Graham, *The Civil Rights Era: Origins and Development of National Policy, 1960-1972* (New York: Oxford University Press, 1990).
[37] Graham, *The Civil Rights Era*, 340. The key roll call took place in the House on December 23, 1969: "to recede from disagreement with Senate Amendment 33 to H.R. 15209, which would limit the application of the so-called Philadelphia Plan." It failed 156-208, with northern Democrats voting 54-78, southern Democrats 61-6, and Republicans 41-124.
[38] "Equal Employment." In *CQ Almanac 1969*, 25th ed., 413-16 (Washington, DC: Congressional Quarterly, 1970). H.R. 6228 and S. 2453 would be introduced on February 5 and June 19, respectively.

group, with important advice provided by Minority Leader Dirksen, would reject congressional Democrats' preference for endowing the EEOC with NRLB-style enforcement powers and push a judicial solution instead. As Graham describes: "in the Administration's bill [S. 2806] the EEOC would seek remedies not through cease-and-desist authority, but rather by bringing suits in federal district courts."[39]

Democrats in Congress largely rejected the administration position, as the relevant subcommittees of the House and Senate Labor committees reported out similar cease-and-desist bills in July 1970. The Senate was the first to act, on August 21, 1970, with the full Senate Labor and Public Welfare Committee reporting out an amended S. 2453, the Equal Employment Opportunities Enforcement Act of 1970.[40] The bill, among other things, would:

- Extend coverage of Title VII to employers and labor organizations with eight or more employees or members – in a three-step, two-year process – to state and local governments, and to employees of schools and colleges.
- Authorize the EEOC, if after a full investigation and hearing it found that an employer had engaged in an unlawful employment practice, to issue an order directing that employer to cease and desist from such a practice and to take affirmative action, such as reinstating or hiring certain employees. If no unlawful action was found, the EEOC would state such findings and dismiss the charges.
- Provide for court review of any final EEOC order.
- Provide for judicial enforcement of an EEOC cease-and-desist order.[41]

S. 2453 was placed on the calendar and finally called up on September 29, 1970.[42] The next day, debate began in earnest and covered two days. Ten amendments total would be offered, with six eliciting rolls (see Table 2).

[Table 2 about here]

---

[39] Graham, *The Civil Rights Era*, 427.
[40] *Congressional Record*, 91st Congress, 2nd Session (August 21, 1970): 29691. See "Equal Employment Opportunities Enforcement Act," 91st Congress, 2nd Session, Senate Report No. 1137.

[41] "Equal Employment Opportunity." In *CQ Almanac 1970*, 26th ed., 01-710-01-712. Washington, DC: Congressional Quarterly, 1971.
[42] *Congressional Record*, 91st Congress, 2nd Session (September 29, 1970): 34065.

On September 30, four amendments were considered, three of which were introduced by Sen. Peter Dominick (R-CO): (1) to delete the section transferring responsibility for supervision of an equal opportunity program for Federal employees from the Civil Service Commission (CSC) to the EEOC, which was adopted 37-29; (2) to delete the section authorizing the EEOC to issue cease-and-desist orders, and insert instead that the EEOC should take employers violating the law to Federal district court to obtain enforcement of findings, which failed 27-41; and (3) to prohibit EEOC officers, employees, and members from filing charges of discrimination, which failed 27-42.[43] The latter two amendments saw near unanimous majorities of northern Democrats oppose near unanimous majorities of southern Democrats, with Republicans effectively split.

The following day, October 1, 1970, Sen. Sam Ervin (D-NC) offered three amendments that produced roll calls: (1) to delete the section expanding EEOC jurisdiction to include employees of state and local government, which failed 30-37; (2) to exempt employees of religious organizations from EEOC coverage, which passed 43-28; and (3) to exempt educational institutions, with respect to their teaching personnel, from EEOC coverage, which failed 30-38.[44] (One change here was that educational institutions were excluded in the earlier l966 legislation that passed in the House.) As on the previous day, the state-and-local and educational institutions amendments saw near unanimous majorities of northern Democrats oppose near unanimous

[43] *Congressional Record*, 91st Congress, 2nd Session (September 30, 1970): 34410, 34419, 34421-22. The fourth amendment was offered by Rep. William Saxbe (R-OH), who called for the creation in the EEOC of a general counsel appointed by the president with advice and consent of the Senate. It was agreed to on a voice vote. *Congressional Record*, 91st Congress, 2nd Session (September 30, 1970): 34422.

[44] *Congressional Record*, 91st Congress, 2nd Session (October 1, 1970): 34565, 34566, 34568. Sen. Erivin also offered two amendments that were agreed to on voice votes: (1) to require that the EEOC make its findings of discrimination by a preponderance of the evidence and (2) to provide that the EEOC appoint counsel for any party in a proceeding before it who is unable to pay for his own attorney. *Congressional Record*, 91st Congress, 2nd Session (October 1, 1970): 34562. Sen. Harrison Williams (D-NJ) also offered an amendment to Ervin's religious exemption amendment (in the nature of a substitute) that was rejected on a voice vote: to exempt employees of religious organizations from EEOC jurisdiction except when that exemption is used as a subterfuge to avoid coverage. *Congressional Record*, 91st Congress, 2nd Session (October 1, 1970): 34566.

majorities of southern Democrats, with Republicans effectively split. The religious exemption amendment though was different, as the northern Democrats were split (as were the Republicans) with southern Democrats strongly in favor – which led to its adoption. Finally, S. 2453, as amended, was considered, and it passed 47-24.[45] Majorities of northern and southern Democrats opposed each other on final passage, with a majority of Republicans voting in support.

What of the House? The congressional midterms were rapidly approaching, and a companion House bill to S. 2453 – H.R. 17555 – was reported out by the House Education and Law Committee on September 9 and referred to the Committee of the Whole House on the State of the Union.[46] And that is where it died. With the support of the AFL-CIO – whose leadership wanted to move the Office of Federal Contract Compliance Programs (OFCC), which was responsible for ensuring that federal contractors comply with equal opportunity policies, out of the Department of Labor to the EEOC, the result of which would "weaken civil right enforcement by overwhelming the small and fragile EEOC" – the Rules Committee, led by Rep. William Colmer (D-MS), refused to grant it a rule in order to move forward.[47] As Hugh Graham Davis notes: "Colmer naturally opposed the cease-and-desist bill … [and] found abundant allies among his committee's Republicans, fellow southern Democrats, plus the unusual backing of organized labor, and above all the clock."[48] As a consequence, the 91st Congress expired with no equal employment opportunity enforcement bill passing into law.

92nd Congress (1971-72)

[45] *Congressional Record*, 91st Congress, 2nd Session (October 1, 1970): 34572-73.
[46] *Congressional Record*, 91st Congress, 2nd Session (September 9, 1970): 30926. See "Equal Employment Opportunities Enforcement Act of 1970," 91st Congress, 2nd Session, House of Representatives Report No. 1434.
[47] Graham, *The Civil Rights Era*, 432.
[48] Graham, *The Civil Rights Era*, 433.

The close-but-no-cigar outcome on providing the EEOC with enforcement powers in the 91st Congress would not stymie civil rights advocates in Congress. Indeed, they proved themselves flexible – learning from defeat and accepting what was possible – and finally broke through and passed new legislation in 1972.

The initial progress on new legislation in the 92nd Congress began in the House. Rep. Reid (D-NY) introduced a new cease-and-desist bill (H.R. 1746) to further promote equal employment opportunities for American workers.[49] The House Education and Labor General Subcommittee on Labor held hearings on H.R. 1746 on March 3-4 & 18 and recommended the bill to the full committee on April 7. The Committee on Education and Labor approved the bill on May 4, on a 21-12 vote with Democrats voting 19-1 and Republicans 2-11, and on June 2 it was reported by Rep. Gus Hawkins to the full House and referred to the Committee of the Whole House on the State of the Union.[50] Importantly, the Committee on Education and Labor rejected an amendment by Rep. John Erlenborn (R-IL) that would have substituted the text of H.R. 6760 – the administration bill that would have replaced cease-and-desist authority for the EEOC with "adversarial authority," i.e., authority to take recalcitrant employers to federal district court – for H.R. 1746, but it failed 14-19, with Democrats voting 1-18 and Republicans 13-1.[51]

H.R. 1746 continued provisions from the previous Congress's bill – giving cease-and-desist authority to the EEOC and extend its coverage to employers and labor organizations of eight or more, including state and local governments, federal agencies, and educational institutions – but added one key provision to move the legislation forward: it gave in to labor demands and

---

[49] *Congressional Record*, 92nd Congress, 1st Session (January 23, 1971): 212.
[50] *Congressional Record*, 92nd Congress, 1st Session (June 2, 1971): 17539. See "Equal Employment Opportunities Enforcement Act of 1971," 92nd Congress, 1st Session, House of Representatives Report No. 238.
[51] "Equal Employment Opportunity: No Final Action." In *CQ Almanac 1971*, 27th ed., 09-644-09-651 (Washington, DC: Congressional Quarterly, 1972).

transferred the OFCC to the EEOC. This transfer solidified the black-labor coalition behind the bill. But the combination of the cease-and-desist and OFCC-transfer provisions also solidified the Republicans *against* H.R. 1746, with lobbyists from the National Association of Manufacturers and the U.S. Chamber of Commerce advocating instead for the court-enforced substitute bill (now embodied in H.R. 9247, which was introduced in the House by Rep. Erlenborn).[52]

Debate on H.R. 1746 began on September 15 and stretched into the following day. Rep. Erlenborn sought to propose the administration bill (H.R. 9247) as a substitute to H.R. 1746, setting up a showdown between those who supported cease-and-desist authority and those who supported an exclusively judicial remedy. There were also wildcards, led by Rep. John Dent (D-PA), who declared that he would propose several amendments should the substitute fail, led by one that would bar the EEOC from imposing quotas or requiring preferential treatment of minorities. Others, like Rep. Hawkins, felt that concerns about quotas were unwarranted, given that the Civil Rights Act of 1964 included language that nothing in it should be read as requiring anyone to given preferential treatment to any individual or group.[53]

Wildcards, however, would not come into play. The first roll call on September 16, 1971, would be on the Erlenborn amendment (encompassing H.R. 9247) in the nature of a substitute for H.R. 1746. It passed, first on a recorded teller vote (200-195) and then immediately on a roll call (202-197).[54] As Table 3 illustrates, a near unanimous set of northern Democrats (voting nay) opposed large majorities of southern Democrats and Republicans (voting yea). Stated differently, a “conservative coalition” emerged to doom the cease-and-desist bill and replace it with the

---

[52] Graham, *The Civil Rights Era*, 433.
[53] “Equal Employment Opportunity: No Final Action.” In *CQ Almanac 1971*, 27th ed., 09-644-09-651 (Washington, DC: Congressional Quarterly, 1972).
[54] *Congressional Record*, 92nd Congress, 1st Session (September 16, 1971): 32111-12.

administration's preferred court-enforced provisions. Rep. John Ashbrook (R-MO) then moved to recommit H.R. 1746 to the Committee on Education and Labor (thus killing it). This motion failed, 130-270, this time with majorities of northern Democrats and Republicans (voting nay) opposing a majority of southern Democrats (voting yea).[55] Finally, the question was on the passage of the bill (H.R. 1746 – now containing the administration's court-enforced provisions), and it was adopted, 285-106, with large majorities of northern Democrats and Republicans (voting yea) opposed a large majority of southern Democrats (voting nay).[56]

[Table 3 about here]

The ball was now in the Senate court. The rest of 1971 saw the Senate Labor and Public Welfare Subcommittee on Labor hold hearings on October 4, 6, and 7 on (a) H.R. 1746; (b) S. 2515, which was identical to the broad cease-and-desist bill considered in the House and similar to the bill passed by the Senate in 1970; and (c) S. 2617, which was introduced by Sen. Peter Dominick (R-CO) on September 30 and contained the same provisions as the House-passed H.R. 1746. On October 28, Sen. Harrison Williams (D-NJ) on behalf of the committee reported out S. 2515 (favorably, on a 17-0 vote) and H.R. 1746 (without recommendation and without change).[57]

The year 1972 would break the logjam on equal employment opportunity enforcement. As Hugh Davis Graham argues:

> The second session of the 92nd Congress, when it convened in January 1972, shared a bipartisan consensus that the equal employment principles of 1964 were sound but the enforcement mechanism was not. [Moreover,] Congress was weary of seven years of debate over enforcement.[58]

---

[55] *Congressional Record*, 92nd Congress, 1st Session (September 16, 1971): 32112-13.
[56] *Congressional Record*, 92nd Congress, 1st Session (September 16, 1971): 32113.
[57] *Congressional Record*, 92nd Congress, 1st Session (October 28, 1971): 38030. The committee also rejected two proposals from Rep. Dominick, the main one seeking to substitute the court-enforcement approach for the cease-and-desist approach in S. 2515. It was rejected, 15-2. "Equal Employment Opportunity: No Final Action." In *CQ Almanac 1971*, 27th ed., 09-644-09-651 (Washington, DC: Congressional Quarterly, 1972).
[58] Graham, *The Civil Rights Era*, 439.

From January 16 to February 15, the Senate debated whether to adopt the cease-and-desist bill (S. 2515) or the court-enforced bill (H.R. 1746). The traditional party coalitions in the recent past had proved themselves to be fluid, as different bills – with different provisions – were voted on. Labor and Blacks could be split, as the Nixon Administration had shown to be true, but the conservative coalition could be split as well, as moderate Republicans defected. As Graham argues: "The trick for the Administration in 1972 was to enlist southern support to prevent passage of the cease-and-desist bill, and then to obtain liberal Democratic acquiescence in a court-enforced bill that would leave the contract compliance program intact in the Labor Department."[59]

On January 20, 1972, Sen. Dominick proposed an amendment to S. 2515 in the form of a substitute, which would swap the cease-and-desist enforcement approach in the bill for a court-enforcement approach (the preferred policy of the Nixon Administration).[60] Debate on the substitute, and the general benefits of a regulatory/commission approach for the EEOC versus a quasi-judicial approach, dominated through January 24, with opposition to the Dominick amendment led by Walter Mondale (D-MN), Jacob Javits (R-NY), and Hubert Humphrey (D-MN).[61] On January 24, the Senate voted on the Dominick amendment, and it failed 41-43.[62] As Table 4 illustrates, this proved to be a conservative coalition vote – a large majority of northern Democrats (voting nay) opposed a near unanimous majority of southern Democrats (voting yea) and a majority of Republicans (voting yea) – but enough Republicans opposed the amendment to result in its defeat. That same day, Sen. Javits offered an amendment to the Dominick substitute,

---

[59] Ibid.
[60] *Congressional Record*, 92nd Congress, 2nd Session (January 20, 1972): 591-92.
[61] "Equal Jobs: Approval of Court Enforcement Approach." In *CQ Almanac 1972*, 28th ed., 01-247-01-256 (Washington, DC: Congressional Quarterly, 1973).
[62] *Congressional Record*, 92nd Congress, 2nd Session (January 24, 1972): 945.

which would allow EEOC lawyers to try cases in both federal district and appeals courts. (The substitute limited EEOC legal action to district courts only.) The Javits amendment was adopted 40-37, with large majorities of northern Democrats (voting yea) opposing a large majority of southern Democrats (voting nay) and a small majority of Republicans (voting nay).[63] Again, this was a conservative coalition vote, but enough Republicans defected to throw the outcome to the liberal side.

[Table 4 about here]

These two votes were a defeat for the Nixon Administration. But their close margins buoyed the Administration belief that the Democratic leadership could be worn down. And as Graham notes: "thereafter, loyalist Republicans generally provided the margins to pass compromises acceptable to the Administration while rejecting the southern forces under Ervin and James B. Allen of Alabama."[64] First, though, was a conservative-coalition vote that was useful to the Administration – which was to amend S. 2515 by deleting language transferring the OFCC from the Department of Labor to the EEOC. It passed, 49-37, with a large majority of Republicans (voting yea) joining with a majority of southern Democrats (voting yea) to defeat a large majority of northern Democrats.[65] This vote split the labor-black coalition and made S. 2515 much less acceptable to the AFL-CIO. Two more attempts to replace the pro-cease-and-desist EEOC authority with court-enforced authority would go down to defeat and thus disappoint the Administration: (1) to reconsider the (amended) Dominick Amendment, which failed narrowly, 46-48, with a large majority of northern Democrats (voting nay) opposing a near unanimous majority of southern Democrats (voting yea) and a sizeable Republican majority

---

[63] *Congressional Record*, 92nd Congress, 2nd Session (January 24, 1972): 954.
[64] Graham, *The Civil Rights Era*, 440.
[65] *Congressional Record*, 92nd Congress, 2nd Session (January 26, 1972): 1384.

(voting yea); and (2) to table an amendment offered by Sen. Allen that would substitute the language from H.R. 1746 for that of S. 2515, which failed, 45-32, with all northern Democrats (voting yea) opposing all southern Democrats (voting nay) with Republicans evenly split.[66]

But the northern Democrats soon recognized they could not move forward with S. 2515. Sens. Allen and Ervin made clear that they would maintain a filibuster to prevent the legislation from advancing, and the pro-S. 2515 forces did not have a supermajority to overcome it. This became clear when Sen. Williams twice tried to shut off debate (invoke cloture), on February 1 and 3, but his motion failed each time (by nine and six votes, respectively).[67] Thus, Sens. Javits and Williams shifted course and sought a compromise. They began their compromise effort on February 8, by offering an amendment to S. 2515 that would have altered the Title VII coverage of organizations (employers and unions) from those with eight or more persons to 15 or more. This was a weakening amendment meant to take the steam out of a conservative amendment that Sen. Ervin was proposing. The Javits-Williams amendment was adopted, 56-26, with all northern Democrats (voting yea) and a large majority of Republicans (voting yea) opposing a large majority of southern Democrats (voting nay).[68]

The next day, Sens. Javits and Williams proposed a re-working of S. 2515 that would bring it closer to the Administration position.[69] Their amendment would move away from cease-and-desist authority and authorize the federal court, not the EEOC, to issue the enforcement order; the EEOC could still hold hearings on employment discrimination complaints and certify findings, but the remedy would be judicial (via a court order). Rep. Dominick was not convinced by the Javits-Williams move toward the Administration position and offered a modified version

---

[66] *Congressional Record*, 92nd Congress, 2nd Session (January 26, 1972): 1398; (January 27, 1972): 1524.
[67] *Congressional Record*, 92nd Congress, 2nd Session (February 1, 1972): 1972; (February 3, 1972): 2494.
[68] *Congressional Record*, 92nd Congress, 2nd Session (February 8, 1972): 3171.
[69] *Congressional Record*, 92nd Congress, 2nd Session (February 9, 1972): 3373-74.

of his earlier amendment (as an amendment to Javits-Williams). The Dominick amendment would definitively eliminate the cease-and-desist authority in S. 2515, by authorizing the EEOC general counsel to bring a civil action in federal court against the offending employer – which could be heard immediately by a three-judge court if it was an emergency (from which an appeal could go directly to the Supreme Court).[70] On February 15, Dominick produced a letter from David Norman, assistant attorney general for civil rights, declaring that his amendment would be "the better system" as compared to that proposed by Javits-Williams.[71] That same day, Sen. Allen declared his support for the Dominick Amendment – perhaps foreshadowing the next attempt to invoke cloture – and stated: "I feel that there would be an excellent change for this bill to become if this amendment is adopted."[72]

Shortly thereafter, the Senate voted on the Dominick Amendment (to the Javits-Williams Amendment). It was adopted, 45-39, a large majority of northern Democrats (voting nay) opposing a near unanimous majority of southern Democrats (voting yea) and a large majority of Republicans (voting yea).[73] The Javits-Williams Amendment to S. 2515 now comprising the Dominick Amendment language, then was adopted, 82-3.[74] S. 2515, now comprising language very much in keeping with Nixon Administration preferences, steamed forward. On February 22, a third attempt was made to shut off debate (invoke cloture) on S. 2515, and it was agreed to 73-21, with all northern Democrats (voting yea) and a large majority of Republicans (voting yea) opposing a large majority of southern Democrats.[75] Sen. Ervin was aghast at the outcome – an

[70] *Congressional Record*, 92nd Congress, 2nd Session (February 9, 1972): 3390.
[71] *Congressional Record*, 92nd Congress, 2nd Session (February 15, 1972): 3966.
[72] *Congressional Record*, 92nd Congress, 2nd Session (February 15, 1972): 3974.
[73] *Congressional Record*, 92nd Congress, 2nd Session (February 15, 1972): 3979. In comparing this roll call to the second Dominick Amendment that was defeated (the failed reconsideration vote, 46-48, on January 28), only one senator switched his vote: George Aiken (R-VT) changed from nay to yea.
[74] *Congressional Record*, 92nd Congress, 2nd Session (February 15, 1972): 3980.
[75] *Congressional Record*, 92nd Congress, 2nd Session (February 22, 1972): 4912.

enforcement bill with teeth on the precipice of adoption – and tried some last-ditch amendments to poison S. 2512, but all failed.[76]

Finally, S. 2512 – as amended – was voted on, and it passed 73-16, with all northern Democrats (voting yea) and a large majority of Republicans (voting yea) opposing a majority of southern Democrats.[77] The Senate then immediately took up the House bill – H.R. 1746 – and, after striking out the enacting clause and inserting the provisions of S. 2515, voted to pass it, 72-17.[78] Hugh Davis Graham lays out how the Senate drama played out:

> [T]he Nixon Administration used Ervin's intransigent bloc to hold off the case-and-desist bill … while successfully fending off Ervin's threats to the Philadelphia Plan. This tactic ultimately forced the congressional leadership to settle for a court-enforced bill that the left the liberal coalition disappointed by nevertheless "moderately pleased" with the final results.[79]

Both bills were then sent to the House. On February 23, the House disagreed to the Senate amendment to H.R. 1746 and asked for a conference; the Senate agreed that same day.[80] Conferees from both chambers filed their report – H. Rept. 899 and S. Rept. 681 – on March 2.

---

[76] These amendments included removing from coverage of S 2515 employment of teachers and other members of the faculties of public schools (defeated on a voice vote); expanding the prohibition against requiring preferential treatment of any minority group to include executive orders requiring affirmative action by federal contractors in employing minority group members, and expand the ban included in any other law or executive order (defeated 30-60 on a roll call); removing from coverage of S 2515 all employment practices of all educational institutions (defeated 15-70 on a roll call); and providing that, on demand of any party, issues of fact in any civil action brought under Title VII of the 1964 Civil Rights Act or under S 2515 shall be resolved by a jury trial (defeated 30-56 on a roll call). *Congressional Record*, 92nd Congress, 2nd Session (February 22, 1972): 4917-20.

[77] *Congressional Record*, 92nd Congress, 2nd Session (February 22, 1972): 4944.

[78] *Congressional Record*, 92nd Congress, 2nd Session (February 22, 1972): 4948. The only difference between the voting here and on the previous roll call (To pass S. 2512) was that Sen. James Buckley (C-NY) switched positions (from a yea to a nay).

[79] Somewhat early in the proceedings on S. 2512 – on January 28 – Ervin proposed an amendment prohibiting an employer to practice discrimination in reverse by employing persons of a particular race, religion, or national origins in either fixed or variable numbers, proportions, or percentages (i.e., to meet a quota). He stated that the OFCC had ignored similar language contained in the 1964 Civil Rights Act and argued that their Philadelphia Plan programs – which required that a federal construction contractor employ a certain percentage of minority-group employees – were inconsistent with the prescription that there should be no discrimination on the basis of race or national origin. His amendment failed, 22-44, with large majorities of both northern Democrats and Republicans (voting nay) opposing all southern Democrats (voting yea). *Congressional Record*, 92nd Congress, 2nd Session (January 28, 1972): 1676.

[80] *Congressional Record*, 92nd Congress, 2nd Session (February 23, 1972): 5187, 5184.

The House conferees essentially agreed to accept the Senate provisions, with a few exceptions.[81] On March 6, the Senate voted to agree to the conference report, 62-10, with all northern Democrats (voting yea) and a large majority of Republicans (voting yea) opposing a bare majority of southern Democrats (voting nay).[82] See Table 5. Two days later, on March 8, the House voted to agree to the conference report, 303-110, with nearly all northern Democrats (voting yea) and a large majority of Republicans (voting yea) opposing a large majority of southern Democrats.[83] And, finally, the Equal Employment Opportunity Act of 1972 was signed into law by President Nixon on March 24, 1972.[84]

[Table 5 about here]

In the end, the Nixon Administration got everything it wanted in the new law. Their court-enforced approach won out over the liberals' preferred cease-and-desist approach and the OFCC remained in the Department of Labor. The new law would apply to organizations with 25 or more workers – instead of the liberals' preferred organizations with 8 or more workers – employees in state and local government, and employees of educational institutions. Finally, the president – rather than the EEOC chairman – would appoint the EEOC's general counsel, and the Attorney General would control EEOC appeals to the Supreme Court (but not the circuit courts of appeal).

III. Restoring Rights that Had Been Erased: The Civil Rights Acts of 1990 and 1991

---

[81] "Equal Jobs: Approval of Court Enforcement Approach." In *CQ Almanac 1972*, 28th ed., 01-247-01-256 (Washington, DC: Congressional Quarterly, 1973). One such Senate concession was Dominick's three-judge panel was dropped in exchange for language that cases be expedited and heard at the earliest practicable date.

[82] *Congressional Record*, 92nd Congress, 2nd Session (March 6, 1972): 7170. Many southern Democrats chose not to vote.

[83] *Congressional Record*, 92nd Congress, 2nd Session (March 8, 1972), 7572-73.

[84] *Public Law* 92-261. 82 *Stat*. 103-13.

While the relative strength of the implementation mechanisms developing out of the 1964 CRA differed between housing and busing versus employment discrimination, Court action influenced all three. The CRA was clear about the goals it intended to achieve for bringing about a more equitable society. It aimed to legally prohibit segregation and many other kinds of social inequality. Yet it provided few clear rules for how to enforce its provisions or how to judge when its goals had been achieved. Title IV of the bill outlaws school segregation, but it does not specify what successful integration means or how it was to be pursued. Title VII bans employment discrimination, but it does not fully consider how particular modes of discrimination are to be identified and overcome. The Courts and the administrative state became policymakers and policy implementers, and what liberal judges and liberal bureaucrats can give – expansive rulings, legislation to encourage lawsuits, financial aid to plaintiffs – conservative judges and bureaucrats can take away. By the late-1980s, this is precisely what began to happen.

In our other work, we treat the counter-mobilization against school busing as a signal that the "Second Civil Rights Era" was over.[85] Ronald Reagan's two landslide victories helped assure its end. Stacked with conservative legal thinkers who opposed much of what the Court handed down through the 1970s, the Reagan administration moved to reverse some of these decisions. On employment discrimination specifically, they took the view that "only the 'actual identification' of 'intentional' employment discrimination" was a violation of Title VII.[86] Reagan's appointments to the Supreme Court – O'Connor, Rehnquist, Scalia, and Kennedy – were pivotal in turning this position into constitutional law. In so doing, they transformed the

---

[85] Jenkins and Peck, "The Collapse of the Civil Rights Coalition."
[86] Sondra Hemeryck, Cassandra Butts, Laura Jehl, Adrienne Koch, and Matthew Sloan, "Reconstruction, Deconstruction and Legislative Response: The 1988 Supreme Court Term and the Civil Rights Act of 1990," *Harvard Civil Rights-Civil Liberties Law Review* 25 (Summer 1990): 475-590; 503.

Court from a bastion of legal liberalism into a reliable ally of far more restrictive interpretations of the CRA. In 1988, in a series of very close rulings, the now-conservative Court "significantly contracted the ability of minorities and women to secure their rights," by "narrowly interpret[ing]" civil rights statutes and revising prior judgments related to employment law.[87]

The Reagan Court's narrow revision of Title VII emerged in five different rulings which, taken as a group, undermined nearly twenty years of prevailing understanding of Title VII. In *Wards Cove Packing Co. v. Antonio* (1989), the Court challenged "disparate impact" violations of Title VII by "holding that the plaintiff must show that an employment practice which disproportionately burdens protected groups does not have a legitimate business purpose, rather than requiring the employer to show that such a purpose exists."[88] In so doing, justices imposed an onerous burden on anybody who might seek to pursue a Title VII claim. In *Independent Federation of Flight Attendants v. Zipes* (1989), the Court further burdened plaintiffs by imposing new limits on their "ability to recover attorneys fees."[89] As we described above, it was this provision of the 1964 CRA that tallowed its weak enforcement regime to have an unexpectedly large impact.

In *Lorance v. AT&T Technologies, Inc.* (1989), the Court "barred a Title VII challenge brought by three female plaintiffs to a seniority system which was neutral on its face but which had been adopted with an intent to discriminate."[90] This was an effort to shrink the circumstances under which a plaintiff could prove disparate impact. In *Martin v. Wilks* (1989), the Court held that a group of white firefighters were allowed to challenge an "'affirmative action" plan which had been implemented pursuant to a consent decree resolving a previous suit brought by black

[87] Hemeryck, Buss, Jehl, Koch, and Slaon, "Reconstruction, Deconstruction, and Legislative Response," 504.
[88] Hemeryck, Buss, Jehl, Koch, and Slaon, "Reconstruction, Deconstruction, and Legislative Response," 507
[89] Hemeryck, Buss, Jehl, Koch, and Slaon, "Reconstruction, Deconstruction, and Legislative Response," 507
[90] Hemeryck, Buss, Jehl, Koch, and Slaon, "Reconstruction, Deconstruction, and Legislative Response," 505-506

firefighters" under Title VII.[91] Finally, in *Patterson v. McLean Credit Union* (1989), the Court held that Section 1981 of "an 1866 statute barring intentional race discrimination in contracts … does not prohibit racial harassment on the job and other forms of discrimination in the application of contracts."[92] Intentional discrimination and harassment on the job, after the contract was signed, did not count as discrimination any longer.

These decisions are relevant to our discussion of the Civil Rights Act of 1990 because the bill was written in reaction to them. As we describe below, advocates for a new civil rights bill were not seeking to advance a positive civil rights agenda. What they were proposing were not *new* rights or *additional* protections. Instead, they were seeking to restore rights that had been erased by the Supreme Court. The Second Civil Rights era, by the 1990s, was in decline.

101st Congress (1990-1991): The Civil Rights Act of 1990

Senator Ted Kennedy (D-MA) introduced the first version of the Civil Rights Act of 1990 on February 7.[93] In opening remarks describing the bill (S. 2104), Kennedy made clear that Congress was motivated to act by Court decisions. "In the past year … the Supreme Court has issued a series of rulings that mark an abrupt and unfortunate departure from its historic vigilance in protecting civil rights," he explained. "The Civil Rights Act of 1990 is intended to overturn these Court decisions and restore and strengthen these basic laws."[94] While Kennedy was the bill's main sponsor in the Senate, a bi-partisan group of lawmakers participated in its development. Republican supporters, like Senator Jim Jeffords (R-VT) also pointed out that S. 2014 was a "direct result" of the Court decisions. The cases we summarized above represented,

---

[91] Hemeryck, Buss, Jehl, Koch, and Slaon, "Reconstruction, Deconstruction, and Legislative Response," 506.
[92] *Congressional Record,* 101st Congress, 2nd Session (February 7, 1990): 1655.
[93] On February 7, 1990, Representative Augustus Hawkins (D-CA) introduced an identical bill in the House of Representatives (HR4000).
[94] *Congressional Record,* 101st Congress, 2nd Session (February 7, 1990): 1653

Jeffords claimed, a concerted effort to "roll back the hard fought gains in employment equality for minorities and women won over the past 25 years."[95]

The Senate's Labor and Human Resources Committee was charged with holding hearings on and marking up S. 2104. This process occurred between February and March. In April 1990, the Committee voted 11-5 to send the bill to the floor.[96] The committee vote reflected the dynamic that would ultimately doom this version of the Civil Rights Act: there existed a bipartisan majority supportive of Kennedy's proposal, but not one that was big enough to override a veto.

The draft version that would now be the subject of floor debate as long and legally complicated, but its main provisions addressed those subjects at the heart of the Supreme Court cases we summarize above. The legislation aimed to "restore the *Griggs* rule" by making clear that disparate impact could be demonstrated statistically through a comparison of the "composition of the qualified persons in the labor market and the persons holding at-issue jobs." Too great a disparity between qualified applicants from protected groups and actual employed workers would then the "the proper basis for the initial inquiry in a disparate impact case."[97] Once disparate impact was demonstrated, the bill required the employer, not the person making the complaint, to prove that the hiring practice in question was "required by business necessity."[98] According to the bill, "business necessity" meant "essential to effective job performance."[99] In sum, then, S. 2014 made clear that "practices – such as strength standards, tests, education requirements, leave or other personnel policies, or other subjective or objective

---

[95] *Congressional Record,* 101st Congress, 2nd Session (February 7, 1990): 1656.
[96] No votes came from Senators Hatch (R-UT), Kassebaum (R-KS), Coats (R-IN), Thurmond (R-SC), and Cochran (R-MS).
[97] "The Civil Rights Act of 1990," 101st Congress, 2nd Session, Senate Report No. 101-315, 18.
[98] "The Civil Rights Act of 1990," 39.
[99] Senate Report, 41.

evaluation procedures – that have a disparate impact on racial minorities or women may be invalidated where they are not demonstrated to be essential to job performance."[100] These provisions aimed at reversing the Court's ruling in the *Wards Cove* case.

In order to reverse the Court's ruling in *Martin v. Wilks*, S. 2104 set new rules to determine when an employment practice implemented in response to a federal consent decree could be challenged on "constitutional or federal civil rights law grounds."[101] Stated differently, this part of the legislation laid out a narrow set of circumstances under which white citizens might invoke "diverse discrimination" as cause for challenging affirmative action policies. It also addressed the issue of lawyers' fees by making clear that courts may continue to "award prevailing parties reasonable expert fees and other litigation expenses."[102] Lastly, S. 2104 worked to overturn the decision in the *Patterson* case by stipulating that "the right to make and enforce contracts' free from race discrimination … includes the 'making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship."[103] In short, Section 1981 protected people on the job from intentional discrimination and harassment.

For opponents of S. 2104, disparate impact, "business necessity," and the fees repaid to attorneys became the main targets of attack. Three of the committee's five "no" votes – Senators Hatch (R-UT), Thurmond (R-SC), and Coats (R-IN) – telegraphed the grounds on which those who opposed the law would stake their claim in a minority report published as the bill left committee. According to these senators, the disparate impact and business necessity provisions of the law, should it be enacted, would "seriously erode" employment standards. This outcome

---

[100] "The Civil Rights Act of 1990," 46.
[101] "The Civil Rights Act of 1990," 49.
[102] "The Civil Rights Act of 1990," 58
[103] "The Civil Rights Act of 1990," 58.

followed, they claimed, because the bill would compel employers to "resort to quota hiring and promotion in order to avoid future liability under the revised theory of discrimination" set out in S. 2104. They also described S. 2104 as a "bonanza for lawyers" because it would turn Title VII "into a statute where protracted and costly litigation will be the tool of first resort."[104] This was, they claimed, a quota bill and a windfall for trial lawyers. These claims would be repeated multiple times over the next year.

The Senate took no further action on the bill between March and July because, according to Kennedy, he and others wanted time to negotiate with the White House.[105] President George H.W. Bush had made clear his willingness to embrace a more limited measure – one that reversed only the *Patterson* and *Lorance* decisions – but he had also made clear his intent to veto S. 2104 should it pass both in both the Senate and the House.[106] By July, Kennedy's patience ran out. He accused the Bush Administration of "pulling back from [a] tentative agreement" and then introduced a revised bill with substantive changes made to those parts of the proposal dealing with disparate impact and business necessity. Working with Republican John Danforth (MO), Kennedy's revised language changed "the definition of business necessity from 'essential' to job performance to 'bears a substantial and demonstrable relationship to effective job performance."[107] The new bill also obligated plaintiffs to be much more specific about the particular employment practices which they believed were causing disparate impact. According to Kennedy, "these changes should put to rest the spurious charge that this bill requires quotas."[108]

---

[104] "The Civil Rights Act of 1990," 64-65.
[105] *Congressional Record,* 101st Congress, 2nd Session (July 10, 1990): 16706.
[106] "Bush Vetoes Job bias Bill; Override Fails," in *CQ Almanac 1990,* 46th ed., 462-473 (Washington, D.C.: Congressional Quarterly, 1991).
[107] *Congressional Record,* 101st Congress, 2nd Session (July 10, 1990): 16707.
[108] *Congressional Record,* 101st Congress, 2nd Session (July 10, 1990): 16707.

The “Kennedy-Danforth” amendment did not mollify Senate critics. Senator Hatch continued to deride the bill for “using the guise of civil rights” to “force employers to go to proportional hiring. That is interpreted as quotas,” he claimed.[109] Hatch also continued to repeat the claim that “the most obvious benefactors of S. 2104 are trial lawyers … this new substitute is a litigation bonanza for lawyers.”[110] Senator Strom Thurmond, of Dixiecrat fame, echoed Hatch. “The Kennedy bill now before us would create a violation based on statistics and encourage plaintiff attorneys to file discrimination suits whenever they can show a mere statistical imbalance in the workforce,” he argued.[111]

These bombastic claims about the bill preceded a more substantive discussion focusing on whether S. 2104 would also apply to those working in the Congress. More specifically, Senator Wendell Ford (D-KY) proposed an amendment stating clearly that “the rights and remedies” of the proposed legislation would also apply to Senate employees. The Senate adopted Ford’s amendment by voice vote.[112] Soon thereafter, Senator Charles Grassley (R-IA) tried to supplement Ford’s amendment with language allowing employees of the Senate who believed themselves to be victims of discrimination to press their claims in federal court.[113] Ford’s amendment had not included an explicit guarantee of this remedy. Grassley’s amendment was depicted by supporters of the bill as “political demagoguery,” a blatant effort to attach language that would make the underlying bill unpassable.[114] The Senate voted, 63-26, to table it. As Table 6 makes clear, support for Grassley’s proposal came primarily from Republicans who opposed the underlying bill.

---

[109] *Congressional Record,* 101st Congress, 2nd Session (July 10, 1990): 16713.
[110] *Congressional Record,* 101st Congress, 2nd Session (July 10, 1990): 16715.
[111] *Congressional Record,* 101st Congress, 2nd Session (July 10, 1990): 16724-16725.
[112] *Congressional Record,* 101st Congress, 2nd Session (July 10, 1990): 16753-16754.
[113] *Congressional Record,* 101st Congress, 2nd Session (July 10, 1990): 16756.
[114] *Congressional Record,* 101st Congress, 2nd Session (July 10, 1990): 16757.

[Table 6 about here]

One week later, on July 17, Kennedy filed a cloture motion to end debate on S. 2104. It passed with 62-38 majority and won support from 8 out of 45 voting Republicans.[115] Only one Democrat, James Exon (NE), voted to prevent S. 2104 from moving to the final vote stage. Despite this ostensible momentum and support from more than 60 senators, the bill's supporters were not optimistic that it would pass. "This bill is not going to become law unless the president agrees with it," Danforth warned, because it did not have support from a veto-proof majority.[116] Senator Hatch agreed and offered an amendment which he, as an opponent of the bill, claimed make it more palatable to opponents. The Hatch amendment aimed, in his words, to prevent S. 2104 from "disproportionately stripping white males of a right to their day in court."[117] It would do so by broadening the circumstances under which white male workers who believed themselves to be victims of "reverse discrimination" by mandate of federal consent decrees to challenge them in court. This was a direct attack on federally imposed affirmative action programs. Kennedy responded by, in turn, amending the Hatch amendment to allow such challenges so long as they came within a particular window of time. The Kennedy amendment passed, 60-40. As Table 6 makes clear, only 4 Democrats opposed the revised language.[118]

Immediately after these votes, Republican Leader Bob Dole (R-KS) took the floor to condemn the Democrats for trying to "put everybody on this side on the wrong side of a civil rights issue."[119] He portrayed Democrats as grandstanding and claimed that President Bush and his Republican allies in the Senate were simply opposing a "bad" civil rights bill. Then he

---

[115] *Congressional Record,* 101st Congress, 2nd Session (July 17, 1990): 17670. The Republican senators voting in support were: Cohen (ME), Danforth (MO), Durenberger (MN), Hatfield (OR), Heinz (PA), Jeffords (VT), Packwood (OR), and Specter (PA).
[116] *Congressional Record,* 101st Congress, 2nd Session (July 17, 1990): 17671.
[117] *Congressional Record,* 101st Congress, 2nd Session (July 17, 1990): 17681.
[118] No votes came from Senators Boren (D-OK), Bryan (D-NV), DeConcini (D-AZ), and Exon (D-NE).
[119] *Congressional Record,* 101st Congress, 2nd Session (July 17, 1990): 17685.

introduced a substitute measure, crafted by Senator Nancy Kessebaum (R-KS). It addressed the disparate impact/business necessity issue by stipulating that an employment practice alleged to have a disparate impact was allowed if that practice "has a manifest relationship to the employment in question or that the respondent's legitimate employment goals are significantly served by – even if they do not require – the challenged practice or group of practices."[120] The Kessebaum substitute also aimed to challenge the recent Supreme Court decisions "without encouraging litigation." "I have felt strongly," she explained, "that we not expand recovery of attorneys fees."[121] Accordingly, it barred Title VII cases from receiving jury trials and capped monetary damages for women alleging sexual harassment under Section 1981 at $100,000.

Kennedy responded by once again trying to mollify those who opposed "quotas" and "bonanzas for lawyers." To do so, he changed the language of the underlying bill to adopt a more restrictive definition of "business necessity:" "significantly related to successful performance on the job," is what he offered now. To mollify those who condemned the bill for allowing quotas, Kennedy pointed out that the revised version included "clear language for no quotas." In disparate impact cases, the bill made clear that successful lawsuits could only lead to "equitable relief" rather than allowing victorious plaintiffs to seek "compensatory and punitive damages." Lastly, Kennedy conceded to Kessebaum by explaining that the revised bill would include a cap of $150,000 on punitive damages in cases where discriminatory *intent* was proven.[122] Yet even having made these concessions, Kennedy argued that the Democratic Party could not support the changes proposed by Bush's supporters in the Senate because they would not "restore the full force of the anti-discrimination law" overturned by the Supreme Court in *Wards Cove*.[123] The

---

[120] *Congressional Record,* 101st Congress, 2nd Session (July 17, 1990): 17688.
[121] *Congressional Record,* 101st Congress, 2nd Session (July 17, 1990): 17688.
[122] *Congressional Record,* 101st Congress, 2nd Session (July 18, 1990): 18028-18029.
[123] *Congressional Record,* 101st Congress, 2nd Session (July 18, 1990): 18029.

Senate voted, 65-34, to accept Kennedy's revised bill and then 65-34 again to pass the underlying measure (See Table 6).[124]

Up to this point, all floor consideration of the 1990 CRA occurred in the Senate. In the House, the Education and Labor Committee and the Judiciary Committee had marked up the version of S. 2104 introduced by Representative Augustus Hawkins (R-DA), but had not moved any further along. The House began floor consideration of the bill in August, after the Senate had already moved. Referred to now as the "Kennedy-Hawkins" bill, House debate echoed many of the same themes and complaints that emerged in the Senate. Supporters claimed that new legislation was needed to re-establish the pre-1989 legal status quo, while opponents condemned the bill for mandating quotas and serving as a giveaway to lawyers.

To address these complaints, House members voted on an amended version of the bill stipulating that "the mere existence of a statistical imbalance in an employers workforce on account of race, color, religion, sex, or national origin is not alone sufficient to establish a *prima facie* case of disparate impact." Offered by Representatives Michael Andrews (D-TX) and Stephen Neal (D-NC), the amended bill was aimed at conservative opponents, to make clear that "this bill is not about quotas."[125] The Andrews-Neal amendment was approved by a vote of 397-24.[126] Next, the House considered an amendment offered by Representative Jack Brooks (D-TX) limiting the amount of punitive damages available to those who proved intentional discrimination to $150,000.[127] Brooks' amendment passed, 289-134.[128] Here again supporters conceded to their conservative opponents (See Table 7).

---

[124] *Congressional Record,* 101st Congress, 2nd Session (July 18, 1990): 18039; 18051.
[125] *Congressional Record,* 101st Congress, 2nd Session (August 2, 1990): 22017.
[126] *Congressional Record,* 101st Congress, 2nd Session (August 2, 1990): 22020.
[127] *Congressional Record,* 101st Congress, 2nd Session (August 2, 1990): 22021.
[128] *Congressional Record,* 101st Congress, 2nd Session (August 2, 1990): 22024.

[Table 7 about here]

As House members worked feverishly to make the bill more amenable to Republican holdouts, Representative John LaFalce (D-NY) offered a substitute proposal which, he claimed, was more likely than the amended bill to win Bush's support. The LaFalce substitute adopted a more stringent definition of business necessity than the one written into the underlying bill, thereby making it harder to demonstrate disparate impact. It also imposed a tighter cap on the amount of money a successful plaintiff could be awarded in a successful Title VII case.[129] Separate from these substantive changes, LaFalce made the case that passing his substitute proposal offered supporters a strategic advantage. If the House passed his bill, he claimed, House and Senate conferees would have enough material to craft a compromise that Bush might not veto. "If we vote yes on the substitute," he argued, "we go to conference with the Senate with dozens of differences between the House bill and the Senate bill. And we can work … to come out on a non-partisan or bipartisan fashion with a bill that the president could sign."[130] Democrats were not persuaded, and the LaFalce substitute failed, 188-238.[131] The House then voted, 272-154, to pass its version of the Kennedy-Hawkins bill.[132] Only 30 "yea" votes from Republicans combined with 12 Democratic Party defections prevented the House from reaching the two-thirds majority that would be required to override a veto (See Table 7).

[Table 7 about here]

The House and Senate versions of the 1990 CRA were very similar, but a conference was still needed to iron out the small points of disagreement and to perhaps revise features of the law so that President Bush would not veto it. Conferees began deliberating in mid-September and

[129] *Congressional Record,* 101st Congress, 2nd Session (August 3, 1990): 22163.
[130] *Congressional Record,* 101st Congress, 2nd Session (August 3, 1990): 22163
[131] *Congressional Record,* 101st Congress, 2nd Session (August 3, 1990): 22173.
[132] *Congressional Record,* 101st Congress, 2nd Session (August 3, 1990): 22173.

they released a new draft on September 26, 1990. This new version specified that "an employment practice or group of employment practices demonstrated to be required by business necessity shall be unlawful where a complaining party demonstrates that a different employment practice … with less disparate impact would serve the respondent as well."[133] On the subject of disparate impact specifically, the conference report also stipulates that the "mere existence of a statistical imbalance in an employers workforce on account of race, color, religion, sex, or national origin is not alone sufficient to establish a prima facie case of disparate impact."[134] To establish grounds for an investigation into discrimination of this kind, plaintiffs must show a statistical imbalance between the "qualified labor pool and the protected group," as well as additional evidence that a specific employment practice is having a discriminatory impact.[135] These changes were made to reassure those who were skeptical of the bill that it would not "require an employer to adopt hiring or promotion quotas."[136]

The conference bill also capped punitive damages at $150,000 for "respondents employing fewer than 100 employees."[137] The cap on damages was included in order to address the concerns of those who believed the law would impose undue financial burdens on small business owners. The revised version also specifies "that where appropriate … the use of alternate means of dispute resolution … is encouraged to resolve disputes."[138] Combined with the cap on damages, this feature of the bill was a response to those who portrayed it as simply a financial windfall for trial lawyers.

---

[133] "The Civil Rights Act of 1990: Conference Report," 101st Congress, 2nd Session, House Report No. 101-755, 13.
[134] "The Civil Rights Act of 1990: Conference Report," 14.
[135] "The Civil Rights Act of 1990: Conference Report," 15.
[136] "The Civil Rights Act of 1990: Conference Report," 8.
[137] "The Civil Rights Act of 1990: Conference Report," 16.
[138] "The Civil Rights Act of 1990: Conference Report," 20.

These concessions to members who were skeptical of the underlying proposal proved inadequate. When the House began debate on the conference proposal, opponents of the measure continued to describe it as a "quota bill." "Despite what proponents of the conference report claim," charged Representative Jim Sensenbrenner (R-WI), "this is a quota bill. It is a very subtle bill, and even though it says expressly that it is not a quota bill, the only way an employer can defend against the crushing cost of litigation … is to hire by the numbers."[139] The persistence of this critique led Minority Leader Robert Michel (R-IL) to request that the House conferees "be instructed to report back a bill which includes language making it clear that businessmen/women would not have to adopt artificial hiring and promotion quotas … language reducing the need for further burdening the judicial system as well as language which lessens the prospect for huge damage awards."[140] The House adopted Michel's motion to recommit the bill to conference, 374-45 (See Table 9).[141]

On the following day, Senator Arlen Specter (R-PA) announced that conferees had accepted the House's instructions and made yet more revisions. On recommendations from Senator Hatch (R-UT), who was acting as President Bush's proxy in the negotiations, new language lowered the burden of proof on employers who wanted to defend potentially discriminatory practices as simply a "business necessity." Hatch also persuaded the conference committee to include a provision granting white citizens who believed themselves to have been harmed by "reverse discrimination" to challenge affirmative action programs in Court. Lastly, even in cases where intentional discrimination was proven in court, the revised bill prohibited a plaintiff from winning punitive damages in cases of "mixed motives." In other words, when the

---

[139] *Congressional Record,* 101st Congress, 2nd Session (October 11, 1990): 28614.
[140] *Congressional Record,* 101st Congress, 2nd Session (October 11, 1990): 28619.
[141] *Congressional Record,* 101st Congress, 2nd Session (October 11, 1990): 28619

choice not to employ a member of a protected group was attributable to discriminatory intent and to more legitimate reasons.[142] According to Specter, "Senator Hatch said that he found the amendments acceptable … and that he would recommend the proposal to the president."[143] In light of this development, Senator Kennedy expressed his view that "we have a good chance in Congress to override Bush's veto," should he not follow Hatch's recommendation.[144]

On October 16 the Senate moved forward despite Bush renewing his veto threat. Prior to a final vote on the conference proposal, Hatch announced to the Senate that the "President has taken a principled stand that this bill has so much wrong with it," that he had no other option but to veto.[145] Hatch also praised Kennedy and the other conferees for being willing to adopt changes which, in his view, "definitely improved the bill." Ultimately, however, Hatch told the Senate "I fall on the side of the President."[146] After Hatch took the time to rationalize his opposition, a parade of senators took the floor to rehearse all of the now-standard arguments for and against the bill. Then Minority Leader Bob Dole (R-KS) moved to recommit the bill to conference with instructions to replace it with the proposal drafted by Senator Kessebaum. The Senate rejected Dole's last-ditch effort to undermine the bill by a vote of 35-61 (See Table 8). Not a single Democrat voted with Dole.[147] Finally, nearly a year after first introducing S. 2104, the Senate approved the compromise bill, 62-34. They were 5 votes short of the two-thirds needed to overturn a veto (See Table 8).[148] The House followed suit, voting 273-154 to send the bill on to President Bush (See Table 9), well short of the number of votes required to overturn a veto.[149]

---

[142] *Congressional Record,* 101st Congress, 2nd Session (October 12, 1990): 28804.
[143] *Congressional Record,* 101st Congress, 2nd Session (October 12, 1990): 28804.
[144] *Congressional Record,* 101st Congress, 2nd Session (October 12, 1990): 28880.
[145] *Congressional Record,* 101st Congress, 2nd Session (October 16, 1990): 29524.
[146] *Congressional Record,* 101st Congress, 2nd Session (October 16, 1990): 29524-29525.
[147] *Congressional Record,* 101st Congress, 2nd Session (October 16, 1990): 29558.
[148] *Congressional Record,* 101st Congress, 2nd Session (October 16, 1990): 29606.
[149] *Congressional Record,* 101st Congress, 2nd Session (October 17, 1990): 30136.

[Tables 8 and 9 about here]

When presented with the passed version of S. 2104, President Bush made good on his veto threat. In the message he delivered to the Senate on October 22, Bush explained that S.2014 "employers a maze of highly legalistic language to introduce the destructive force of quotas into our nation's employment system."[150] He also argued that the disparate impact and business necessity language incorporated into the law would "lead to years – perhaps decades – of … expensive litigation." Combined with "attorneys fee provisions that will discourage settlements," S. 2104 also incentivized adversarial legal battles. In order to be seen as not simply an opponent of a new civil rights law, Bush also requested that the Senate pass an administration sponsored bill that he had "transmitted to the Senate on October 20," only four days earlier.[151]

Before calling a vote to override Bush's veto, Senator Kennedy took the floor to attack the administration's substitute bill. "[Bush's] proposal would fail to overturn key aspects of the *Wards Cove* decision," Kennedy argued. It would also "permit employers to apply a lesser legal standard [to determine disparate impact] than the *Griggs* rule." On the subject of compensatory damages for demonstrated Title VII violations, Bush's bill would "give courts vast discretion to deny any meaningful remedy to victims of even the most offensive types of discrimination on the job." Lastly, the administration proposal would "permit repetitious challenges to consent decrees," which had imposed hiring guidelines on those who had a history of employment discrimination.[152] Despite Kennedy's best efforts, and despite arguments made by Republican supporters of the bill, the veto override fell one vote short, 66-34 (See Table 8).[153] Bush had

[150] *Congressional Record,* 101st Congress, 2nd Session (October 22, 1990): 31828.
[151] *Congressional Record,* 101st Congress, 2nd Session (October 24, 1990): 31828.
[152] *Congressional Record,* 101st Congress, 2nd Session (October 24, 1990): 33380.
[153] *Congressional Record,* 101st Congress, 2nd Session (October 24, 1990): 33406.

successfully killed the 1990 Civil Rights Act, "the first defeat of major civil rights bill a quarter-century."[154]

<u>102nd Congress (1990-1991): The Civil Rights Act of 1991</u>

When the Senate upheld President Bush's veto of S.2014, it ended all hope of any new civil rights legislation passing during the 101st Congress. As soon as the 102nd Congress convened, however, Democrats in the House introduced a new bill (H.R. 1) which, according to legal scholars, represented movement away from the compromise measure that had failed only months before.[155] Regardless, the House Education and Labor and Judiciary Committees held hearings on the bill and reported out a measure that set a standard for proving "business necessity" that was broader than what the Bush administration proved it was willing to accept. According to H.R. 1, an employment practice having disparate impact was only defensible if it was "necessary to the conduct of business" because it had a "significant relationship" to an employee's "ability to succeed at the job." H.R. 1 also allowed plaintiffs broad latitude to recover attorney fees, made it more difficult for white citizens to challenge consent decrees, and broadened Section 1981 so that those discriminated against on the job would not be dissuaded from suing.[156]

Recognizing that H.R. 1 might win fewer House votes than the 1990 compromise bill – which did not win the two-thirds majority needed to override a veto – Democrats in the House also prepared a compromise measure which more closely resembled S. 2014. In early June, the House began taking votes on civil rights bills that ranged from being more aggressive than H.R.

---

[154] "Compromise Civil Rights Bill Passed," in *CQ Almanac 1991,* 47th ed., 251-261 (Washington, D.C.: Congressional Quarterly, 1991)

[155] J.R. Franke, "The Civil Rights Act of 1991: Remedial Civil Rights Policies Prevail," *Southern Illinois University Law Journal* 17 (Winter 1993):2667-298; 276.

[156] The bill is summarized in "Compromise Civil Rights Bill Passed."

1 to being a copy of the bill Bush had introduced in the previous Congress. More specifically, the House was now considering:

1. the version of H.R. 1 that had moved through Committee;
2. the "Brooks-Fish Substitute," written by Representatives Hamilton Fish (R-NY) and Jack Brooks (D-TX), which hewed closer to the failed version of S. 2140;
3. the "Towns-Schroeder Substitute," written by Representatives Edolphus Towns (D-NY) and Pat Schroeder (D-CO), which was a more "liberal" version of H.R. 1;
4. the "Michel Substitute," introduced by Minority Leader Robert Michel (R-IL) on behalf of George H.W. Bush.

Very few believed that any one of these proposals could win the veto-proof majority President Bush had made clear would be necessary if any new civil rights bill was to become law.

The first votes were cast for and against the "Towns-Schroeder Substitute." It failed, 152-277.[157] As Table 10 makes clear, 118 Democrats refused to support a bill that tried to provide more civil rights protections than H.R. 1. Next came a vote on the "Michel Substitute," which also failed 162-266.[158] There was not even close to a majority in the House willing to support the Bush Administration's substitute (See Table 10). Each of these failures was explainable, according to Representative William Goodling (D-PA), by the fact that members could not agree on how the bills dealt with "quotas and damages."[159] The "Brooks-Fish Substitute" was the last real House-sponsored to try and bridge this divide. Brooks-Fish adopted language on business necessity and disparate impact that came close to what had been proposed by S. 2104. It also included an identical $150,000 cap on damages. Because a near identical version of this bill had already passed the House, members who were now desperate for something to come from their months of work voted 264-166 to substitute it for the original version of H.R. 1.[160] Then

[157] *Congressional Record,* 102nd Congress, 1st Session (June 4, 1991): 13253.
[158] *Congressional Record,* 102nd Congress, 1st Session (June 4, 1991): 13265.
[159] *Congressional Record,* 102nd Congress, 1st Session (June 5, 1991): 13524.
[160] *Congressional Record,* 102nd Congress, 1st Session (June 5, 1991): 13553.

members voted 273-158 to pass the overall bill (See Table 10).[161] With a majority of this size, the House was fifteen votes shy of the number needed to overturn a veto.

[Table 10 about here]

Senators were watching as the House failed to muster a two-thirds majority for any compromise bill, yet the upper chamber had yet to begin debate on any new bill. According to a law review article written by aides to a group of "seven moderate Republicans" who wanted a new bill, however, this group was just waiting for a moment when they might "break the civil rights gridlock."[162] On June 4, one day before the House voted to pass the Brooks-Fish Substitute, Senator John Danforth (R-MO) introduced three bills – S. 1207, S. 1208, and S. 1209 – addressing the most controversial aspects of the debate separately. The Civil Rights Restoration Act (S. 1207) explicitly overturned the *Patterson* and *Lorance* decisions because, according to Danforth, they "incorrectly narrowed" existing law banning employment discrimination.[163] According to Danforth, S.1 207 was truly "a consensus package of proposals for overruling Supreme Court decisions which could be agreed on in very short order"[164]

The Equal Employment Opportunity Act (S. 1208) took on "the more knotty issue of defining business necessity and overruling the *Wards Cove*" decision.[165] On these subjects, Danforth tried to offer a "moderate" approach. S. 1208 defined business necessity as a "manifest relationship to requirements for effective job performance." The bill also obligated plaintiffs charging disparate impact to identify the specific practice or procedure that was having

---

[161] *Congressional Record,* 102nd Congress, 1st Session (June 5, 1991): 13553.
[162] Peter M. Leibold, Stephen A. Sola, and Reginald E. Jones, "Civil Rights Act of 1991: Race to the Finish – Civil Rights, Quotas, and Disparate Impact in 1991," *Rutgers Law Review* 45 (Summer 1993): 1043-1088; 1043. The moderate group included: Danforth (R-MO), Durenberger (R-MT), Jeffords (R-VT), Chafee (R-R.I.), Specter (R-PA), Cohen (R-ME), and Heinz (R-PA).
[163] *Congressional Record,* 102nd Congress, 1st Session (June 4, 1991): 13140.
[164] *Congressional Record,* 102nd Congress, 1st Session (June 4, 1991): 13134.
[165] *Congressional Record,* 102nd Congress, 1st Session (June 4, 1991): 13135.

discriminatory effects.[166] In so doing, those raising a potential Title VII complaint could not simply rely on "statistical imbalances" to prove their case. The Civil Rights and Remedies Act – S. 1209 – took on another "very, very contentious issue." Here Danforth and his supporters proposed to cap the punitive damages available to the proven victim of discrimination at $150,000 for employers with over 100 employees, and at $50,000 for those with fewer than 100 employees.[167]

The Senate took no further action on Danforth's trio of bills through the summer as the Administration once again worked with senators to craft some kind of compromise. While negotiations were on-going, the Bush Administration was also managing the controversial nomination of Clarence Thomas to be a Supreme Court justice. According to *Congressional Quarterly*, some members believed that the Thomas hearings, combined with the growing popularity of Republican gubernatorial candidate David Duke – a former Klansman and neo-Nazi – put pressure on the Bush Administration to find a way to work with Danforth.[168] Negotiations went on for months and Danforth introduced two new bills to reflect changes demanded by the Bush administration.

By October, a revised Danforth compromise (S. 1745) gained momentum. This version of the bill:

1. Set caps on punitive damages that ranged from $50,000 to $200,000 depending on the number of people working for any employer proven guilty for discriminating against women or other protected groups;
2. Defined "business necessity" a bearing a "manifest relationship to the employment in question" or to the "legitimate business objective of the employer;"[169]
3. Reversed *Patterson v. McLean Credit Union* by making clear that Title VII barred harassment and discrimination on the job as well as in the hiring process;
4. Made clear when white citizens were allowed to challenge federal consent decrees;

---

[166] *Congressional Record,* 102nd Congress, 1st Session (June 4, 1991): 13135.
[167] *Congressional Record,* 102nd Congress, 1st Session (June 4, 1991): 13135.
[168] "Compromise Civil Rights Bill Passed."
[169] For more on the business necessity provision of S.1745 see Leibold, et. al., "Race to the Finish," 1079.

5. Reversed the *Lorance* decision by stipulating when workers were allowed to allowing challenge seniority systems on disparate impact grounds;
6. Made clear that victorious plaintiffs would be allowed to have attorney fees and the costs of hiring other experts reimbursed.[170]

On October 30, after some debate over how the bill would apply to employees of the Congress, Democrats and Republicans each took the floor to celebrate the compromise measure now before them for a vote. Even Senator Kennedy (D-MA) – the main player behind the previous year's failed effort to pass a bill – praised S. 1745 for reversing the Court and for enabling "victims of intentional discrimination based on sex, religion, or disability to be compensated for bias on the job."[171] He also called the bill "a resounding victory for civil rights."[172] An overwhelming majority of senators agreed and passed S. 1745 in a 93-5 vote.[173] The House followed suit on November, voting 381-38 to pass the bill. With Bush's signature, Congress ended a nearly two-year battle simply to undo what the Supreme Court had done in 1988-1989. This was legislating to restore, not to advance, rights.

Conclusion

The 1964 Civil Rights Act was a path-breaking legislative achievement. When it passed this law Congress challenged the institutional regime responsible for upholding Jim Crow for the first time since the Reconstruction era. As we have shown here, however, implementing the provisions of the CRA proved to be a significant political challenge. Title VII may have banned employment discrimination, and it may have created the Equal Employment Opportunities Commission, but it did not stipulate precisely the different modes of discrimination it aimed to root out or how the EEOC might be used to identify and punish those guilty of Title VII

[170] "Compromise Civil Rights Bill Passed."
[171] *Congressional Record,* 102nd Congress, 1st Session (October 30, 1991): 29048.
[172] *Congressional Record,* 102nd Congress, 1st Session (October 30, 1991): 29058.
[173] *Congressional Record,* 102nd Congress, 1st Session (October 30, 1991): 29066.

violations. Indeed, almost immediately after the 1964 CRA went into effect, groups seeking to further advance the cause of civil rights were working to bolster the EEOC's enforcement authority. Furthermore, it took the Supreme Court's intervention in the 1970s to clearly delineate between explicit, intentional discrimination and more indirect cases, in which facially neutral employment practices had a "disparate impact" on protected groups. Simply focusing on the conditions that made it possible for Congress to pass the CRA therefore would lead scholars to miss the ways in which implementation of the law reconfigured our politics.[174]

Through a close examination of how Congress put Title VII into practice, we draw out an important feature of late-20th century American political development: the erosion and collapse of the "Second Civil Rights Era." In the early-1970s, civil rights liberals found themselves unable to supplement the EEOC's enforcement power in the way they would have liked. The strength of the opposition they faced led them to settle for a court-based enforcement regime rather than one that looked more like the National Labor Relations Board (NLRB). As Farhang and others have explained, this concession did not doom Title VII to irrelevance. Yet the "strong" policy to come out of Title VII was not planned for in advance. Civil rights liberals were on the defensive as they worked to chip away at modes of discrimination that were subtle and which influenced lives outside the South. Even though they were forced to accept a weaker EEOC than they would have preferred though, supporters of additional civil rights protections did successfully push Congress to supplement Title VII.

By the end of the 1980s, civil rights liberals found themselves trying to prevent their successes from being rolled back. Congress fought for nearly two years to pass a new civil rights act establishing no new rights and adding no new protections. Instead, the 1991 Civil Rights Act

---

[174] For a thorough discussion of avoiding "snapshot" analyses, see Paul Pierson, "The Study of Policy Development," *The Journal of Policy History* 17 (January 2005): 34-51.

aimed simply at restoring rights that had been withdrawn by a Supreme Court that was pursuing a dramatically more conservative reading of the Constitution. It is important, therefore, to see the fight in 1990-1991 as a direct consequence of how the 1964 CRA was written. When it came time to implement features of the law action generated forces which, over the long-term, successfully undermined the bill's original aims.

.

Table 1: Equal Employment Act of 1966, 89th House

	To Agree to H. Res. 506 (Open Rule for Consideration of H.R. 10065)		To Table Motion to Reconsider Vote to Adopt H. Res. 506		To Pass H.R. 10065	
Party	Yea	Nay	Yea	Nay	Yea	Nay
Northern Democrat	166	2	165	1	179	3
Southern Democrat	17	69	21	63	23	59
Republican	76	50	8	117	98	31
Total	259	121	194	181	300	93

Source: *Congressional Record*, 89th Congress, 1st Session (September 13, 1965): 23607-08, 23608-09; 2nd Session (April 27, 1966): 9153-54.

Table 2: Equal Employment Act of 1970, 91st Senate

	To Amend S. 2453 – Eliminate Transfer Responsibilities to EEOC		To Amend S. 2453 – Provide Enforcement in Federal Courts		To Amend S. 2453 – Prohibit EEOC Employees from Filing Charges		To Amend S. 2453 – Exclude State & Local Employees from Coverage	
Party	Yea	Nay	Yea	Nay	Yea	Nay	Yea	Nay
Northern Democrat	2	19	1	23	0	24	2	22
Southern Democrat	12	1	10	2	11	1	12	1
Republican	23	9	16	16	16	17	16	14
Total	37	29	27	41	27	42	30	37

Source: *Congressional Record*, 91st Congress, 2nd Session (September 30, 1970): 34410, 34419, 34421-22; (October 1, 1970): 34565.

	To Amend S. 2453 – Exclude Religious Organizations from Coverage		To Amend S. 2453 – Exclude Educational Institutions from Coverage		To Pass S. 2453	
Party	Yea	Nay	Yea	Nay	Yea	Nay
Northern Democrat	13	11	3	21	24	0
Southern Democrat	14	1	12	0	2	13
Republican	16	16	15	17	21	11
Total	43	28	30	38	47	24

Source: *Congressional Record*, 91st Congress, 2nd Session (October 1, 1970): 34566, 34568, 34572-73.

Table 3: Equal Employment Act of 1972, 92nd House

	To Agree to a Substitute Amendment for H.R. 1746 (teller vote)		To Agree to a Substitute Amendment for H.R. 1746		To Recommit H.R. 1746		To Pass H.R. 1746	
Party	Yea	Nay	Yea	Nay	Yea	Nay	Yea	Nay
Northern Democrat	6	150	6	152	69	90	127	28
Southern Democrat	63	16	63	16	44	35	28	51
Republican	131	29	133	29	17	145	130	27
Total	200	195	202	197	130	270	285	106

Source: *Congressional Record*, 92nd Congress, 1st Session (September 16, 1971): 32111, 32111-12, 32112-13.

Table 4: Equal Employment Act of 1972, 92nd Senate

	To Amend S. 2515 by substituting the language from H.R. 17456 (Dominick Amendment)		To Amend Dominick Substitute by providing that EEOC conducted litigation Appeals Court instead of Attorney Gen.		To Reconsider the Dominick Amendment		To Amend S. 2515 by deleting language transferring the OFCC from Labor Dept to EEOC	
Party	Yea	Nay	Yea	Nay	Yea	Nay	Yea	Nay
Northern Democrat	3	29	23	4	3	30	4	25
Southern Democrat	15	1	2	14	16	1	10	6
Republican	22	13	15	18	26	17	34	6
Conservative	0	0	0	0	0	0	0	0
Independent	1	0	0	1	1	0	1	0
Total	41	43	40	37	46	48	49	37

Source: *Congressional Record*, 92nd Congress, 2nd Session (January 24, 1972): 945, 954; (January 26, 1972): 1384, 1398.

	To Table Allen Amendment (Substituting Language from H.R. 1746)		To Move to Close Debate on S. 2515 (Invoke Cloture)		To Move to Close Debate on S. 2515 (Invoke Cloture)		Javits-Williams Organizational Compromise Amendment	
Party	Yea	Nay	Yea	Nay	Yea	Nay	Yea	Nay
Northern Democrat	26	0	22	4	27	2	26	0
Southern Democrat	0	12	2	14	2	15	4	13
Republican	19	19	24	17	24	16	26	11
Conservative	0	0	0	1	0	1	0	1
Independent	0	1	0	1	0	1	0	1
Total	45	32	48	37	53	35	56	26

Source: *Congressional Record*, 92nd Congress, 2nd Session (January 27, 1972): 1524; (February 1, 1972): 1972; (February 3, 1972): 2494; (February 8, 1972), 3171.

Table 4: Equal Employment Act of 1972, 92nd Senate (continued)

	Dominick Amendment to Javits-Williams Compromise		To Move to Close Debate on S. 2515 (Invoke Cloture)		To Pass S. 2515		To Pass H.R. 1746 (after striking out the enacting clause & inserting the provisions of S. 2515, as passed)	
Party	Yea	Nay	Yea	Nay	Yea	Nay	Yea	Nay
Northern Democrat	4	25	34	1	32	0	32	0
Southern Democrat	14	1	5	11	6	9	6	9
Republican	25	13	33	8	34	6	34	6
Conservative	1	0	1	0	1	0	0	1
Independent	1	0	0	1	0	1	0	1
Total	45	39	73	21	73	16	72	17

Source: *Congressional Record*, 92nd Congress, 2nd Session (February 15, 1972): 3979; (February 22, 1972), 4912, 4944, 4948.

Table 5: Equal Employment Act of 1972, Conference Report, 92nd Congress

	Senate To Agree to the Conference Report		House To Agree to the Conference Report	
Party	Yea	Nay	Yea	Nay
Northern Democrat	26	0	154	4
Southern Democrat	5	6	31	50
Republican	29	4	118	56
Conservative	1	0	-	-
Independent	1	0	-	-
Total	62	10	303	110

Source: *Congressional Record*, 92nd Congress, 2nd Session (March 6, 1972): 7170; (March 8, 1972), 7572-73.

Table 6: Votes on S. 2104, 101st Senate

	Grassley Amendment		Cloture		Kennedy Amendment		Kennedy Amendment [2]		Enactment	
Party	Yea	Nay	Yea	Nay	Yea	Nay	Yea	Nay	Yay	Nay
Democrat	42	6	54	1	51	4	55	0	55	0
Republican	21	21	8	37	9	36	10	34	10	34
Total	63	27	62	38	60	40	65	34	65	34

Source: *Congressional Record,* 101st Congress, 2nd Session (July 10, 1990): 16757; (July 17, 1990): 17671, 17681; (July 18, 1990): 18039, 18051.

Table 7: Votes on S. 2104, 101st House

	Andrews-Neal Amendment		Brooks Amendment		LaFalce Substitute		Enactment	
Party	Yea	Nay	Yea	Nay	Yea	Nay	Yea	Nay
Democrat	250	1	211	41	28	226	242	12
Republican	147	23	78	94	160	12	30	142
Total	397	24	289	135	188	238	272	154

Source: *Congressional Record,* 101st Congress, 2nd Session (August 2, 1990): 22020, 22024; (August 3, 1990): 22173, 22173.

Table 8: Senate Votes on S. 2104 (Conference Bill), 101st Congress, 2nd Session

	Kessebaum Substitute		Enactment		Veto Override	
Party	Yea	Nay	Yea	Nay	Yea	Nay
Democrat	0	54	54	0	55	0
Republican	35	7	8	34	11	34
Total	35	61	62	34	66	34

Source: *Congressional Record,* 101st Congress, 2nd Session (October 16, 1990): 29558, 29606; (October 24, 1990): 33406.

Table 9: Votes on S. 2104 (Conference Bill), 101st House

	Michel Motion to Recommit		Final Passage	
Party	Yea	Nay	Yea	Nay
Democrat	205	45	239	15
Republican	169	0	33	139
Total	374	45	272	154

Source: Con*gressional Record,* 101st Congress, 2nd Session (October 11, 1990): 28619; (October 17, 1990): 30136.

Table 10: Votes on H.R. 1 & Substitutes 102nd House

	Towns-Schroeder Substitute		Michel Substitute		To Substitute Brooks-Fish		To Pass H.R. 1	
Party	Yea	Nay	Yea	Nay	Yea	Nay	Yea	Nay
Democrat	145	118	16	246	241	23	250	15
Republican	6	160	146	19	22	143	22	143
Independent	1	0	0	1	1	0	1	0
Total	152	278	162	266	264	166	273	158

Source: *Congressional Record,* 102nd Congress, 1st Session (June 4, 1991): 13253, 13265; (June 5, 1991): 13553, 13553.