Legislative Heart and Phase Transitions: An Exploratory Study of Congress and Minority Interests

Vincent Di Lorenzo
**LEGISLATIVE HEART AND PHASE TRANSITIONS: AN EXPLORATORY STUDY OF CONGRESS AND MINORITY INTERESTS**

VINCENT DI LORENZO*

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* Professor of Law, Center for Law and Public Policy, St. John's University. J.D., Columbia University School of Law. I am grateful for the comments of Brian Tamanaha and the participants in the 1997 Research Colloquium, Vincentian Chair of Social Justice.
I. INTRODUCTION: DOES RACE MATTER?

Racial gerrymandering . . . threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire.¹

The goal of racial blindness convinced Justice O'Connor and a

majority of the United States Supreme Court to subject race-based congressional reapportionment schemes to strict scrutiny analysis under the Equal Protection Clause.\(^2\) Such an analysis caused the Court to invalidate, most recently in 1996,\(^3\) certain congressional districts created to ensure that minority voters held a majority position in those districts—so called “majority-minority” districts.

Despite the Court's lofty goals, however, the question remains whether race continues to matter in the political process. The answer to this question should influence the Court's view of the applicability of the Equal Protection Clause as well as the manner in which it may be applied in political districting decisions. This Article does not focus on election results. It focuses, instead, on the issue of representation of minority interests in the Congress—representation that takes the form of policy responsiveness.

Only a decade ago, an opinion of the United States Supreme Court led to legislative redistricting aimed at maximizing the number of elected officials from minority groups.\(^4\) Subsequent Congresses reflected the results of this redistricting. After the 1992 election, the number of black members of the House of Representatives rose to thirty-nine, from only seventeen in 1981.\(^5\) District maps drawn specifically to elect additional mi-

\(^4\) See Thornburg v. Gingles, 478 U.S. 30 (1986) (addressing the issue of redistricting that was used to dilute the impact of black citizens’ votes).

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nority members made it possible for thirteen new blacks and six new Hispanics to win election to the House in 1992. Thirty-six of the thirty-nine black members elected in 1992 were elected from majority-minority districts, whereas only three were elected from majority-white districts.

A decade after the *Thornburg* decision, however, the Court views race-based districting differently. Yet the Court's view of the equal protection challenge still is evolving. This Article addresses that evolution. Depending in part on future federal and state court equal protection decisions, gains achieved through race-based redistricting may be eliminated. The 1996 election

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*Id.*


8. See *id.* at 1962-63 (applying strict scrutiny to redistricting along racial lines and holding that the states' desire to remedy past discrimination did not justify such redistricting); *Hunt*, 116 S. Ct. at 1904-06 (holding that race-based redistricting did not satisfy strict scrutiny when its purpose was to avoid vote dilution claims).

9. For example, the Court assumed, but did not decide, that compliance with the Voting Rights Act constitutes a compelling state interest. See *Bush*, 116 S. Ct. at 1970 (O'Connor, J., concurring).

10. See Linda Greenhouse, *High Court Voids Race-Based Plans for Redistricting*, N.Y. TIMES, June 14, 1996, at A1 (explaining that the result may "be the 'bleaching of Congress' as well as state and local legislative bodies"). In late September 1996, a three judge panel ruled that nine South Carolina legislative districts were unconstitutional. See *Nine Legislative Districts Ruled Unconstitutional by Judges*, N.Y. TIMES, Sept. 25, 1996, at A19. This decision was the first order to redraw state legislative districts since the United States Supreme Court's June 1996 opinions that threw out race-based congressional districts in Texas and North Carolina. See *id*.

The November 1996 elections did not support predictions of a loss of black or Hispanic representatives due to redistricting. See Juliana Gruenwald, *Incumbents Survive Redistricting*, 54 CONG. Q. WKLY REP. 3229 (1996). Congressional districts were redrawn in Texas, Florida, Georgia, and Louisiana during 1996. See *id.* In Louisiana, black Congressman Cleo Fields decided not to seek a third term after the redistricting. See *id.* In Texas, Florida, and Georgia, all incumbents who had represented the redrawn majority-minority districts were re-elected. See *id.* Their success, however, might be due to the power of incumbency. Penda Hair of the NAACP Legal Defense Fund noted one example: "If Cynthia McKinney [of Georgia, one of the
results do not soothe this concern. Although black incumbents were re-elected, racially polarized voting continued to exist.\textsuperscript{11}

What is lost? If race does not matter, as a means of ensuring that minority interests are represented in Congress,\textsuperscript{12} then the Court's decision to give primacy to race-blind aspirations may be acceptable. If race does matter, however, then that conclusion should influence the manner in which the Court applies the Equal Protection Clause to future challenges to legislative districts.

The significance of the research results contained in this Article extends beyond equal protection issues. Current public debate is absorbed with issues, such as welfare reform, immigration reform, minimum wage increase, and health care protection for the uninsured, that have a significant effect on minority

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\textsuperscript{11} In the newly-drawn district in Georgia in which Cynthia McKinney was re-elected, Representative McKinney won more than 90\% of the black vote and an estimated 31\% of the white vote. In the other newly-drawn district in Georgia in which Sanford Bishop was re-elected, he won more than 90\% of the black vote and an estimated 36\% of the white vote. See Kevin Sack, Victory of 5 Redistricted Blacks Recast Gerrymandering Dispute, N.Y. Times, Nov. 23, 1996, at A1. This racial polarization is as extreme as that which had caused the Court in 1986 to support a finding of violation of the Voting Rights Act due to vote dilution. See Thornburg v. Gingles, 478 U.S. 30, 54-82 (1986) (analyzing racially polarized voting in state legislative races in North Carolina).

\textsuperscript{12} Swain provides evidence, gathered through surveys, of the so-called "objective" interest of blacks, as well as blacks' "subjective" interests. See SWAIN, supra note 5, at 7-11. Blacks tend to favor redistributive programs more than whites, and this constitutes one of the most important differences between the two races. See id. at 10-11.

The Hispanic population is a more ideologically diverse group. See RODOLFO O. DE LA GARZA ET AL., LATINO VOICES: MEXICAN, PUERTO RICAN & CUBAN PERSPECTIVES ON AMERICAN POLITICS 83-84 (1992) (noting that the percentage of survey respondents evaluating themselves as slightly to very conservative were 36\% of the Mexican respondents, 39\% of the Anglos, 47\% of the Puerto Ricans, and 55\% of the Cubans). Notably, however, the socioeconomic status of Hispanic groups is lower than blacks' on several indicators. See RODNEY E. HERO, LATINOS AND THE U.S. POLITICAL SYSTEM 52-54 (1992). As a result of this lower average socioeconomic status, the Hispanic population generally would benefit from redistributive programs and, of course, from civil rights initiatives. Surveys concerning the government's role in providing jobs, housing and a minimum income to those in need found that Hispanics, like blacks, favor more government involvement than Anglos. See DE LA GARZA ET AL., supra at 85-86 (presenting the results of the Latino National Political Survey).
groups as well as other groups without a powerful, direct lobbying voice. Fundamental policy divisions that impede progress often influence the public policy debate. The initial impression is one of elected officials providing meaningful representation to minorities, yet failing to pass meaningful legislation because of policy deadlock.

We must look below the surface, however. We must search for "legislative heart"—that is, whether elected officials truly feel compassion for the needs of particular minorities and are committed to finding some way to address these needs. When we examine legislative heart, we may, at times, uncover a "legislative mask" that develops when the words spoken by legislators provide an explanation for inaction or deadlock, but actually mask a lack of commitment.

Part II of this Article examines both the methodology and results of prior case studies that have attempted to measure representation. These studies are evaluated in light of chaos theory. Chaos theory highlights the need for additional research—the need for more qualitative research, in contrast to past reliance on quantitative research (e.g., roll-call votes). Based on this evaluation, a new approach to the study of representation is presented, one seeking to unmask legislative heart. Part III of this Article is a case study of legislative heart and minority interests at the federal level. It is a study of fair lending reforms from 1968 to 1996, reforms aimed at combating racial and ethnic discrimination against individuals and entire urban neighborhoods. In Part III, chaos theory's concept of phase transitions is developed in the legislative arena. The result is an additional explanation for the continued need for race-based districts.

This study concludes that Congress collectively demonstrates weak legislative heart toward minority needs and interests—i.e., a weak desire and commitment to address these issues. Individ-


ual members of Congress demonstrate varying levels of desire and commitment, including strong legislative heart on the part of some individual white members. Nevertheless, black and Hispanic members of Congress demonstrate a stronger desire and a more consistent commitment to address minority needs and interests than white members. The difference is one of degree, with a substantial degree of difference from Southern white Democratic members, as well as a noticeable degree of difference from Northern white Democratic members.

In the past, the expression of the legislative heart of black and Hispanic members was constrained by the relatively small number of black and Hispanic members. The evidence finally points to achievement of a critical mass after the 1992 elections and race-based redistricting and a phase transition, leading to a more recognizable minority voice in the legislature.

II. LEGISLATIVE HEART AND REPRESENTATION OF MINORITY INTERESTS

Professors Eulau and Karps have defined four components of representation: service responsiveness, allocation responsiveness, policy responsiveness, and symbolic responsiveness. Earlier studies found that race matters, not only for symbolic representation but also for service responsiveness. This Article focuses on policy responsiveness. Professor Pitkin provides a useful and frequently cited definition of the policy responsiveness component of representation:

[Represent[ation] here means acting in the interest of the

16. Swain, for example, discusses both symbolic representation and service responsiveness. See SWAIN, supra note 5, at 211-20. Regarding the former, she writes that “[t]he presence of black representatives in Congress, regardless of their political party, fulfills a host of psychological needs that are no less important for being intangible.” Id. at 217. Regarding the latter, she reports: “Whenever a black representative is elected, he or she is likely to be contacted by blacks throughout the region for assistance. This might be expected, in view of Sidney Verba and Norman Nie’s findings that African Americans tend to be reluctant to contact white public officials.” Id. at 219 (citing SIDNEY VERBA & NORMAN NIE, PARTICIPATION IN AMERICA: POLITICAL DEMOCRACY AND SOCIAL EQUALITY (1972)).
represented, in a manner responsive to them. The representative must act independently; his action must involve discretion and judgment; he must be the one who acts. . . . And, despite the resulting potential for conflict between representative and represented about what is to be done, that conflict must not normally take place. The representative must act in such a way that there is no conflict, or if it occurs an explanation is called for.¹⁷

This Article develops the concept of legislative heart as a measure of policy responsiveness. In the context of legislative heart, this Article focuses Pitkin’s definition on a demand that elected representatives desire to act, and are committed to act, in a manner responsive to the needs of those whom they represent. Two types of studies have been conducted: studies of the number and resources of lobbying groups, including public interest lobbyists; and studies of the responsiveness of Congress as a body—and of black, Hispanic and white (non-Hispanic) members of Congress—to the interests of minority group members. These studies are discussed in Parts II.A and II.B infra.

A. Direct Versus Representative Legislative Voice

Empirical studies have concluded that two groups are represented poorly among organized interest groups: the less-advantaged and the proponents of broad public policy initiatives.¹⁸ Professors Schlozman and Tierney found:

In spite of all the newborn organizations representing the interests of diffuse publics, minorities, poor people, the elderly and other disadvantaged groups, business actually is a more dominating presence in Washington now than it was two decades ago. Considering all organizations having representation in Washington, the proportion representing the in-

terests of business rose from 57 percent to 72 percent since 1960. The proportion of citizens' groups decreased from 9 percent to 5 percent of all organizations and the proportion representing labor plummeted from 11 percent to 2 percent.

... To summarize, a very large share of the civil rights and social welfare organizations and of the groups representing women, the elderly, and the handicapped are young, having been established since 1960. However, there are still so few of them compared with other kinds of organizations that, even though their numbers have grown substantially, they do not form a more significant component in the pressure community.19

Douglas Imig reached a similar conclusion in his study of the political voice of those who advocate on behalf of the poor.20 Imig concluded:

Poor people and their supporters attempted to influence the policy-making process in the United States in the 1980s both directly through social-movement mobilization and indirectly through interest-group activity. Their demands, however, were often muted and inconsistent ...

... [A]dvocates for the poor ... generated little consistent political response, either through widespread interest-group or social-movement activity. Not only do the resources neces-

19. SCHLOZMAN & TIERNEY, supra note 18, at 77-78, 81. Such groups also have fewer financial resources available with which to pursue their interests. See id. at 117-19.

In an earlier survey of national public interest groups, Jeffrey Berry made a number of findings that reveal the limitations faced by such groups. See JEFFREY M. BERRY, LOBBYING FOR THE PEOPLE 46-55 (1977). The Internal Revenue Code limits the ability of groups claiming tax-exempt status to advocate for the adoption or rejection of legislation. See id. at 46-48. In Berry's study, such groups possessed a wide range of financial assets, and had annual budgets that ranged from less than $100,000 (25% of the groups studied) to more than $1,000,000 (19% of the groups studied). See id. at 60. Finally, public interest lobbyists generally have a low level of experience in their present work, with 65% of the activists studied having had two years' experience or less. See id. at 87.

sary for political action remain difficult for the poor to generate, but the allies that had come to their support at other times were absent.21

As a result, minorities and other groups with weak direct influence must rely primarily on elected officials to provide them a legislative voice. Both pluralist and public choice theorists have assumed that elected officials would provide such a legislative voice.

Bentley22 and Truman,23 for example, presented the pluralist assumption that the legislature itself would provide a representative voice to all group interests.24 Public choice theorists provided explanations for this assumed representative voice. First, many public choice theorists accept the proposition that, although self-interest is the dominant motive, legislators act not only out of self-interest, but also from ideological motivations.25 Second, legislator “interest” has been defined broadly as encompassing the interests of voting supporters as well as contributors.26 Moreover, some have suggested that unorganized voters with distinct interests influence a legislator’s decisions even if they are not direct supporters.27 Third, some public

21. Id. at 89.
27. See id. at 195-97. A study of Senate votes in the 96th Congress led Peltzman to imply that the interests of both supporting and opposing voters are reflected in
choice theorists have introduced the concept of the legislator as a "political entrepreneur." Arguably, the positions advocated by such an entrepreneur can reflect the interests of unorganized, nonvocal groups.

These theoretical conclusions regarding representative legislative voice rarely have been tested. This Article tests the representative legislative voice hypothesis. It explores not merely outcomes, as a surrogate measure of legislative voice, but a broader spectrum of factors.

B. Members' Policy Responsiveness: Existing Studies

Studies conducted at the local level have linked the election of minority representatives to policy gains for minority groups.

legislator votes. See id. at 197-206.


29. One exception is Robert Dahl's case-study of urban redevelopment efforts and public education issues, among other issues confronting the City of New Haven, Connecticut. ROBERT A. DAHL, WHO GOVERNS?: DEMOCRACY AND POWER IN AN AMERICAN CITY (1961). He found that public officials—the professional politicians—were the most influential group in initiating proposals that were later adopted, and in blocking the proposals of others. See id. at 305-10.

30. As to outcomes, public choice theorists do not draw sanguine conclusions regarding the interests of silent minorities. George Stigler's theory led to the conclusion that relatively small but powerful groups can obtain regulation for their benefit. See George J. Stigler, The Theory of Economic Regulation, 2 BELL J. ECON. & MGMT. SCI. 3, 4-10 (1971); see also Richard A. Posner, Theories of Economic Regulation, 5 BELL J. ECON. & MGMT. SCI. 335, 343-44 (1974) (suggesting that regulation is enacted as product of coalitions among industry groups, at the expense of unorganized, mostly consumer, groups).

31. Kathryn Yatrakis concluded that a black mayor brought significant policy benefits to Newark, New Jersey's black community. See KATHRYN B. YATRAKIS, ELECTORAL DEMANDS AND POLITICAL BENEFITS: MINORITY AS MAJORITY: A CASE STUDY OF TWO MAYORAL ELECTIONS IN NEW JERSEY: 1970, 1974, at 315-18 (photo reprint 1989) (1981). In a study of 10 cities in California, Browning, Marshall, and Tabb found that the presence of minorities on local councils led to the creation of police review boards, the increased use of minority contractors, and a general increase in programs oriented toward minorities. See RUFUS P. BROWNING ET AL., PROTEST IS NOT ENOUGH: THE STRUGGLE OF BLACKS AND HISPANICS FOR EQUALITY IN URBAN POLITICS 141-51 (1984); see also WILLIAM R. KEECH, THE IMPACT OF NEGRO VOTING 58-79 (1968) (finding that black political participation affected the distribution of ser-
At the congressional level, studies have focused not on specific policy gains, but on the voting records of black, Hispanic and other members of Congress. Examined below are the recent studies of the policy responsiveness of Congress and members of Congress.

Hero and Tolbert studied the Hispanic population and the substantive representation of Hispanic interests in the House. Their study targeted votes during the 100th Congress (1987-1988) on issues of concern to Hispanic leaders, as determined by the Southwest Voter Research Institute (SWVRI). They concluded that:

Latino representatives score 10 points higher on the SWVRI measure than non-Latinos. This level of difference is fairly close to Welch and Hibbing's finding that Hispanic representatives have "voting records . . . nearly 13 points [on scale of 0 to 100] less conservative [or more liberal] than a non-Hispanic representative." They also concluded, however, that the difference was not statistically significant.

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32. See, e.g., Charles Cameron et al., Do Majority-Minority Districts Maximize Substantive Black Representation in Congress? 90 AM. POL. SCI. REV. 794, 799-801 tbl. 2 (1996). Cameron used the Leadership Conference on Civil Rights (LCCR) index for the 103d Congress as his primary source of data. See id. at 799. The LCCR index is compiled from voting records on 14 bills that were considered to be important to minority interests. See id.


34. See id. at 640. "SWVRI scores represent 'the extent to which votes [by Members of Congress] coincide with Hispanic state legislators' views on the issues.'" Id. at 641 (citing Southwest Voter Research Institute, The 100th Congress: How They Voted on Issues of Concern to Latino Leaders, 3 SOUTHWEST VOTER RES. NOTES 1 (1989).


36. "In the Welch and Hibbing study . . . Hispanic representatives' scores were different from non-Hispanics at statistically significant levels; here they are not." Hero & Tolbert, supra note 33, at 643.
Turning to the substantive representation provided by all House members, Hero and Tolbert found that House representation of Hispanic interests ranged from limited to nonexistent.\(^{37}\) Their research focused on the effect of variations in the number of Hispanic constituents on members' votes.\(^{38}\) They did find, however, that Congress as a whole had enacted legislation deemed salient to Latinos, providing some evidence of possible collective representation.\(^{39}\)

Hero and Tolbert's analysis of representation through correlations between votes and the size of a legislator's Hispanic constituency does not address the nature and strength of commitment to minority interests, commitment that emerges in the give and take of committee and floor deliberations. The issue of legislative commitment not reflected in final votes, and its implications regarding collective representation, is explored further in this Article.\(^{40}\)

Overby and Cosgrove studied the behavior of individual white incumbents following the 1992 legislative redistricting and subsequent elections.\(^{41}\) They concluded that white incumbents who lost black constituents became less sensitive to the concerns of African-Americans.\(^{42}\) By implication, this finding shows a re-

\(^{37}\) See id. at 647.

\(^{38}\) See id. at 648-49.

\(^{39}\) Tolbert and Hero noted:

On the other hand, the roll-call votes deemed to be most important to Latinos were all decided consistent with Latino preferences.... The finding that Congress may substantively represent Latinos, albeit only collectively, should not be overlooked. This study is the first to find evidence of indirect substantive representation regarding Latinos. This finding is important both theoretically and normatively. At the same time, whether this collective-partisan representation "compensates" fully or partly for the essential absence of direct substantive representation is itself a theoretical and normative issue that deserves future attention. Id. at 648-49.

\(^{40}\) The portion of Hero and Tolbert's study that correlates voting records to the preferences of Hispanic leaders does reveal a sizable difference in voting scores between Hispanic and non-Hispanic members. See id. at 643-44. Yet, other studies are divided on the statistical significance of the difference.


\(^{42}\) See id. at 547-48.
sponsiveness to constituents, just as Peltzman had opined. Overby and Cosgrove found, however, that district racial composition did not have much appreciable impact on Republican voting behavior,\(^4\) and "[t]he positive and robust relationship between black constituency size and voting behavior exist[ed] only for Democrats in the South."\(^5\) Their explanation for this result was based on the heavy reliance that southern Democrats place on biracial electoral coalitions, sensitizing them to the size of their minority constituencies.\(^6\) Overby and Cosgrove thus found evidence of a constituency policy responsiveness that perhaps is subordinated to party preferences.\(^7\) One consequence of the Overby-Cosgrove finding may be a trade-off between symbolic representation and policy representation in the Congress as a whole.\(^8\) Majority-minority districts drawn to help elect minority representatives may limit the impact of the minority community in surrounding areas.\(^9\) This is an issue requiring further study. It is not, however, the focus of this Article. This Article does, however, find a phase transition due to race-based redistricting that increases the legislative voice of all minority members. This may at least set-off the effects documented by Overby and Cosgrove, and perhaps have an even greater effect.

The research design of the Overby-Cosgrove study relies on roll-call voting scores, namely returning white, incumbent House members' 1993 rating by the AFL-CIO's Committee on Political Education (COPE).\(^10\) The Hero and Tolbert study also relied on roll-call voting scores, tabulated by SWVRI.\(^11\) Voting record ratings have been criticized as a measure of policy representation.

\(^{43}\) See Peltzman, \textit{supra} note 25, at 210.
\(^{44}\) See Overby & Cosgrove, \textit{supra} note 41, at 546.
\(^{45}\) \textit{Id.} at 547.
\(^{46}\) \textit{Id.}
\(^{47}\) \textit{Id.} at 547-48. The authors describe the Republican party as being less sensitive to civil rights issues since the 1960s than the Democratic party has been. \textit{See id.} at 540. Swain reached the same conclusion. \textit{See SWAIN, supra} note 5, at 15.
\(^{48}\) See Overby & Cosgrove, \textit{supra} note 41, at 549.
\(^{49}\) \textit{See id.}
\(^{50}\) \textit{Id.} at 542.
\(^{51}\) See Hero & Tolbert, \textit{supra} note 33, at 640.
Among these criticisms is the concern that they reflect strategic, as well as policy, goals. Additionally, the votes can be a function of many influences, including a representative's party, constituency, and ideology. Finally, all the varied bills comprising a representative's voting record rating may not reflect policies that actually help minority communities.

My reluctance to rely solely on voting record ratings is based on a deeper concern. Such ratings do not reveal the advocacy efforts, if any, of particular representatives in committee and on the floor, including the legislation or amendments that they propose. Policy responsiveness does not consist solely of roll-call votes. It includes actions that shape the policy agenda in a manner favorable to minority interests, such as bills proposed, actions in committee hearings, committee lobbying, and other efforts to bring issues to the floor. It also includes shaping the details of proposed legislation, through methods such as proposing amendments. Finally, it includes blocking proposals that are adverse to the interests of minority groups, by ensuring that bills are not reported out of committee, or ensuring that amendments are blocked or defeated. In short, roll-call votes alone do not adequately measure the legislative heart of an individual legislator—the strength of a member's desire and commitment to address the needs of minority constituents.

A third, recent study of the policy responsiveness of individual members of Congress to minority interests was conducted by Carol Swain. Swain's study had four components: (a) interviews with twenty-seven members and their staffs; (b) observations in the field; (c) historical analysis, consisting of news clip-
pings, constituency mailings, published interviews, and position papers; and (d) roll-call data analysis for the 100th Congress (1987-1989). The first three components extended through the spring of 1992. In other words, all the data was compiled prior to the legislative redistricting reflected in the 1992 elections.

Swain's main conclusion is that "[r]edrawing boundaries to create additional districts with large black majorities ... appears not to be the most effective way to increase the representation of black interests." After 1990, no white representative represented any majority-black congressional districts and 1990 census data initially revealed few areas where new majority-minority districts could be drawn. In addition, Swain concluded that "white representatives are an underutilized and perhaps underappreciated alternative source of support for many of the issues that are of greatest interest to African Americans. The representation of black interests depends on more than the shared skin color of the representative and the electorate."

It may be desirable, as Swain suggests, not to use the sixty-five percent minimum minority population as a standard for forming race-based districts. A lower percentage of minority population within districts might better maximize the number of minority members of Congress. Whatever the figure em-

56. See id. at x, 227-31.
57. See id. at x.
58. Id. at ix.
59. See id. at 3. Swain notes some experts' suggestions that blacks and Hispanics might find 12 to 15 new majority-minority districts after the 1990s redistricting, but beyond that, these groups "can expect severe limitations on what can be achieved by relying on creation of black majority districts ...." Id. at 200.
60. Id. at ix-x.
61. See id. at 210.
62. Cameron, Epstein, and O'Halloran have made this argument:

There are important differences across regions, perhaps best summarized by the concentration level of BVAP [black voting age population] required to achieve a 50% probability that the elected representative is a black Democrat .... [I]n the South the required level of BVAP is 40.3%; in the Northwest, 47.3%; in the Northeast only 28.3%. These figures carry a number of important implications. It is rarely necessary for minority voters to be a clear majority within a district to have a good chance of electing a minority representative, and the 65% rule enforced by the courts certainly seems excessive. By the same token, black candidates seem to have a fair chance of winning election, even in districts with a white majority (so-called minority-minority districts).
ployed, my critique focuses on the unwillingness of the United States Supreme Court to protect some districts that were created to serve the goal of maximizing minority representation, by questioning whether a compelling state interest is served.

Swain’s conclusion was similar to Overby and Cosgrove’s on the issue of party affiliation and responsiveness. She found that Republicans are less responsive to black interests than are Democrats, but “[b]lack representatives are . . . not the only source of black representation in Congress—white Democrats also appear to represent blacks well.”63 One dissimilarity between Swain’s conclusions and the findings of Overby and Cosgrove is that Swain found that almost all white Democrats supported black interests regardless of the percentage of blacks in their districts.64

Despite these broad conclusions, the Swain study actually reveals a great deal of variation in policy responsiveness. One variation was between the roll-call voting records of white versus black representatives, according to the white representative’s region. Black representatives were clearly the most responsive to minority interests.65 White, Northern Democrats were the next most responsive, and white Southern Democrats were third in line.66 Swain also drew the conclusion, however,

Cameron et al., supra note 32, at 804.

Swain made a similar argument, although she continued to assert that it would be possible to achieve increased black representation from majority-white districts. See SWAIN, supra note 5, at 207-09; see also id. at 234-35 app. C (comparing LCCR and COPE voting record ratings of black members representing black districts, heterogeneous districts, and majority-white districts).

63. SWAIN, supra note 5, at 19. As more black-majority districts are created, the remaining white-majority districts are more likely to elect Republicans. See id. at 205.

64. See id. at 17.

65. See id. at 234-35 app. C (reporting that COPE ratings for the 100th Congress averaged 99.7 in historically black districts, 95.3 in newly black districts, 100 in heterogeneous districts, and 98.9 in majority-white districts; LCCR ratings averaged 89, 96.5, 88.8 and 97.7 in these respective districts).

66. Swain reported the following statistics regarding white representatives in the 100th Congress:

<table>
<thead>
<tr>
<th>COPE Rating</th>
<th>LCCR Rating</th>
</tr>
</thead>
<tbody>
<tr>
<td>Northern Democrats</td>
<td>92.7</td>
</tr>
<tr>
<td>Southern Democrats</td>
<td>80.2</td>
</tr>
<tr>
<td>Northern Republicans</td>
<td>37.5</td>
</tr>
<tr>
<td>Southern Republicans</td>
<td>14.6</td>
</tr>
</tbody>
</table>
that "in a multivariate regression analysis that includes the race of the representative as one of the independent variables, race is statistically insignificant ...."\textsuperscript{67} This conclusion has been criticized in a more recent study by Michael Cobb and Jeffrey Jenkins.\textsuperscript{68} Cobb and Jenkins concluded that black representatives "have a significant and large impact on the dependent variable [LCCR voting record scores]. .... [B]lack representatives score nearly 13 LCCR percentage points higher than white representatives, holding the other variables constant."\textsuperscript{69} These contrasting findings mirror those in studies of Hispanic representatives' voting scores during different sessions of Congress.\textsuperscript{70}

At a minimum, one can say that some studies of voting scores have concluded that race does matter. In evaluating these studies, one must not forget that many congressional districts subject to challenge under the United States Supreme Court's recent redistricting decisions are located in the South. The difference in consistency and strength of commitment, as reflected by voting record ratings, is quite large between Southern white Democrats and Southern black Democrats.\textsuperscript{71}

Swain's conclusions regarding policy responsiveness relied on roll-call data, although not limited to COPE ratings.\textsuperscript{72} They are thus useful, but subject to many of the same limitations dis-

\textsuperscript{67} See id. at 57 tbl.3.3.
\textsuperscript{68} Id. at 212.
\textsuperscript{69} Michael D. Cobb & Jeffrey A. Jenkins, Who Represents Black Interests in Congress?: Sponsoring and Voting for Legislation Beneficial to Black Constituents, Paper presented at 1996 Midwest Political Science Association Annual Meeting, Apr. 18-20, 1996, at 4-5 (on file with author). Cobb and Jenkins's study is of the 103d Congress; Swain's study was of the 100th Congress. Nonetheless, Cobb & Jenkins do compare their results to Swain's and critique Swain's conclusions.
\textsuperscript{70} Id. at 12. Cobb and Jenkins further state: "This finding is not altered when the sample is reduced to the sub-set of Democrats. In this model, black representatives are estimated to earn, on average, a LCCR rating of over 21 points more than their white colleagues." Id. at 23 n.7.
\textsuperscript{71} See supra notes 33-40 and accompanying text.
\textsuperscript{72} See SWAIN, supra note 5, at 57 tbl.3.3. Swain concludes that "[g]iven their constraints, southern white representatives of districts with substantial black minorities do a credible job of representing blacks." Id. at 168 (emphasis added).
\textsuperscript{72} See id. at 14. Swain also used LCCR ratings, as well as two other ratings systems that she devised, to measure civil rights responsiveness and redistributive policy responsiveness. See id. at 14-15.
This Article presses the point that conclusions regarding policy responsiveness must not be based exclusively or almost exclusively on roll-call data.

Although not the main focus of her study, Swain did draw conclusions about the advocacy efforts of individual members. Her aim was to test whether blacks can obtain additional legislative voice from white members of Congress. Swain's research revealed that strength of advocacy is subject to great variations. Some black representatives have been extremely vocal and active in advocating the interests of minority group members in the legislative policy process, whereas others have been more restrained followers of party positions.

Similar variations exist among white representatives of black districts, regardless of whether the district contains a majority or a substantial (thirty-five percent or more) minority of blacks. Enormous variation has existed in the responsiveness of various representatives of the same district. For example, in the sixth district of South Carolina:

In less than a decade, blacks in the sixth district went from little representation under MacMillan to meaningful representation with Jenrette, and then back to little representation under Napier. That this traditionally Democratic district elected the conservative Napier is understandable, given that the 59 percent white district also voted Republican in the presidential elections of 1972, 1984, and 1988, and that Jimmy Carter, a son of the South, barely carried it in 1980. . . . In 1982 blacks gained meaningful representation again when Robin Tallon was elected.

73. See supra text accompanying notes 52-54. But see supra note 54 (citing authors who defend use of roll call votes to measure legislative responsiveness).

74. For example, Swain compares the confrontational Adam Clayton Powell, Jr. with the conciliatory William Dawson. See SWAIN, supra note 5, at 34-37. She also reports that "historically black districts have produced both docile and militant black representatives, and they have also rejected representatives of both types." Id. at 47.

Diverse ideological positions also exist. For example, black conservative Republican Gary Franks opposes affirmative action. See id. at 39.

75. Id. at 148-49.
Significant variation also has been witnessed across district lines.\textsuperscript{76}

These conclusions were based not only on roll-call data, but also on opinions and impressions reported in the media, interviews, and Swain's work in the field.\textsuperscript{77} Swain has provided individual examples of strong versus weak legislative heart among both white and black members of Congress. Except for analysis of voting ratings, however, Swain's work never attempted to measure the overall strength of legislative heart among black and other minority members of Congress. It also failed to examine the difference in such strength of commitment between white representatives on the one hand, and black or Hispanic representatives on the other.

One recent study that has attempted to measure commitment apart from voting records was conducted by Michael Cobb and Jeffrey Jenkins.\textsuperscript{78} One aspect of this study considered the bills sponsored in the 103d Congress (1993-1994).\textsuperscript{79} The sample consisted of bills that offered symbolic benefits to blacks, indirect social benefits, direct social benefits, indirect economic benefits, and direct economic benefits.\textsuperscript{80} The results are as follows:

\begin{center}
\textbf{TABLE ONE}
\end{center}

\textit{Legislation Beneficial to Blacks, by Type and Sponsor}\textsuperscript{81}

\begin{tabular}{|l|c|c|c|}
\hline
Type of Legislation & # of Reps & # of Black Reps & # of Resolutions \\
\hline
\end{tabular}

\textsuperscript{76} Swain compiled the roll-call vote ratings of four white representatives: Robin Tallon, Tim Valentine, Lindy Boggs, and Peter Rodino, Jr., each of whom was from a district in which blacks comprised a majority or a substantial minority. \textit{See id.} at 158-59 tbl. 7.2. COPE and LCCR ratings varied, for example, between Rodino (with ratings generally in the 90 to 100 range) and Valentine (with COPE ratings in the 37 to 44 range and LCCR ratings varying from 60 to 100). \textit{See id.}

\textsuperscript{77} \textit{See id.} at x, 227-31.

\textsuperscript{78} \textit{See Cobb & Jenkins, supra} note 68.

\textsuperscript{79} \textit{See id.} at 7.

\textsuperscript{80} \textit{See id.} at 9-10.

\textsuperscript{81} \textit{Id.} at \*34 tbl.2. Bills involving health care, education, civil rights, and discrimination are examples of socially based bills. Bills seeking to redistribute income or wealth in ways that advantage blacks, or simply provide greater economic opportunities for blacks, exemplify the economic dimension. \textit{See id.} at 9-10.
<table>
<thead>
<tr>
<th>Category</th>
<th>Symbolic</th>
<th>Indirect Social</th>
<th>Direct Social</th>
<th>Indirect Economic</th>
<th>Direct Economic</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>30</td>
<td>17</td>
<td>55</td>
<td>33</td>
<td>33</td>
</tr>
<tr>
<td></td>
<td>33</td>
<td>7</td>
<td>33</td>
<td>27</td>
<td>27</td>
</tr>
<tr>
<td></td>
<td>19</td>
<td>10</td>
<td>23</td>
<td>9</td>
<td>6</td>
</tr>
<tr>
<td></td>
<td>27</td>
<td>10</td>
<td>27</td>
<td>9</td>
<td>6</td>
</tr>
<tr>
<td></td>
<td>9</td>
<td>6</td>
<td>12</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Thus, black representatives were found to disproportionately sponsor not only legislation that offered symbolic benefits to blacks, but also legislation that offered direct social and economic benefits.

In this Article, I further explore the issue of strength of desire and commitment of individual members of Congress toward minority interests, and I examine the issue of representation by Congress collectively. This is done through a time series study, exploring congressional responsiveness and the advocacy efforts of individual representatives. The study covers a period of almost thirty years and deals with the policy issue of fair lending.

C. Legislative Heart As a Measure of Legislative Voice

1. The Quantitative/Qualitative Research Debate

In their influential 1994 work on social science research, Gary King, Robert Keohanne, and Sidney Verba take the position that neither quantitative nor qualitative research is superior to the other, regardless of the research problem being addressed. Since many subjects of interest to social scientists cannot be meaningfully formulated in ways that permit statistical testing of hypotheses with quantitative data, we do not wish to encourage the exclusive use of quantitative techniques.\(^2\)

Chaos theory, as applied to legislative decision making, leads to the conclusion that legislative policy responsiveness falls within this category of social science research. Quantitative data may serve as one source of information that leads to an assessment

\(^2\) Gary King et al., Designing Social Inquiry: Scientific Inference in Qualitative Research 5-6 (1994).
regarding responsiveness, but qualitative data is also useful for such assessment.\textsuperscript{83}

Past empirical studies have relied upon quantitative measures of representation. For example, Sam Peltzman's work has combined public choice with law and economics perspectives and has relied upon Senate voting as the measure of responsiveness.\textsuperscript{84} Roll-call voting as a measure of responsiveness has been employed frequently in empirical studies, regardless of their theoretical bent.\textsuperscript{85} For example, the Miller-Stokes congruence model, which has had enormous influence on political science research methodology, relied on roll-call voting as a measure of constituency influence on members of Congress.\textsuperscript{86} This Article takes the position that for purposes of exploring legislative heart, quantitative data is useful, but qualitative data is equally important.

\textbf{2. Chaos Theory's Contribution}

Chaos theory has transformed scientific research.\textsuperscript{87} It is now being explored in the social sciences, including political science, as a lens through which to view evidence.\textsuperscript{88} It is particularly

\begin{itemize}
  \item King, Keohanne, and Verba's description of the dividing line between quantitative and qualitative research is adopted for purposes of this Article. They describe quantitative research as that which "uses numbers and statistical methods. It tends to be based on numerical measurements of specific aspects of phenomena . . . ." \textit{Id.} at 3. They then define qualitative research in the following terms:
    \begin{quote}
    Qualitative research, in contrast, covers a wide range of approaches, but by definition, none of these approaches relies on numerical measurements. Such work has tended to focus on one or a small number of cases, to use intensive interviews or depth analysis of historical materials, to be discursive in method, and to be concerned with a rounded or comprehensive account of some event or unit.
    \end{quote}
  \item \textit{Id.} at 4.
  \item See Sam Peltzman, \textit{An Economic Interpretation of the History of Congressional Voting in the Twentieth Century}, 75 \textit{AM. ECON. REV.} 656 (1985).
  \item See Malcolm E. Jewell, \textit{Legislators and Constituents in the Representative Process}, in \textit{HANDBOOK OF LEGISLATIVE RESEARCH} 118-23 (Gerhard Loewenberg et al. eds., 1985); see also supra notes 33-77 and accompanying text (discussing the Herbst-Tolbert, Overby-Cosgrove, and Swain studies).
  \item See \textit{CHAOS THEORY IN THE SOCIAL SCIENCES} (L. Douglas Kiel & Euel Elliot
well suited to the study of legislative dynamics. 89

Chaos theory concludes that outcomes are unpredictable. This unpredictability exists for several reasons, including complexity 90 and nonlinear effects, 91 that characterize legislative decision making. Decisions are the product of many factors which vary in existence and influence over time. These factors include chance occurrences and the influence of occurrences external to the legislative process (the external environment). 92 Each factor does not have a stable or proportional impact on decision making. Rather, the impact is nonlinear and is largely a function of the unique synergy produced at various points in time. An important factor influencing outcomes is feedback. 93 Feedback occurs when internal experiences, external changes, and the course of experience under a legislative enactment all have an impact on the legislative climate for initial action and additional change. 94 The cognition, evaluation, and influence of the information received in feedback is unpredictable. 95

Chaos theory also recognizes aperiodic outcomes and the principle of sensitive dependence on initial conditions. 96 Decisions are unpredictable, but decisions and outcomes are not random. A general boundary constrains them. Within a general boundary, the details of particular legislative enactments also are unpredictable. The reason for this unpredictability is that no single

89. See Vincent Di Lorenzo, Legislative Chaos: An Exploratory Study, 12 YALE L. & POLY REV. 425, 428-29 (1994) (proposing that chaos theory may provide the best means of understanding legislative dynamics).

90. See GRÉGOIRE NICOLIS & ILYA PRIGOGINE, EXPLORING COMPLEXITY 6 (1989) (attempting to define "complexity" in terms understandable to the layman).

91. A proportionate relationship exists between cause and effect in linear systems. In nonlinear systems, the cause-effect relationship is not proportionate, and the relationship between variables is dynamic. The nonlinear nature of politics is discussed in COURTNEY BROWN, SERPENTS IN THE SAND: ESSAYS ON THE NONLINEAR NATURE OF POLITICS AND HUMAN DESTINY 1-8 (1995).

92. See Di Lorenzo, supra note 89, at 432-35.

93. See id. at 434.

94. See id.

95. See id.

96. See JACK COHEN & IAN STEWART, THE COLLAPSE OF CHAOS: DISCOVERING SIMPLICITY IN A COMPLEX WORLD 235-63 (1994). Scientists refer to "strange attractions" as constraints on outcomes, creating outer boundaries. Cf. GLEICK, supra note 87, at 133-44 (discussing the development of "strange attractors").
equilibrium point, or outcome, exists; rather, there are an almost infinite number of equilibrium points. Thus, if repetition of the decision-making process was possible, then the same forces would yield somewhat different results. This is the aperiodic nature of decision making.\textsuperscript{97}

In addition, individual commitment to action on a particular policy issue, or to a particular action, depends not only on the forces exerting influence but also on the background and beliefs of each individual representative. No two individuals will react identically, despite having identical demographic characteristics, such as being a Northern white Democrat. Similarly, a group will react differently in the long term, depending on the initial input of these individual members, as well as their continuing contributions. This unpredictable, long-term variance is based on individual variations and their influence on group dynamics over time, and reflects chaos theory's principle of sensitive dependence on initial conditions.\textsuperscript{98}

These principles of chaos theory contain several implications for our research methodology. First, a long-term study is necessary. Because of complexity, one enactment is an unreliable measure of the responsiveness of the legislative body as a whole. Enactments may occur for many reasons, and at times are not motivated principally by a desire to address the needs of the targeted group. Moreover, the details of the enactment are as important, if not more important, in assessing responsiveness. Enactments become one measure of responsiveness to be supplemented with other evidence. For the same reason, inaction over a short term is also an unreliable measure of responsiveness. Second, given the uncertainty inherent in relying on action or inaction as the sole measure of responsiveness, the reasons behind a representative's action or inaction are more important than the acts themselves. Third, because of complexity, nonlinear relationships between cause and effect, and the aperiodic nature of outcomes, the details of proposals and outcomes must be explored to provide a window through which to view legisla-

\textsuperscript{97} Cf. Gleick, supra note 87, at 299-300 (describing the aperiodic character of biological organisms).

\textsuperscript{98} See Cohen & Stewart, supra note 96, at 235-36.
Finally, a study of responsiveness cannot occur in a vacuum. Rather, external forces influence assessments of legislative heart at particular points in time, and actions on related initiatives provide a more complete picture of legislative heart. Such external forces are one aspect of the concept of feedback. The feedback concept also helps to tie administrative action to legislative responsiveness. Administrative action might fill the gaps or ameliorate the deficiencies in legislation, and thereby relieve the pressure for legislative amendment. Administrative action or inaction might also stymie the effectiveness of a legislative enactment, and thereby highlight the need for further legislative action. Subsequent legislative response must be judged in this environment. With complexity and nonlinearity as characteristics of the legislative process, however, a long time-series for study is necessary to provide a useful view of legislative heart.

All of these considerations relate to our study of the collective responsiveness of Congress, as well as to the responsiveness of individual members. Black and Hispanic members will form a significant group in Congress, but will remain a numerical minority even after race-based redistricting. Nonetheless, one focus in our study is on these individuals. One reason is that chaos theory teaches us that action or inaction by Congress as a whole, and the details of any such action or inaction, are unpredictable. This is true in both the short term and the long term. Another reason is that unless consistent, collective responsiveness is demonstrated, constituents justifiably look at least to the individual efforts of their representatives to provide them with a voice.

3. A New Approach to the Study of Legislative Voice

I propose a two-part methodology for the study of policy responsiveness. It consists of a search for (a) legislative compassion, and (b) the environment in which representative voice is manifested.

For the legislative body as a whole, the legislative compassion component is found in the following evidence:
- enactments over the course of time;
- the reason(s) for such enactments;
- the details of bills enacted, focusing on the benefit or detriment of each detail to the group;
- the reason(s) for adoption of such details;
- legislative initiatives, such as amendments proposed, regarding bills on the legislative agenda that offered benefits for, or detriments to, the group;
- the reason(s) for such actions, particularly the blocking of such initiatives;
- other legislative proposals by members of the legislative or executive branch, that offer benefits for, or detriments to the group over the existing legal landscape;
- the reason(s) for these proposals and for the failure of the proposals to become part of the legislative agenda; and
- legislative feedback and reaction not otherwise encompassed within the categories described above, such as hearings held or studies conducted.

The legislative compassion component draws from Polsby's analysis of community power, which considers success to be the best measure of power, but not its sole measure. Polsby's analysis also considers gain-loss analysis and participation as possible measures. Polsby's reliance on success is suspect when applied to representative voice. Moreover, the emphasis is as much on the reason(s) for the various actions that representatives take, to the extent such reasons are known, as it is on the actions themselves.

100. See id. at 136-38. Polsby describes "success" in the context of community power in the following terms:

Three kinds of events can be considered as, in some sense, indices of success: when an actor initiates some community policy, meets with no opposition, and it is enacted; when an actor prevents the policy of some other actor from being enacted; and when an actor initiates a policy, meets with opposition, and the policy is enacted.

Id. at 136.

101. See id. at 132-36. As applied to legislative voice, gain/loss analysis focuses on the details of enacted legislation and evaluates who gains and who loses as a result of such statutory particulars.

102. See id. at 123-32. "Participation," for purposes of this Article, focuses on representative participation, because silent minorities will enjoy little or no direct participation in legislative debate and decision making.
Overall, the search is for legislative heart—a desire to address the needs of minorities—and a commitment to finding ways to address these needs. Thus, the search for reasons for action or inaction actually is a search for strength of legislative desire and commitment—e.g., strong desire and commitment can be found in a strong House/Senate proposal stymied by Senate filibuster or weak desire and commitment can be found in a strong proposal by only a small group in the Senate and House. One of the two questions I will explore is whether black and Hispanic members of Congress generally exhibit stronger legislative heart than does Congress as a whole: in other words, whether these minority legislators' desire and commitment is measurably different.

The proposed approach relies on qualitative evidence. A study of bills enacted, bills blocked, and proposals introduced can be largely a quantitative study—a simple tally of responses. This is the approach most often relied upon in past empirical research that used congressional roll-call votes to measure legislative responsiveness to constituent interests.\textsuperscript{103} The proposed approach begins with such a tally, but it then insists first on evaluating the benefit or detriment of particular actions, and second, on uncovering, if possible, the reasons for a particular action or case of inaction. The search for reasons often relies on the explanation for action or inaction that is identified (but not explained) by the source materials—e.g., Senate filibusters, no proposal or no strong proposal endorsed by the House or Senate, or leadership opposition.

The research methodology to assess legislative compassion outlined above is directed at the Congress as a whole. This is the first focus of this Article—the possibility of collective policy responsiveness. A second focus of this Article is to assess the possibility and strength of legislative voice through individual efforts. This study focuses on the legislative heart of individual white versus black or Hispanic members of Congress. The search is similarly for legislative compassion, but the compassion of individuals as opposed to Congress as a whole. Congressman Adam Clayton Powell, Jr. exemplifies strong legislative heart—measurably stronger than Congress as a whole during the same

\textsuperscript{103} See supra notes 83-85 and accompanying text.
time period. Bills proposed, individual advocacy efforts taken or foregone, the details of such proposals and advocacy positions, and voting record ratings fall within the research components of actions taken and not taken that are necessary for assessing individual legislative compassion. In addition, the reason(s) for such action or inaction should be explored, although the evidence may be more difficult to obtain for individuals. Absent such evidence, legislative compassion is inferred from the very existence and nature of action or inaction over a period of time. A baseline is the legislation enacted. Individual proposals and actions then can be compared with the generally endorsed outcome in order to assess strength of desire and commitment.

Legislative heart is revealed through action and inaction, in their various forms, and the reasons for each. To fully understand legislative dynamics, however, one must be aware of the environment in which legislative voice is manifested. An understanding of the legislative environment provides additional information useful for evaluating legislative compassion. At times, environment also provides evidence of responsiveness or unresponsiveness that would not be captured otherwise.

Environment, for purposes of this Article, consists of the following:

- administrative and/or court actions taken in implementing a legislative enactment—interpreting its provisions and enforcing its contents—and the reason(s) for such actions;
- administrative and/or court actions not taken in implementing a legislative enactment, and the reason(s) for such inaction; and
- external occurrences exacerbating, highlighting, or amelio-

104. For example, on more than 100 occasions in the 1950s, Congressman Powell unsuccessfully sought to add nondiscrimination amendments to appropriation bills for federal aid to housing, education, and other matters. See Stephen C. Halpern, On the Limits of the Law: The Ironic Legacy of Title VI of the 1964 Civil Rights Act 23 & n.26 (1995). He also persuaded the Kennedy Administration, after persistent urgings, to take two early steps aimed at prohibiting groups that received federal funds from discriminating on the basis of race. See id. at 24. Finally, as Chairman of the Education and Labor Committee, Congressman Powell delayed forwarding even liberal legislation to the Rules Committee when he thought it did not contain enough benefits for blacks. See Richard F. Fenno Jr., Congressmen in Committees 131 (1973).
rating the particular need at which legislative proposals were directed.

The first two factors can be described as the "internal environment," evidencing the development of, and experience under, the particular legislative issue addressed by Congress. The last factor can be described as the "external environment," evidencing an external, independent influence on legislative action on the particular issue under study.

Administrative action is an important part of the environment for or against legislative response. Administrative agencies, at times responding to executive wishes, have enormous leverage and power to realize or frustrate policy initiatives. The lobbying efforts of interest groups reflect this power. Schlozman and Tierney asked lobbyists how important each institution was as a focus of their activity. The results were as follows: 105

<table>
<thead>
<tr>
<th>Trade Corporations</th>
<th>Trade Associations</th>
<th>Trade Unions</th>
<th>Trade Groups</th>
</tr>
</thead>
<tbody>
<tr>
<td>Congress</td>
<td>94%</td>
<td>91%</td>
<td>95%</td>
</tr>
<tr>
<td>White House</td>
<td>67%</td>
<td>59%</td>
<td>37%</td>
</tr>
<tr>
<td>Executive agencies</td>
<td>68%</td>
<td>82%</td>
<td>58%</td>
</tr>
<tr>
<td>Courts</td>
<td>18%</td>
<td>21%</td>
<td>28%</td>
</tr>
</tbody>
</table>

Id.

Similarly, Berry surveyed national public interest groups and found that the targets of their lobbying efforts were the following:

<table>
<thead>
<tr>
<th>Major Target</th>
<th>Major or Secondary Target</th>
</tr>
</thead>
<tbody>
<tr>
<td>Congress</td>
<td>60% (50)</td>
</tr>
<tr>
<td>Administrative agency or dept.</td>
<td>25% (21)</td>
</tr>
<tr>
<td>White House (President)</td>
<td>2% (2)</td>
</tr>
<tr>
<td>Public opinion</td>
<td>5% (4)</td>
</tr>
<tr>
<td>Corporations</td>
<td>4% (3)</td>
</tr>
<tr>
<td>Other</td>
<td>4% (3)</td>
</tr>
<tr>
<td>No second target mentioned</td>
<td>—</td>
</tr>
</tbody>
</table>

BERRY, supra note 19, at 56 tbl.III-2. Moreover, tax-exempt organizations identified administrative agencies as their primary lobbying target almost as often as they identified Congress as a target (42% versus 44%). See id. at 57 tbl.III-3.
**TABLE TWO**

**Focus of Interest Group Lobbying Activity, by Institution**

<table>
<thead>
<tr>
<th>Institution</th>
<th>Very Important</th>
<th>Somewhat Important</th>
<th>Not too Important</th>
</tr>
</thead>
<tbody>
<tr>
<td>Congress</td>
<td>89%</td>
<td>8%</td>
<td>2%</td>
</tr>
<tr>
<td>White House</td>
<td>55%</td>
<td>32%</td>
<td>12%</td>
</tr>
<tr>
<td>Executive agencies</td>
<td>65%</td>
<td>28%</td>
<td>6%</td>
</tr>
<tr>
<td>Courts</td>
<td>22%</td>
<td>27%</td>
<td>51%</td>
</tr>
</tbody>
</table>

The research procedure employed in this Article is influenced by King, Keohane and Verba's exhortation to employ "scientific research" methods in the social sciences. One aspect of such a research design is that the procedures are public. As King and his colleagues stated:

Scientific research uses explicit, codified, and *public* methods to generate and analyze data whose reliability can therefore be assessed. Much social research in the qualitative style follows fewer precise rules of research procedure or of inference. As Robert K. Merton put it, "The sociological analysis of qualitative data often resides in a private world of penetrating but unfathomable insights and ineffable understandings . . . . [However,] science . . . is public, not private." Merton's statement is not true of all qualitative researchers (and it is unfortunately still true of some quantitative analysts), but many proceed as if they had no method—sometimes as if the use of explicit methods would diminish their creativity. Nevertheless they cannot help but use some method. Somehow they observe phenomena, ask questions, infer information about the world from these observations, and make inferences about cause and effect. If the method and logic of a researcher's observations and inferences are left implicit, the scholarly community has no way of judging the validity of what was done. We cannot evaluate the principles of selection that were used to record observations, the ways in which observations were processed, and the logic by which conclusions were drawn. We cannot learn from their methods or replicate their results. Such research is not a *public* act. Whether or not it makes good reading, it is not a contribu-
tion to social science.106

III. AN EXPLORATORY STUDY: CONGRESS AND FAIR LENDING

The fair lending debate has focused both on allegations of discriminatory actions directed at individual applicants, and on allegations of discriminatory policies directed at neighborhoods or other geographic areas that are predominantly black or Hispanic. It is thus both a civil rights issue and a business reinvestment issue pursuant to government mandate.

Nationwide data on the extent of the possible discriminatory actions against individual loan applicants have been collected. The most recent data reported by the Federal Financial Institutions Examination Council is for calendar year 1995.107 During 1995 financial institutions rejected black mortgage loan applicants twice as often as white applicants.108 The disparity remained wide even when the data were adjusted for income.109 This disparity is as great, if not greater, than that documented by federal regulators more than twenty years ago.110

106. King et al., supra note 82, at 8.
108. See id. The rates of rejection for home purchase loans were 40.5% of mortgage applications of blacks, 29.6% of mortgage applications of Hispanics, and 20.6% of mortgage applications of whites. See id. For 1994, the rates of rejection for home purchase loans were 33.4% of mortgage applications of blacks, 24.6% of mortgage applications of Hispanics, and 16.4% of mortgage applications of whites. See Minority Applicants Gain on Home Loans, N.Y. TIMES, July 19, 1995, at D8.
See also FEDERAL HOME LOAN BANK BOARD, FAIR HOUSING INFORMATION SURVEY 1, at I.1-I.2 (1975), reprinted in ECOA Hearings, supra, at 646, 648-49. The Federal Home Loan Bank Board did similar studies in six other SMSAs and analyzed the data based on the ethnicity of applicants. The Federal Home Loan Bank Board found that rates for denial of loan applications were 18% for black applicants,
Federal prohibitions against discrimination based on race or ethnic origin were enacted almost thirty years ago, and have been revisited periodically. Yet, disparate lending remains a reality. Similarly, federal enactments addressing community disinvestment were enacted almost twenty years ago. In recent years, they have borne some fruit, causing a commitment of more than sixty-one billion dollars, largely in the 1990s. Claims of redlining remain, however. The case study presented below explores the policy responsiveness of the United States Congress during the 1967-1996 period on this issue of possible race-based disparity in lending decisions and in community disinvestment.

A second focus of the study is to compare the efforts of white and minority legislators. The aim is to gauge whether one group has been more responsive to the interests of minorities, or whether both groups, or at least sectors of both groups, have been equally responsive.

12% for Hispanic applicants, and 8% for white applicants. See id. at IV.1 tbl.1, reprinted in ECOA Hearings, supra, at 658.

111. See NATIONAL COMMUNITY REINVESTMENT COALITION, CRA DOLLAR COMMITMENTS SINCE 1977 (1995). The NCRC study documented more than $15.3 billion in commitments as a result of agreements negotiated with lenders, and $45.6 billion in voluntary commitments. NCRC noted that information on voluntary commitments is not complete (tending to focus on the largest banks) and therefore this figure substantially underestimates the actual number of commitments.

The Community Reinvestment Act was not enforced actively and was not subject to any significant community pressure, through actions such as protests of bank expansion applications, until the late 1980s. See Community Reinvestment Act: Hearings Before the Senate Comm. on Banking, Hous., and Urban Affairs, 100th Cong. 204, 209 (1988) (statement of Martha R. Seger, Member of the Board of Governors of the Federal Reserve System), reprinted in 74 FED. RESERVE BULL. 307, 310 (1988) (stating that three applications were protested in 1984 and the number of protests increased to 35 by 1987); see also Jonathan R. Macey & Geoffrey P. Miller, The Community Reinvestment Act: An Economic Analysis, 79 VA. L. REV. 291, 292 (1993) (noting that for many years the CRA was “little more than a vague statement of principle without much real-world effect”).

112. See, e.g., Judith Evans, Home Buyers Favor Suburbs Over Cities, WASH. POST, June 29, 1996, at E1, E2 (noting claims by the Housing Assistance Council that inner cities are experiencing redlining by mortgage lenders); Terence Samuel, Lender Accused of Redlining, PHILA. INQUIRER, Oct. 4, 1996, at C1 (discussing a complaint filed by the ACLU and the NAACP that accused one of the nation's largest mortgage lenders of redlining black neighborhoods).
A. The Congress: Policy Responsiveness of the Majority

1. Actions Taken

The following enactments are the significant actions taken by the Congress on fair lending and are the sources for this study:

- 1968 Fair Housing Act (FHA)\(^{113}\)
- 1974 Equal Credit Opportunity Act (ECOA)\(^ {114}\)
- 1975 Home Mortgage Disclosure Act (HMDA)\(^ {115}\)
- 1976 Amendments to the ECOA\(^ {116}\)
- 1977 Community Reinvestment Act (CRA)\(^ {117}\)
- 1988 Fair Housing Amendments Act\(^ {118}\)
- 1989 Amendments to the HMDA and the CRA\(^ {119}\)
- 1991 Amendments to the ECOA\(^ {120}\)

The 1968 FHA, the 1974 ECOA, and later amendments to these statutes are the legislative response to allegations of discrimination in lending against individuals.\(^ {121}\) The 1975 HMDA the 1977 CRA, and later amendments to these enactments are the legislative response to allegations of discrimination in lending against neighborhoods populated by minority residents.\(^ {122}\)

\[^{121}\text{See Banking Insurance, Credit Bill Cleared, 30 CONG. Q. ALMANAC 164, 166 (1974) (noting that the ECOA bars discrimination by creditors on the basis of sex or marital status); Congress Enacts Open Housing Legislation, 24 CONG. Q. ALMANAC 152, 154 (1968) (stating that the FHA prohibits discrimination in the provision or terms of real estate loans).}\]
\[^{122}\text{See $12.5 Billion Urban Aid Authorization Voted, 33 CONG. Q. ALMANAC 126,}\]
This list of enactments, including amendments, reveals three periods of activity: (1) initial action in 1968; (2) a subsequent period of further action and refinement of initiatives during the 1974-1977 period; and (3) a final period of reassessment and revision in the 1988-1991 period. This timeline reveals a fair degree of responsiveness, with periods of equilibrium interrupted by periods of turbulence as legislators recognize a need for change and as forces coalesce to shatter the inertia. Mere enactments, however, are an obviously insufficient measure of responsiveness. The reasons for action must be explored and the details of the enacted statutes must be examined in order to determine Congress's motivation for action and whether its response was weak or strong.

2. Legislative Details

The 1968 FHA contained a broad prohibition against discrimination in the financing of housing, as well as the sale and rental of housing. In that respect it was a gain for minority groups. However, the administrative and enforcement provisions in the FHA were weak. The Department of Housing and Urban Development (HUD) administered the FHA but it could not take enforcement action on its own; it could act only in response to a complaint. HUD's enforcement powers were limited to trying to "eliminate or correct the alleged discriminatory housing practice by informal methods of conference, conciliation, and persuasion." Moreover, HUD had to suspend its enforcement actions if state or local authorities were addressing the complaint. The Attorney General also had enforcement authority, but could only act when a "pattern or practice" of discrimina-

137 (1977) (noting that the CRA would require financial supervisory agencies to consider lenders' records of meeting the credit needs of low-income neighborhoods when deciding whether they could open new branches); Congress Clears 'Redlining' Legislation, 31 Cong. Q. Almanac 458, 458 (1975) (stating that the HMDA "responded to charges that lenders were 'redlining' certain city neighborhoods").
124. See id. § 804, 82 Stat. at 83.
125. See id. § 810, 82 Stat. at 85-86.
126. Id. § 810(a), 82 Stat. at 85.
127. See id. § 810(c), 82 Stat. at 86.
tion was found.\(^4\) Furthermore, the Attorney General's powers seemed limited to injunctive relief rather than the imposition of penalties.\(^5\) Finally, private parties also could enforce the FHA, but the statute imposed a 180-day statute of limitations on such actions.\(^6\) Resort to HUD proceedings was a prerequisite to the commencement of any civil action.\(^7\) Additionally, punitive damages in such actions were limited to one thousand dollars.\(^8\)

The 1974 ECOA did not mention discrimination based on either race or national origin.\(^9\) It was aimed at discrimination based on sex or marital status.\(^10\) Thus, it was not responsive to the interests of racial minorities. This shortcoming, however, was addressed by the 1976 amendments to the ECOA.\(^11\) As amended in 1976, the ECOA was in many respects a gain for minority groups over the earlier legal landscape created by the 1968 FHA. The amended ECOA prohibited discrimination on the part of any creditor, rather than only housing lenders.\(^12\) Lenders were required to provide reasons for any adverse action.\(^13\) Federal bank regulatory agencies had administrative examination and enforcement power under the banking statutes.\(^14\) Private civil actions were authorized, without any necessity to exhaust administrative remedies before commencing litigation.\(^15\)

\(^{128}\) See id. \(\S 813, 82\) Stat. at 88.
\(^{129}\) See id.
\(^{130}\) See id. \(\S 812(a), 82\) Stat. at 88.
\(^{131}\) See id. \(\S 810(d), 82\) Stat. at 86; see also id. \(\S 812(a), 82\) Stat. at 88.
\(^{132}\) See id. \(\S 812(c), 82\) Stat. at 88.
\(^{134}\) See id. \(\S 502, 88\) Stat. at 1521.
\(^{135}\) See Equal Credit Opportunity Act Amendments of 1976, Pub. L. No. 94-239, \(\S\) 701(a)(1), 90 Stat. 251 (1976) (codified as amended at 15 U.S.C. \(\S\) 1691) (providing that it is unlawful for any creditor to discriminate "on the basis of race, color, religion, national origin, sex or marital status, or age").
\(^{136}\) See id.
\(^{137}\) See id. \(\S 701(d)(2), 90\) Stat. at 252.
Punitive damage limitations were higher under the ECOA than under the FHA.\textsuperscript{140} Finally, the statute of limitations under the ECOA was two years.\textsuperscript{141}

After 1976, the deficiencies in the 1968 FHA remained. However, some of these deficiencies could be avoided by allegations of discriminatory lending, as opposed to discriminatory housing practices, by utilizing the ECOA. Of course, the limited ability of HUD or the Justice Department to enforce any fair lending claim remained unchanged. Perhaps Congress thought that the federal banking agencies could be relied upon to enforce the ECOA. Experience did not support this possible assumption.\textsuperscript{142} No sweeping conclusions about congressional responsiveness can be drawn from these activities, because the strengthening of antidiscrimination legislation that occurred in 1976 did not occur across the board—for both fair lending and fair housing. Congress left fair housing complaints, other than those involving lending discrimination, with a weak and ineffective enforcement mechanism for the next twenty years.

Congress revisited the issue of lending discrimination against individuals with the enactment of the Fair Housing Amendments Act of 1988.\textsuperscript{143} The amendments substantially strengthened the enforcement provisions of the FHA by granting HUD independent enforcement power for the first time,\textsuperscript{144} and by adopting an administrative enforcement vehicle,\textsuperscript{145} amendments also extended the statute of limitations for private parties from 180 days to two years,\textsuperscript{146} removed the exhaustion of ad-

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\textsuperscript{140} See id. § 706(b), 90 Stat. at 253-54 (establishing a $10,000 limit on punitive damages recovery to individuals and a limit of the lesser of $500,000 or one percent of the creditor's net worth in class action suits).

\textsuperscript{141} See id. § 706(f), 90 Stat. at 254.

\textsuperscript{142} See infra notes 150-55 and accompanying text.


\textsuperscript{144} See id. § 8, 102 Stat. at 1625 (authorizing the Secretary of HUD to investigate housing practices in order to determine whether a complaint should be filed, and enabling him to file a complaint on his own initiative); see also H.R. Rep. No. 100-711, at 16 (1988) (noting that under existing law, HUD even lacked the power to bring the parties to the conciliation table).

\textsuperscript{145} See Pub. L. No. 100-430, § 8, 102 Stat. at 1625-33 (granting HUD the authority to adjudicate complaints alleging FHA violations).

\textsuperscript{146} See id., 102 Stat. at 1693.
ministrative remedies requirement from the 1968 FHA, and removed the limitation on punitive damages. Finally, the amendments allowed the Attorney General to seek civil penalties.

In 1991, Congress again addressed lending discrimination against individuals by strengthening the enforcement provisions of the ECOA. The 1991 Amendment required federal bank examiners to notify either the Justice Department or HUD of possible violations, and authorized the Justice Department to seek actual and punitive damages for violations of the ECOA.

Since 1991, evidence has been collected on the persistent disparity in lending to white applicants as compared to minority applicants. Yet Congress has not responded further. One explanation for this inaction is that the antidiscrimination laws suffered from a lack of enforcement, in part due to lack of power. In Congress's view, this lack of power is now thought to have been remedied, and the need for greater commitment is not thought to require further legislative intervention.

On its face, congressional action against discrimination in lending policies to individuals reveals slow legislative responsiveness. Initial action was only mildly responsive because enforcement authority was so weak and enforcement power so limited. After twenty years, recent amelioration of these weaknesses reveals a more responsive commitment. This is not to say

147. See id.
148. See H.R. REP. NO. 100-711, at 40 ("The Committee believes that the limit on punitive damages served as a major impediment to imposing an effective deterrent on violators and a disincentive for private persons to bring suits under existing law.").
149. See Fair Housing Amendments Act § 8, 102 Stat. at 1634-35.
151. See id. § 223(c), 105 Stat. at 2306.
152. See id. § 223(b), 105 Stat. at 2306.
153. See supra notes 107-10 and accompanying text.
154. See H.R. REP. NO. 100-711, at 16 (1988) ("Existing law has been ineffective because it lacks an effective enforcement mechanism.").
155. See id. at 13 (stating that the Fair Housing Amendments Act of 1988 "seeks to fill [the void caused by the lack of an effective enforcement mechanism] by creating an administrative enforcement system").
that the final legislative product has effectively tackled lending discrimination against individuals. Only desire and commitment are explored in this study, however, not effectiveness of result.

Congress's other fair lending initiative addressed allegations of discrimination in lending based on the racial makeup of a neighborhood or other geographic area. The 1975 HMDA was the first legislation enacted to address this problem. It was a fact-gathering statute that required depository institutions to maintain certain records, and to make those records available to the public. The records were to contain information regarding the number of residential mortgage loans originated by the banks, broken down by census tract or zip code. The Federal Reserve Board was authorized to issue regulations implementing the HMDA.

The fact-gathering obligation was a gain for minority groups. The deficiencies in the statute were substantial, however. First, the HMDA provided no private right of action and no other express enforcement mechanism. Second, the data collected was not broken down by the race or ethnic origin of the mortgagor.

The 1977 CRA did not rectify these two deficiencies. The

156. Indeed, I have argued in a recent article that the statutes were not effective and could not be effective, because of the legislative insistence on a causation requirement. See Vincent Di Lorenzo, Complexity and Legislative Signatures: Lending Discrimination Laws As a Test Case, 12 J.L. & POL. 637 (1996).
158. See id. § 304, 89 Stat. at 1125-26.
159. See id.
160. See id. § 305(a), 89 Stat. at 1126.
161. See id. § 305, 89 Stat. at 1126-27 (failing to provide any express enforcement mechanism within the HMDA, although providing that compliance with the HMDA could be enforced under other statutes). The Committee report does not speak of finding and ending discrimination policies by specific lending institutions. See H.R. REP. NO. 94-561, at 14 (1975). It speaks instead of "identify[ing] the beginning stages of redlining, the point at which a neighborhood can be saved [and] provid[ing] a vehicle for neighborhood residents, public officials and financial institutions to enter into partnerships with each other in joint efforts to plan reinvestment strategies . . . ." Id.
CRA primarily reaffirmed the existing obligation of depository institutions to serve the needs of their communities, although it emphasized that this obligation includes serving credit needs.\textsuperscript{164} It also reconfirmed that the federal bank regulatory agencies must assess compliance with this obligation in their examinations.\textsuperscript{165} This reconfirmation and emphasis was itself a gain for minority groups, but this legislation also had its deficiencies. The CRA did not authorize public disclosure of bank examiners’ findings and did not create a private right of action.\textsuperscript{166} In addition, no express enforcement obligations were imposed on the federal bank regulatory agencies, but instead they were merely required to take the bank’s community reinvestment record “into account” when evaluating an application for bank expansions.\textsuperscript{167}

In 1989, Congress revisited the issue of neighborhood lending discrimination. As part of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Congress amended both the HMDA and the CRA.\textsuperscript{168} In both cases, the amendments resulted in gains for minority groups. The HMDA was extended to apply to all mortgage lenders, including mortgage companies, rather than being limited to banking institutions.\textsuperscript{169} For the first time, these mortgage lenders were required to collect and report information on the income, race, and gender of applicants.\textsuperscript{170} The CRA was amended to require public disclosure of portions of agency evaluations, including the ratings of institutions’ record of meeting community needs.\textsuperscript{171}

Overall, Congress’s responsiveness to the issue of neighborhood lending discrimination has been weak. The nature of the response has been limited and self-defeating, involving fact-gathering only. Initially, no facts on race were even collected, and no

\textsuperscript{165} See id. § 802(a), 91 Stat. at 1147.
\textsuperscript{166} See id. § 802(b), 91 Stat. at 1147; id. § 804, 91 Stat. at 1148.
\textsuperscript{167} See id. tit. VIII, 91 Stat. at 1147-48.
\textsuperscript{168} See id. § 804, 91 Stat. at 1148.
\textsuperscript{170} See id. § 1211(d), 103 Stat. at 525.
\textsuperscript{171} See id. § 1211(a)(3), 103 Stat. at 524.
public disclosure of the facts were required to be made. The relevant legislation never has created an express private enforcement right or a public enforcement duty.

3. Actions Refused

There are various possible explanations for the weak responsiveness of Congress outlined in Part III.A.2.—rival hypotheses to that of weak legislative heart. One explanation might be that the legislative agenda contained no stronger proposals. Table Three presents a tally of all of the proposed fair lending bills, other than the enacted statutes, and a tally of bills that were more responsive to the interests of minorities. Table Three reveals that in almost all of the years studied, the majority of bills proposed—in most years a supermajority—were more responsive to minority interests than the enacted legislation. These alternative proposals did not fare well in the legislative process, however. Of the seventy-five “more-responsive” bills introduced in the 1967-1996 period, two bills were reported out of committee but never passed either house of Congress, and two bills were passed by one house.

Two bills reported out of committee in 1980, H.R. 5200 and S. 506, sought to strengthen the enforcement provisions of the FHA. H.R. 5200 passed the House, and might have passed the Senate but for Senate rules that permitted a filibuster coupled with an inability to obtain the sixty votes required to invoke cloture. The House and, seemingly, a majority of the Senate thus were responsive to the interests of minorities by trying to amend the FHA as early as 1980. Ultimately, this does not change, though it may modify, our understanding of the twenty-year period of congressional inaction documented in Part II.

172. Infra pp. 1786 tbl.3.
176. See Nadine Cohodas, Failure To Vote Cloture Kills Fair Housing Bill, 38 CONG. Q. WKLY. REP. 3544 (1980) (noting that the cloture vote was 54 to 43).
Congress never has shown significant support for further strengthening the CRA and the HMDA. The closest Congress came to providing additional support was when the House Banking Committee reported H.R. 5094 in 1988.\textsuperscript{177} That bill would have removed agency discretion under the CRA, requiring rejection of expansion applications if banks had a poor CRA rating.\textsuperscript{178} This provision was added to a bill that expanded banks' securities underwriting power.\textsuperscript{179} The bill, however, never obtained approval from the Senate Banking Committee. Indeed, Senator Proxmire, chair of that committee and chief sponsor of the CRA, disfavored changing the law.\textsuperscript{180}

The final proposal, S. 3049, passed the Senate in 1990 but was never reported out of committee in the House.\textsuperscript{181} The bill sought to strengthen the ECOA.\textsuperscript{182} Many of its provisions found their way into the 1991 amendment to the ECOA. The 1991 amendment dropped the provision creating a consumer compliance program in each federal banking agency, which aimed to improve oversight.\textsuperscript{183}

This evidence on the number and frequency of “more responsive” bills, and the actions taken or not taken with regards to these bills, may lead to debate on whether any further congressional responsiveness existed in addition to that documented through enactments. It is clear, however, that stronger proposals were included in the legislative agenda, but were not enacted.

Two more hypotheses remain to be explored that might rival

\textsuperscript{178} See id. at 2099. The bill required the Federal Reserve Board to deny a bank holding company's application to buy a bank in another state, unless the holding company and its bank had an “excellent” or “good” community reinvestment rating. See id. Banks with an “average” rating could have their applications approved only if the banks made specific financial commitments to their community. See id.
\textsuperscript{179} See id. at 2096.
\textsuperscript{180} See John R. Cranford, Banks Upset by Price Tag on Deregulation Bill, 46 CONG. Q. WKLY. REP. 796, 797 (1988) (“[Senator] Proxmire . . . seems content to turn up the heat on the regulators without changing the law. It's more realistic to try to get the present law enforced,” he said . . . .”).
\textsuperscript{181} See generally 136 CONG. REC. 17,472 (1990) (noting that S. 3049 passed the Senate).
\textsuperscript{182} See id. (statement of Sen. Dixon).
that of weak legislative heart: First, perhaps Congress believed that it had enacted effective, strongly responsive legislation; or second, maybe Congress was unable to enact stronger legislation for reasons unrelated to weak legislative heart. The next section explores these hypotheses.

4. Reasons Given and Perceived

In order to determine the motivation behind the legislative enactments and thus assess the legislative heart of the Congress, a search was conducted of the Congressional Quarterly Weekly Reports for the 1967-1996 period. In addition, for the years in which bills were enacted, a search also was conducted of the Congressional Quarterly Almanac. All articles that discussed fair lending or fair housing initiatives were collected. Finally, for all years in which bills were enacted, a search of the Congressional Record was conducted to obtain all statements by black and Hispanic members of Congress regarding pending legislation. These three sources are the source materials for this section of the Article, as well as for Part II.B.2, the section that discusses the advocacy efforts of individual members of Congress.

a. The Initial Enactment: 1968

President Johnson repeatedly called for civil rights legislation including fair housing provisions, beginning in 1966.184 His proposals' enforcement provisions, however, were a curious example of compromise. They required HUD to attempt to seek a voluntary solution for discriminatory real estate practices, but then allowed an administrative hearing and issuance of a cease-and-desist order if a voluntary settlement could not be

184. See, e.g., President Lyndon B. Johnson, State of the Union Message (Jan. 12, 1966), in 22 CONG. Q. ALMANAC 1206, 1207 (1966) (proposing legislation "to prohibit racial discrimination in the sale or rental of housing"); see generally 1966 Civil Rights Act Dies in Senate, 22 CONG. Q. ALMANAC 450 (1966) (discussing the Johnson Administration's 1966 Civil Rights bill, the most controversial provision of which was the open housing provision).
reached.\textsuperscript{185}

As originally passed by the House, on August 16, 1967, the bill that ultimately would become the 1968 Act\textsuperscript{186} did not contain a fair housing provision.\textsuperscript{187} The fair housing provisions were added in a Senate amendment that was nearly identical to a Johnson Administration open housing bill.\textsuperscript{188} Some legislators believed that the amendment would lead to defeat of the entire civil rights bill.\textsuperscript{189} The bill as amended became subject to a Senate filibuster.\textsuperscript{190} That filibuster was stopped only after Senator Mondale, sponsor of the open housing amendment, and Senator Dirksen, the Senate Minority Leader who had consistently opposed the Mondale amendment, worked out a compromise measure.\textsuperscript{191} That compromise omitted the enforcement power that HUD had received in the Mondale amendment.\textsuperscript{192} After the compromise bill passed the Senate and was sent back to the House, some legislators supported sending it to conference, where it could be further amended, perhaps resulting in the deletion of the fair housing provisions.\textsuperscript{193} Ultimately, however, this did not occur.\textsuperscript{194}

Congress thus comprehended the 1968 FHA's weaknesses. The weaknesses were deliberate—compromises made in order to avoid complete defeat. Moreover, in the House, the compromise

\textsuperscript{185} See President Lyndon B. Johnson, Special Message to the Congress on Equal Justice, 1 PUB. PAPERS 184, 190 (Feb. 15, 1967).

\textsuperscript{186} H.R. 2516, 90th Cong. (1967).

\textsuperscript{187} See Bill to Protect Civil Rights Workers Passes House, 23 CONG. Q. ALMANAC 778, 779-80 (1967).

\textsuperscript{188} See Congress Enacts Open Housing Legislation, supra note 121, at 156-57.

\textsuperscript{189} Senate Majority Leader Mike Mansfield stated: "I don't think we have the votes for an open housing amendment and if we got into a fight on that, it would endanger the chances of Title V [HR 2516] which is in trouble enough as it is." Id. at 156.

\textsuperscript{190} See id. at 157 (noting that a cloture motion was defeated on February 20, 1968).

\textsuperscript{191} See id. at 156-59.

\textsuperscript{192} See id. at 159. On its fourth attempt at cloture, the Senate adopted the motion by exactly the 65 votes needed. See id. at 160.

\textsuperscript{193} See id. at 164-65 (discussing actions of the House Rules Committee and division among House Republicans). "Most observers believed that the bill would have been weakened in conference and that Senate opponents of the bill might have been able to delay or obstruct a vote on accepting a conference report, thus killing the legislation." Id. at 164.

\textsuperscript{194} See id. (noting that the House voted to accept the Senate amendments without change).
was not forced upon a membership strongly committed to a more responsive bill. Rather, the House membership was not certain that it was committed to any open housing legislation.

b. The First Period of Turbulence: 1974-1977

The 1974 ECOA was the first bill enacted during this period of turbulence. It prohibited discrimination by all creditors but only on the basis of sex or marital status. The Senate had passed such a prohibition in 1973, but it stalled in the House Banking and Currency Committee.\textsuperscript{195} In 1974, the Senate amended a House banking bill to add consumer protection provisions, including an equal credit provision aimed at sex or marital status.\textsuperscript{196} These Senate amendments were accepted in conference.\textsuperscript{197} When the issue again came before the House, Representative Leonor K. Sullivan, Chair of the Subcommittee on Consumer Affairs, criticized the Senate amendment for failing to protect the elderly, minorities, and religious groups against similar discrimination.\textsuperscript{198} Objections were waved aside, however because "Banking and Currency Committee Chairman Wright Patman (D Texas) and other committee members argued that with little time left in the session the conference report on HR 11221 presented the only opportunity for enacting restraints on sex discrimination."\textsuperscript{199} Congress therefore was aware that the bill enacted in 1974 did not extend its protections to minorities, but no strong motivation arose to expand its coverage. The House initially had not passed any consumer protection provisions, while the Senate proposals that ultimately made their way to the final bill were directed at, and motivated by, a desire to address the specific issue of discrimination against women.

\textsuperscript{195} See Banking Insurance, Credit Bill Cleared, supra note 121, at 169 (discussing the earlier Senate bill that would have barred sex discrimination in credit transactions); see also Consumer Credit Protection, 29 CONG. Q. ALMANAC 410 (1973) (reviewing the Senate consumer protection bill and its treatment in Congress).

\textsuperscript{196} See Senate Tacks Spending Ceiling onto Bank Bill, 32 CONG. Q. WKLY. REP. 1616, 1617 (1974).

\textsuperscript{197} See Banking Insurance, Credit Bill Cleared, 32 CONG. Q. WKLY. REP. 2922, 2924 (1974).

\textsuperscript{198} See id.

\textsuperscript{199} Id.
The 1975 HMDA was the second piece of legislation in the turbulent 1974-1977 period of legislative action on fair lending. The proposed bill was always a disclosure-only bill. Many Republicans opposed even this disclosure requirement. Republican-led efforts to transform the bill into a three-year demonstration survey in a limited number of cities were rejected by a narrow margin of 40 to 41 in the Senate and 165 to 167 in the House. Congress thus intended to pass a disclosure-only bill, not a bill more responsive to minority interests.

The third enactment during this period of turbulence was amendment of the ECOA. The House had passed a version of the ECOA Amendment in 1975 that was weaker than the final 1976 enactment. The 1975 Amendment was brought before the House and passed by a voice vote, under a suspension-of-rules procedure. This procedure required a two-thirds vote for passage, and did not allow any amendments other than those included in the motion to suspend the rules. According to one subcommittee member, this procedure was used because the chair of the subcommittee who had pressed for the measure felt that "the House would be more likely to accept floor amendments to weaken the bill rather than those to strengthen it." Overall, the House probably desired a weaker, not stronger, measure than that which was ultimately enacted. In the Senate, the bill was strengthened to meet many of the criticisms of Representative Sullivan, former chair of the House Subcommittee on Consumer Affairs. In 1976, Congress thus was aware of ear-

200. Senate Banking, Housing, and Urban Affairs Committee Chairman, William Proxmire, who sponsored the legislation, stated: "There is no need to order a bank to make loans in certain neighborhoods, or to set up new enforcement bureaucracy. Disclosure is a better approach.... Once citizens know which banks are redlining their neighborhoods, they are likely to favor institutions that treat the community fairly." Elizabeth Bowman, Neighborhood Decay: Is 'Redlining' a Factor?, 33 CONG. Q. WKLY. REP. 1040 (1975).
201. See Congress Clears 'Redlining' Legislation, supra note 122, at 461.
202. See id. at 463-64.
204. See id.
205. See id.
206. Id. (quoting Representative Leonor K. Sullivan's statement regarding the sentiments of Subcommittee Chairman Frank Annunzio).
207. See Equal Credit Opportunity, 32 CONG. Q. ALMANAC 443, 443-44 (1976)
lier criticisms of the 1974 Act's shortcomings, and strengthened the new legislation in order to meet these criticisms. The legislature may have believed that it was passing an effective bill—a responsive bill. Certainly no member proposed further strengthening modifications at the time of the bill's passage.

The final enactment during the 1974-1977 period of turbulence was the CRA, which eventually was included in a bill focusing on amendments to the Community Development Act of 1974. The Administration and House bills did not mention community reinvestment. That provision was added by the Senate Banking Committee, in the form that ultimately was adopted. A more responsive proposal was never offered by the Senate Banking Committee or the Senate itself. The main proponent of the bill, Senator Proxmire, wanted only to reaffirm existing obligations. As he put it: "[T]he section was included 'to reaffirm that banks and thrift institutions are indeed chartered to serve the convenience and needs of their communities . . . and needs does not just mean drive-in teller windows and Christmas Club accounts. It means loans.' Debate centered on the aid formulas to be used under the Community Development Act and not on the community reinvestment provision. In conference, when a compromise was reached on the aid formula, the House members also accepted the community reinvestment provisions as part of the compromise.

When Congress enacted the CRA, it was not interested in passing a more responsive bill. The House did not even consider a community reinvestment requirement until it emerged as an issue in the conference committee's compromise proposal. Neither did the Senate advocates responsible for the measure push for a more responsive bill. The source materials mention no con-

(discussing the provisions of the 1976 bill that was signed into law); see also Equal Credit Opportunity, 31 CONG. Q. ALMANAC 582, 583 (1975) (presenting Representative Sullivan's criticisms of the 1974 credit discrimination provisions).

208. See $12.5-Billion Urban Aid Authorization Voted, supra note 122, at 126, 130.
209. See id. at 130-33.
210. See id. at 133-34.
211. Id. at 136.
212. See id. at 136-37 (describing deadlock over aid formulas).
213. See id. at 137.
gressional criticism of the measure's shortcomings. The only apparent criticism was by trade groups who wanted to remove the measure entirely.\footnote{See id. at 136 (reporting Senator Proxmire's statement that the redlining provision had been the target of intensive lobbying and scare tactics by some trade associations).}

In three of the four enactments during the 1974-1977 period, therefore, Congress was aware of the bills' limitations but deliberately chose to adopt the measures with their weaknesses intact. Only with regard to the 1976 Act is it possible that Congress was unaware of the Act's deficiencies, thinking that they were adopting a strong measure.


The 1988 amendment to the FHA was the first enactment made during this second period of turbulence. Civil rights groups wanted an improved enforcement mechanism utilizing only administrative law judges, and the bill reported by the House Judiciary Committee reflected this approach.\footnote{See Nadine Cohodas, Clear Sailing Forecast for Fair-Housing Bill, 46 CONG. Q. WKLY. REP. 1729, 1729-30 (1988).} Prior to the bill's passage by the House, however, a compromise was reached that permitted a choice between administrative proceedings or civil action in the case of failed HUD mediation efforts.\footnote{See id.} Absent this compromise, the bill faced serious trouble on the House floor.\footnote{See id. at 1730 ("The version of HR 1158 approved by the Judiciary Committee April 27 included only the administrative-law-judge procedure, but Rep. Don Edwards, D-Calif., and civil rights lawyers knew they would have serious trouble on the House floor unless some sort of compromise was worked out.")} The compromise measure achieved the support of the Republican administration\footnote{See Congress Clears Fair-Housing Bill, 46 CONG. Q. WKLY. REP. 2289 (1988).} and avoided the opposition of the National Association of Realtors, who had helped to block the 1980 fair housing reform bill.\footnote{See Nadine Cohodas, Prognosis Good as Housing Bill Goes to Senate, 46 CONG. Q. WKLY. REP. 1838 (1988); see also Cohodas, supra note 215, at 1729 (noting that the National Association of Realtors opposed the original bill's administrative-law-judge-only scheme).} As a result, it passed both the House and
Senate by lopsided votes.\textsuperscript{220}

The Congress seemed willing to enact fair housing legislation in 1988, but support for the more responsive original bill preferred by the civil rights community was missing. Once again, Congress was aware of the options but consciously chose a compromise measure.

The Bush Administration opposed the 1989 amendments to the CRA and the HMDA, and those provisions were not included in the Senate bill.\textsuperscript{221} In the House, the Banking Committee had rejected the proposed amendments and reported a banking bill without them.\textsuperscript{222} However, an amendment to the House bill was adopted on the floor by a close margin.\textsuperscript{223} This last minute amendment permitted the provisions to be a part of the thrift bailout bill that went to conference, where the provisions survived.\textsuperscript{224} Congress never considered stronger measures with respect to the CRA and the HMDA; it was barely willing to consider the measures that were adopted.

The 1991 strengthening of the ECOA had its genesis in the Senate in 1990.\textsuperscript{225} In the House, the bank overhaul bill, of which the 1991 amendment became a part, made no mention of the ECOA.\textsuperscript{226} The Senate considered an amendment to remove the provisions from the final bill, but rejected it.\textsuperscript{227} The House considered no other changes to the ECOA or the FHA, but the change adopted by Congress was a knowing, deliberate one.

In the debates surrounding the bank overhaul legislation, one

\textsuperscript{220} See Congress Clears Fair-Housing Bill, supra note 218.


\textsuperscript{222} See John R. Cranford, House Banking's Bailout Bill Toughens Rules for S&Ls, 47 CONG. Q. WKLY. REP. 1022, 1025 (1989).

\textsuperscript{223} See Cranford, Bills Differ, supra note 221, at 1584 (noting that the vote was 214 to 200).

\textsuperscript{224} See Sweeping Thrift Bailout Cleared, 45 CONG. Q. ALMANAC 117, 130-32 (1989).

\textsuperscript{225} See Bill Targets Discrimination in Mortgage Lending, 48 CONG. Q. WKLY. REP. 2392 (1990).

\textsuperscript{226} See John R. Cranford, Banking Overhaul Bill, 49 CONG. Q. WKLY. REP. 1924, 1929 (1991) (discussing the consumer provisions of the Banking Committee bill).

\textsuperscript{227} See John R. Cranford, Lawmakers Go to the Wire on Bank Overhaul Bill, 49 CONG. Q. WKLY. REP. 3439, 3442 (1991).
other fair lending change was proposed. Representative Kennedy suggested that banks with disparate lending records should be required to develop plans to lend to minorities.\(^{228}\) The proposal was rejected soundly.\(^{229}\)

The House and Senate considered various changes to the CRA, but adopted none. Indeed, in the initial mark-up of the bank overhaul legislation, the House Banking Committee had abandoned efforts to alter the CRA.\(^{230}\) As of the last enactment in 1991, Congress had not evidenced a mood to further strengthen fair lending requirements. They had strengthened the FHA and ECOA in 1988 and 1991, but had repeatedly rejected attempts to strengthen the CRA and HMDA.

In summary, little evidence exists to support the rival hypothesis that reasons unrelated to weak legislative heart prevented Congress from enacting stronger measures. The one possible exception is the 1968 FHA, where a filibuster had to be overcome. Yet, support for any fair housing bill, let alone a stronger fair housing bill, was quite weak, thereby casting into doubt even this example of a rival hypothesis. The time pressures of the legislative calendar that faced the 1974 ECOA fail to qualify as a second possible exception, because legislators exhibited no desire or commitment to consider a stronger measure. Such a measure simply was not included in the legislative agenda.

In addition, little support exists for the rival hypothesis that Congress believed, at the time that the eight statutes discussed were enacted, that they were enacting strong, responsive legislation. The possible exceptions are the 1976 and 1991 amendments to the ECOA and the 1988 amendment to the FHA. Experience after 1976 quickly revealed, however, that such a view of the ECOA was not justified. Thus, the conclusion remains that Congress responded slowly to individual fair lending problems, and never was committed to enacting a strong response to community fair lending problems.

\(^{228}\) 137 CONG. REC. 8947-50 (1991).
\(^{229}\) See id. at 8956-57 (reporting that the Kennedy amendments were rejected by a vote of 152 to 241).
5. Feedback and the Legislative Environment

Congressional action and inaction must be viewed contextually. The context that this Article focuses on involves the experience of government agencies and private parties in applying the statutes and Congress's knowledge of shortcomings in the statutes or their application. The former is part of the legislative environment for further change, which focuses on the internal environment. The latter results from feedback, which itself forms a part of the legislative environment for further action.

At times, administrative interpretation and application of a statute may compensate for its deficiencies, sufficiently protecting interested parties, and making the need for legislative modification less pressing. At other times, court interpretation and application of a deficient statute may enhance the protection it offers interested parties. Neither of these possibilities has occurred with respect to the fair lending statutes.

The courts have not been important players in developing the fair lending prohibitions. Their role in applying the CRA has been to defer to agency decisions. In the FHA/ECOA arena,
courts have been faced with limitations inherent in the statute and the small number of agency or private actions that have been initiated. In this situation, the courts' role is inherently constrained. They cannot find violations when no action has occurred, or force commencement of actions on their own initiative. If nonlegislative action were to strengthen the effectiveness of fair lending enactments, the actor would need to be the administrative agencies.

Federal agencies have infrequently initiated fair lending actions alleging violations of the FHA/ECOA. The federal bank regulatory agencies obtained the power to enforce the ECOA through the periodic bank examination process. Very few banks have been cited for violations. The Comptroller of the Currency, for example, conducted 3437 consumer compliance examinations during a two-year period from 1987 to 1989 and did not cite any institution for illegal discrimination in real estate lending.\(^{233}\) The experience of the Federal Reserve Board has been similar.\(^{234}\)

Finally, the regulatory agencies historically have not referred cases to the Justice Department for action.\(^{235}\) In turn, the Jus-

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234. During 1987-1991, the Federal Reserve Board examined 3721 banks. It cited the following number of institutions for violations of the ECOA:

<table>
<thead>
<tr>
<th>Year</th>
<th>Violations Based on Race/National Origin</th>
<th>Violations Based on Sex</th>
<th>Number of Banks Involved</th>
</tr>
</thead>
<tbody>
<tr>
<td>1989</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>1990</td>
<td>5</td>
<td>5</td>
<td>1</td>
</tr>
<tr>
<td>1991</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>1992</td>
<td>3</td>
<td>3</td>
<td>2</td>
</tr>
<tr>
<td>1993</td>
<td>7</td>
<td>7</td>
<td>7</td>
</tr>
<tr>
<td>1994</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
</tbody>
</table>

Letter from Alan Greenspan, Chairman, Federal Reserve Board, to Joseph P. Kennedy II, Chairman, House Subcommittee on Consumer Credit and Insurance (Dec. 30, 1994); available in LEXIS, Bnkng Library, Bnkng File (search: Kennedy and “fair lending law*” and date is 4/12/95).

235. See Problems in Community Development Banking, Mortgage Lending Discrimination, Reverse Redlining, and Home Equity Lending: Hearings Before the Senate Comm. on Banking, Hous., and Urban Affairs, 103d Cong. 532, 537 (1993) (state-
tice Department brought no actions alleging lending discrimination, in violation of the FHA/ECOA, until September 1992.\footnote{See Fair Lending Enforcement and the Data on the 1992 Home Mortgage Disclosure Act (HMDA); Hearings Before the Senate Comm. on Banking, Hous., and Urban Affairs, 103rd Cong. 53, 54 (1993) (statement of Janet Reno, Attorney General).} In recent years, prompted by the Clinton Administration, the Justice Department has brought a handful of cases without waiting for referrals from the bank regulatory agencies.\footnote{See Keith Bradsher, Regulators Join Banks in Protesting U.S. Discrimination Suits, N.Y. TIMES, Oct. 30, 1994, at A34.} The agencies have responded by protesting the Justice Department's initiative.\footnote{See id.}

Various explanations have been offered for this history of agency inaction. Asserted reasons for inaction have included lack of power, lack of commitment, lack of training and time allowed for adequate examinations, and the difficulty of uncovering evidence of wrongdoing. Regardless of their stated reasons, or their inability or unwillingness, the conclusion remains that vigorous agency action has not compensated for any of the statutory deficiencies.\footnote{The Justice Department has been an exception to this rule, but only within the last several years. See supra notes 150-52 and accompanying text. An example of the Justice Department's recent activity is its action against Chevy Chase Federal Savings Bank, arguing for the first time that failure to locate bank branches in predominantly black neighborhoods is itself a violation of federal fair lending laws. See Jerry Knight, U.S., Chevy Chase FSB Discussing Bias Probe, WASH. POST, Aug. 20, 1994, at F1.}

The experience with the CRA has been the same. It is frequently stated that the only enforcement possible under the CRA is denial of a merger or expansion application,\footnote{See, e.g., Thomas P. Vartanian et al., Proposed CRA Rules Go Beyond Clear Boundaries of Law, 13 BANKING POLY REP. 1, 14 (1994).} but this is not true. If the federal bank regulatory agencies wished to apply the CRA aggressively, a violation of any banking statute could lead to a cease-and-desist order. Only twice, however, has a federal regulator issued a cease-and-desist order on CRA grounds.\footnote{See Kenneth H. Thomas, Is CRA Enforcement Consistent?, AM. BANKER, May 1, 1992, at 4 (noting that the 1992 Farmers and Merchants Bank cease-and-desist order was the second such order issued).}
Similarly, merger or expansion applications have been denied infrequently. During the first ten years of the CRA's existence, only eight of 50,000 bank expansion applications were denied on CRA grounds. In recent years, including the period of increased emphasis on CRA enforcement prompted by the Clinton Administration, denials have increased. Nevertheless, only seventeen denials have occurred since 1989. Greater agency commitment can be detected from the number of merger or expansion applications recently approved with CRA-related commitments or conditions imposed. The General Accounting Office quickly acknowledged, however, that "regulatory guidance states that commitments can only remedy specific problems in an otherwise satisfactory CRA record and cannot be the basis for the

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242. See Cranford, supra note 180, at 796.
243. The General Accounting Office reported the following data for 1989-1994:
Applications and CRA-Related Denials by Regulatory Agencies from 1989 Through 1994 (A = Applications, D = Denials)

<table>
<thead>
<tr>
<th>Year</th>
<th>FRB A</th>
<th>FDIC D A</th>
<th>OCC D A</th>
<th>OTS D</th>
</tr>
</thead>
<tbody>
<tr>
<td>1989</td>
<td>761</td>
<td>1</td>
<td>2056</td>
<td>0</td>
</tr>
<tr>
<td>1990</td>
<td>696</td>
<td>0</td>
<td>2099</td>
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<td>1991</td>
<td>551</td>
<td>1</td>
<td>1899</td>
<td>0</td>
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<td>1992</td>
<td>619</td>
<td>1</td>
<td>1891</td>
<td>0</td>
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<tr>
<td>1993</td>
<td>821</td>
<td>2</td>
<td>2181</td>
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<tr>
<td>1994</td>
<td>826</td>
<td>0</td>
<td>2883</td>
<td>3</td>
</tr>
</tbody>
</table>

GENERAL ACCOUNTING OFFICE, COMMUNITY REINVESTMENT ACT: CHALLENGES REMAIN TO SUCCESSFULLY IMPLEMENT CRA 30 tbl.1.6 (1995). The low number of applications denied does not reflect a lack of community protests. See id. at 32. For example, during the years 1993-1994, 192 applications were filed with protests lodged against them and only one protested application was denied. See id. at tbl.1.8.

244.

Number of Applications Approved with CRA-Related Commitments or Conditions from 1989 Through 1994

<table>
<thead>
<tr>
<th>Year</th>
<th>FRB Approved with commitments</th>
<th>FDIC Approved with commitments</th>
<th>OCC Approved with conditions</th>
<th>OTS Approved with conditions</th>
</tr>
</thead>
<tbody>
<tr>
<td>1989</td>
<td>5</td>
<td>0</td>
<td>15</td>
<td>2</td>
</tr>
<tr>
<td>1990</td>
<td>6</td>
<td>0</td>
<td>26</td>
<td>1</td>
</tr>
<tr>
<td>1991</td>
<td>7</td>
<td>0</td>
<td>18</td>
<td>1</td>
</tr>
<tr>
<td>1992</td>
<td>4</td>
<td>0</td>
<td>20</td>
<td>0</td>
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<tr>
<td>1993</td>
<td>9</td>
<td>0</td>
<td>18</td>
<td>0</td>
</tr>
<tr>
<td>1994</td>
<td>22</td>
<td>1</td>
<td>11</td>
<td>1</td>
</tr>
</tbody>
</table>

Id. at 31 tbl.1.7.
the approval of an application.\textsuperscript{245}

Few explanations have been offered for this history of inaction in applying the CRA. Critics have contended that such inaction reflects a lack of commitment.\textsuperscript{246} Regardless of the explanation, again the conclusion is that agencies did not compensate for the deficiencies in the statute via aggressive interpretation and application of its prohibitions.

In recent years, the Clinton Administration has pressured regulatory agencies to enforce the fair lending laws more rigorously. In addition, community protests of bank mergers and expansions have increased, and have exacted "voluntary" community reinvestment commitments.\textsuperscript{247} Curiously, the regulators' response has been to urge an easing of CRA examinations.\textsuperscript{248} This confirms that future agency action is unlikely to strengthen the CRA, and actually might weaken it further.

The administrative experience in implementing a statute relates to legislative policy responsiveness through feedback and subsequent action or inaction. Congressional hearings examined the weak enforcement structure of the FHA/ECOA as early as 1978.\textsuperscript{249} Congress repeatedly revisited not only the experiences

\textsuperscript{245} Id. at 30.
\textsuperscript{247} See id. at 297-98.
\textsuperscript{248} See Keith Bradsher, Shift Seen in U.S. Stance on Loans in Poor Areas, N.Y. TIMES, Oct. 31, 1995, at D1 (discussing the Comptroller of the Currency's plan to eliminate some of the more time-consuming features of the CRA examination guidelines, which will result in less detailed regulatory examinations); Saul Hansell, Fed Proposal Would Ease Some Regulations for Banks, N.Y. TIMES, Aug. 24, 1996, at A38 (stating that the Federal Reserve Board's proposed rules seek to ease the regulatory burden on banks).
of the federal agencies in enforcing both the FHA/ECOA and the CRA, but also the issue of a possible lack of commitment on the agencies' part. 250 Congress never took action to improve the

FHA, however, until 1988. Congress never took action on the CRA. Even though Senator Proxmire, the original sponsor of the CRA, was highly critical of the sparse enforcement of the Act,251 he did not favor strengthening the statute.252

B. Individual Members: Comparative Policy Responsiveness of White and Minority Members

Part III of this study compares the legislative heart of non-Hispanic white, and black or Hispanic members of Congress, using three forms of evidence. The analysis first collects and studies legislative proposals that are more responsive to minority interests than the current legislative landscape. “More responsive” proposals reflect a greater desire and commitment than the levels that generally exist in Congress. The study then explores advocacy efforts in the course of legislative consider-
ation of current statutes. These efforts also permit comparisons with the desire and commitment of Congress generally. Additionally, they may permit comparison between individual white and black or Hispanic members in the context of individual legislative initiatives, including the efforts made to influence the specific details of an enactment. Finally, the study compiles voting record ratings of black and Hispanic members following the 1992 legislative redistricting. This compilation updates and permits comparison with the earlier study conducted by Swain.253

The first two types of evidence come from the study of fair lending legislation during the 1967-1996 period. The third type of evidence is broader in scope, covering voting records on many legislative proposals during the 1993 and 1994 legislative sessions.

1. Proposals for Action

The bills introduced in Congress were collected for the period between January 1967 and June 1996.254 The collection includes all bills dealing with the fair lending issues discussed in this Article. Bills on related policy issues, such as community development banks or assistance for low income housing, were not included unless they also dealt with fair lending issues.

Table Three summarizes the findings with respect to sponsorship of more responsive bills. Any bills actually enacted into law were excluded because sponsorship and advocacy of enacted legislation is analyzed separately. Enacted legislation formed the baseline for comparison in the session in which it was enacted, and in all later sessions. Bills were deemed "more responsive" to the interests of minority groups if they provided a greater scope of coverage or protection, or greater remedies than the baseline.

253. See SWAIN, supra note 5; supra notes 55-67, 72-76 and accompanying text.
254. In the 1967-1989 period, the source was Digest of Public General Bills and Resolutions. In the 1990-1996 period, the source was Commerce Clearing House Congressional Index.
### TABLE THREE

**Fair Lending Bills Introduced During 1967-1996**

<table>
<thead>
<tr>
<th>Year</th>
<th># of Bills Introduced</th>
<th>Bills “More Responsive” to Interests of Minority Groups</th>
<th>Black/Hispanic Members Only</th>
<th>White Members Only</th>
<th>Both Black/Hispanic and White Members</th>
</tr>
</thead>
<tbody>
<tr>
<td>1967</td>
<td>12</td>
<td>8</td>
<td>2</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>1968</td>
<td>5</td>
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<td>4</td>
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<td>1969</td>
<td>1</td>
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<td>1970</td>
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<td>1985</td>
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<tr>
<td>1995</td>
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<td>1996</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>115</strong></td>
<td><strong>75</strong></td>
<td><strong>7</strong></td>
<td><strong>54</strong></td>
<td><strong>14</strong></td>
</tr>
</tbody>
</table>
Table Three reveals congressional interest in fair lending throughout the 1967-1996 period, and a consistent commitment on the part of some representatives to obtain more responsive legislative enactments. Table Four correlates this responsiveness to the total number of black and Hispanic members of Congress (both House and Senate) during four periods—the three periods of legislative turbulence and the recent period after race-based redistricting.

**TABLE FOUR**

*More Responsive Bills Introduced During 1967-1996*

<table>
<thead>
<tr>
<th>Year</th>
<th># of Black and Hispanic Members of Congress*</th>
<th># of &quot;More Responsive&quot; Bills</th>
<th>% of Total Bills That were &quot;More Responsive&quot;</th>
<th>% of &quot;More Responsive&quot; Bills Sponsored by White Members Only</th>
</tr>
</thead>
<tbody>
<tr>
<td>1967-1968</td>
<td>9</td>
<td>12</td>
<td>70.1</td>
<td>58.3</td>
</tr>
<tr>
<td>1974-1977</td>
<td>21-22</td>
<td>13</td>
<td>51.9</td>
<td>64.3</td>
</tr>
<tr>
<td>1988-1991</td>
<td>31-36</td>
<td>10</td>
<td>71.4</td>
<td>70</td>
</tr>
<tr>
<td>1993-1996</td>
<td>56-58</td>
<td>3</td>
<td>37.5</td>
<td>33.3%</td>
</tr>
</tbody>
</table>

*Excluding non-voting delegates, and Adam Clayton Powell, Jr., whom the House refused to seat in the 90th Congress

No linear correlation exists between the total number of black and Hispanic members and the total number of more responsive bills. Similarly, no linear correlation exists between the total number of black and Hispanic members and the percentage of

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255. The initial period includes both 1967 and 1968, even though legislation was enacted only in 1968, because consideration of the bill spanned the 1967-1968 period and because any one-year-only interval may yield a distorted picture.
all proposed bills that were more responsive. This indicates that minority membership does not affect the total number or percentage of more responsive proposals.

Tables Three and Four, however, do reveal an important impact of black and Hispanic members on the legislative process, in the form of disproportionate commitment generally, and disproportionate voice in a conservative body specifically. Seventy-two percent of all of the more responsive bills introduced between 1967 and 1996 were sponsored by white members only. This reveals responsiveness among white members, but also reveals a disproportionate commitment on the part of black and Hispanic members. The complexity characterizing legislative dynamics will result in variations in this percentage figure from year to year. The long time period of this study more accurately reflects differences in commitment.

During the 1967-1996 period, the total black and Hispanic membership of Congress (including both the House and the Senate, excluding nonvoting delegates) went from 1.7% in 1967, to 4.1% ten years later (1977), 5.8% twenty years later (1988) and rose to 10.5% in recent years (1996) after redistricting. The disproportionate commitment is reflected by the fact that twenty-eight percent of the more responsive bills were either sponsored or co-sponsored by black or Hispanic members, while black or Hispanic members constituted, at most, one-tenth of Congress.

In addition, bills that were more responsive to minority interests were sponsored predominantly by white members until a combination of Republicans and conservative Democrats acquired control of Congress in November, 1992. Thereafter, the percentage of more responsive bills sponsored or co-sponsored by black and Hispanic members jumped from the thirty to forty-two percent range to sixty-six percent. Again, this was a period

256. See supra notes 68-69, 78-81 and accompanying text (discussing the findings of Cobb and Jenkins's study of legislation beneficial to minorities).
257. See supra p. 61 tbl.4 (listing the number of black and Hispanic members of Congress).
258. The small number of bills in the 1993-1996 period might be responsible for this change. A similar pattern is found, however, in the 1990-1992 period. This period, which preceded Republican control of Congress, also had a small number of bills, yet 80% of the bills could be considered "more responsive," and 50% of the bills
in which such members constituted only 10.5% of the Congress.

The analysis of individual members' legislative heart does not seek to predict enactment. Rather, it seeks to measure responsiveness in the form of legislative voice. The evidence of more responsive proposals indicates an even greater significance for black and Hispanic legislative voice in a conservative, Republican Congress.

2. Advocacy Efforts in Committee and on the Floor

Looking beyond the numbers of more responsive bills proposed, it is useful to examine the individuals who actively supported the more responsive measures that were reported by committee and thus became part of the legislative agenda, although not enacted. In addition, it is useful to examine individual advocacy efforts in connection with the fair lending enactments.

The first stage of this analysis considers legislators' advocacy efforts for the four "more responsive" bills on the legislative agenda. Two of these bills, introduced in 1980, sought to strengthen the FHA. The 1980 effort began in the House with H.R. 2540, sponsored by Representative Don Edwards (D. Calif.) and Representative Robert F. Drinan (D. Mass.).\textsuperscript{259} The House Subcommittee on Civil and Constitutional Rights approved an amended bill that was stronger than the original proposal, and was designated H.R. 5200.\textsuperscript{260} The House Judiciary Committee reported the bill on March 4, 1980.\textsuperscript{261} The bill significantly increased HUD's enforcement powers,\textsuperscript{262} and was supported by civil rights groups and the Carter Administration.\textsuperscript{263}
In the House, Representative Edwards was ready to fight for the bill.\textsuperscript{264} Representatives John F. Seiberling (D. Ohio) and Hamilton Fish, Jr. (R. N.Y.) also played roles in avoiding dilution of its provisions, by sending a letter to all House members opposing any exemption for real estate appraisers.\textsuperscript{265}

On June 12, 1980, the House passed H.R. 5200.\textsuperscript{266} The final vote was 310 to 95, but during the intense floor struggle, a one-vote margin avoided possible emasculation of the new enforcement powers.\textsuperscript{267}

In the Senate, a companion bill (S. 506) had been introduced by Birch Bayh (D. Ind.), chair of the Judiciary Committee’s Constitution Subcommittee.\textsuperscript{268} The measure was supported by Howard M. Metzenbaum (D. Ohio), another subcommittee member.\textsuperscript{269} However, Bayh repeatedly was unable to get a quorum in subcommittee, in order for a mark-up to occur.\textsuperscript{270} Finally, a weakened bill was approved.\textsuperscript{271} The Senate Judiciary Committee approved by voice vote a version of S. 506 that more closely resembled the House bill.\textsuperscript{272} In the Senate, the bill was supported by Bayh and Edward M. Kennedy (D. Mass.), who met with opponents of the measure as well as Republican supporters Jacob K. Javits (R. N.Y.) and Charles McC. Mathias, Jr. (R. indent Carter’s Domestic Policy Staff members, indicating that the Administration saw the bill as “the highest civil rights priority”).

\textsuperscript{264} See id. at 1178.

\textsuperscript{265} See id.

\textsuperscript{266} See Cohodas, \textit{supra} note 262, at 1613.

\textsuperscript{267} See \textit{id}. The amendment would have shifted administrative law judges (ALJs) from HUD to the Justice Department; prohibited recent HUD investigators from being appointed as ALJs; prohibited firing an ALJ except through government personnel procedures; and required HUD to refer all zoning and land-use cases to the attorney general. See \textit{id}. The amendment’s sponsors claimed that their proposal would strengthen existing law, but opponents believed it would gut the bill. \textit{See id}.

\textsuperscript{268} See \textit{Fair Housing Bill Stalled in Senate Panel, supra} note 261, at 812.

\textsuperscript{269} See \textit{id}.

\textsuperscript{270} See \textit{Fair Housing Setbacks, 38 CONG. Q. WKLY. REP. 1410 (1980)} (reporting that Senator Bayh failed to obtain a quorum for seventh time in nine months, provoking him to claim that the “Republicans [were] determined not to have a fair housing bill”).

\textsuperscript{271} See Nadine Cohodas, \textit{Senate Judiciary Panel Significantly Weakens New ‘Fair Housing’ Bill, 38 CONG. Q. WKLY. REP. 1570 (1980)} (explaining that the weakened version contained a number of amendments strongly opposed by civil rights groups).

\textsuperscript{272} See \textit{Fair Housing Bill Approved, 38 CONG. Q. WKLY. REP. 2162 (1980)}. 

Md.), to attempt to negotiate their differences. The bill died in the Senate, however, when it faced filibuster and failure to obtain a cloture vote.

The 1988 proposal, H.R. 5094, attempted to strengthen the CRA by requiring regulators to deny expansion applications if a bank had a poor CRA rating. Its chief proponent was House Banking Committee chairman Fernand J. St. Germain (D. R.I.). In committee, his strongest allies were Robert Garcia (D. N.Y.), Walter E. Fauntroy (D. D.C.), Joseph P. Kennedy II (D. Mass.), and Charles E. Schumer (D. N.Y.).

The last bill to make it out of committee was S 3049, which was sponsored by Senator Alan Dixon (D. Ill.), and was passed by the Senate in 1990. This bill, introduced in 1990, sought to strengthen the ECOA and to establish separate consumer compliance programs in each federal bank regulatory agency. Many of the provisions strengthening the ECOA were included in the bill enacted by Congress in 1991. However, the consumer compliance program was not.

These legislative proposals were considered in 1980, 1988, and 1990. Black and Hispanic members of Congress were active only with the 1988 legislative proposal; one Hispanic member and one black non-voting delegate from the District of Columbia served as advocates.

274. See Cohodas, supra note 176 (noting that the motion to invoke cloture failed by a vote of 54 to 43).
275. See Cranford, supra note 177, at 2099. "The bill would require the Federal Reserve Board to deny a bank holding company's application to buy a bank in another state or to expand securities or other permitted affiliate activities, unless the holding company and its bank have an 'excellent' or 'good' community reinvestment rating." Id. Banks with an "average" rating "could" be approved if the banks made specific financial commitments to their communities. Id.
276. See Cranford, supra note 180, at 796. The committee's ranking Republican, Chalmers P. Wylie (R. Ohio), co-sponsored the bank deregulation bill of which this was a part, but did not favor the CRA amendment. See id. at 797.
277. See id.
279. See id. at 17,472-73.
The second stage of this analysis considers legislators' advocacy efforts in connection with the eight fair lending enactments. This inquiry focuses on efforts to obtain a measure more responsive to minority interests than that which was enacted, or efforts to avoid further dilution or defeat of the measure that was enacted. Such efforts reveal a commitment—a legislative heart—that was greater than the commitment of Congress generally. However, efforts to place an initiative on the legislative agenda and press for its enactment also reveal legislative heart—as an initiator of action—even if the proposal was not more responsive than the law that ultimately was enacted.

a. The Initial Enactment: 1968

Two forces supported a strong enactment—a law more responsive than the FHA as enacted. These forces were the lobbying efforts of Clarence Mitchell of the Leadership Conference on Civil Rights, and the advocacy efforts of white members of Congress, particularly in the Senate, as well as the efforts of Senator Brooke (R. Ma.), the only black member of the Senate.

281. See supra notes 113-20.

In less than three months from the day the 90th Congress began its second session on Jan. 15, open-housing legislation was transformed from a goal which almost no one interested in the subject thought remotely attainable in 1968 to public law . . . .

In talks with many of the individuals who followed the three-month battle, Congressional Quarterly learned that the transformation was due in large part to the efforts of Clarence M. Mitchell Jr., the chief lobbyist for the Leadership Conference on Civil Rights. Seldom has an individual lobbyist been accorded so much credit for the outcome of a bill as was Mitchell, who was also Washington director of the National Assn. for the Advancement of Colored People (NAACP). There was considerable agreement among the persons who talked to CQ about the 1968 civil rights battle that Mitchell was the catalyst who organized and kept together the forces that passed the bill.

Id.

283. See id.

After lobbying fruitlessly for most of 1967, [Clarence] Mitchell scored his first breakthrough Dec. 15 when the Senate leadership made a House-passed bill (HR 2516) protecting civil rights workers the first order of Senate business for 1968. Mitchell and other key officials of the Leadership Conference, an organization of 115 church, labor, civil rights and
Senator Mondale (D. Minn.) was the primary, vocal Senate advocate of more responsive provisions. Mondale pressed a strong open housing measure onto the legislative agenda as an amendment to the House bill that was before the Senate and that contained no open housing provision.\footnote{See Senate Passes Civil Rights Open Housing Bill 26 CONG. Q. WKLY. REP. 509 (1968). The Mondale amendment was co-sponsored by Senator Brooke, the only black member of the Senate. See id. Other Senators involved in the lobbying efforts for a strong bill were Hart (D. Mich.), Tydings (D. Md.), Javits (R. N.Y.), Percy (R. Ill.), and Scott (R. Pa.). See Effective Lobbying Put Open Housing Bill Across, supra note 282, at 166.} However, Senator Mondale was not the sole initiator-advocate. Both Senators Mondale and Brooke spoke forcefully of the need for a fair housing bill,\footnote{See 114 CONG. REC. 2274-84 (1968).} with Brooke bringing to the attention of the Senate the grim state of housing available to many black Americans.\footnote{See id. at 2525-26.} The offered fair housing amendment had many co-sponsors, but Mondale and Brooke were its main sponsors.\footnote{Cf id. at 3082 (noting additional cosponsors of the fair-housing amendment).}

Senator Brooke was co-sponsoring an open housing bill that the Republican leadership opposed.\footnote{See Congress Enacts Open Housing Legislation, supra note 121, at 156. Minority Leader Dirksen consistently opposed the Mondale amendment, but later agreed to a compromise open housing measure. See id. at 157-58. In spite of Dirksen's opposition, however, the voting results of an unsuccessful cloture motion and a motion to table the amendments showed substantial Republican support for the civil rights bill and the open housing proposal. See id. at 157.} That act alone demonstrated strong legislative heart. On the floor, Brooke battled against amendments to the proposal that would have weakened it.\footnote{See, e.g., 114 CONG. REC. 5826 (1968) (discussing a substitute amendment that would protect only black veterans and servicemen).} In addition, thirty-six liberal Senators led the fight...
against an amendment by Senator Ervin that would have excluded all activities that involved only state or local benefits, services, and facilities from coverage under the civil rights measure. \(^{290}\) In the House, the advocacy position responsive to minority interests was one that sought to avoid further dilution of the Senate bill by avoiding a conference.\(^{291}\) The advocacy efforts of Representatives Emanuel Celler (D. N.Y.), Richard Bolling (D. Mo.), Charles E. Goodell (R. N.Y.), and Albert H. Quie (R. Minn.),\(^{292}\) as well as the Democratic Study Group, chaired by James G. O'Hara (D. Mich.) were instrumental in preventing a conference on the bill.\(^{293}\)

During the 1967-1968 period, there were two black or Hispanic members of the Senate and seven black or Hispanic members of the House.\(^{294}\) The only one of these members to exhibit strong advocacy efforts for minority-responsive proposals was Senator Brooke.

\(b. \) The First Period of Turbulence: 1974-1977

In the debate surrounding the 1974 ECOA, the only member of Congress who advocated a bill more responsive to minority interests was Representative Leonor K. Sullivan (D. Mo.), chair of the Subcommittee on Consumer Affairs. The proposal to include not only women but also minority groups within the scope of the equal credit opportunity bill originally was sponsored by Sullivan, Henry Gonzalez (D. Tex.), Parren Mitchell (D. Md.), and Andrew Young (D. Ga.).\(^{295}\) Only Representative Sullivan, however, pressed for passage of this broader bill, from 1974 through 1976. She commended the proposed bill for barring credit discrimination against women, but criticized it for failing

\(^{290}\) See Congress Enacts Open Housing Legislation, supra note 121, at 156.

\(^{291}\) See id. at 164-65.

\(^{292}\) See id. at 165. The work of Charles E. Goodell and Albert H. Quie, who organized Republican support for the Senate bill, was one of the key factors in the House outcome. See Effective Lobbying Put Open Housing Bill Across, supra note 282, at 165.

\(^{293}\) See Effective Lobbying Put Open Housing Bill Across, supra note 282, at 167-68.


\(^{295}\) See H.R. 14,856, 93d Cong. (1974).
to protect the elderly, minorities, and religious groups against similar discrimination.296

Advocacy of the 1975 HMDA came from Senate Banking Committee Chair William Proxmire, who sponsored the legislation.297 A similar bill was introduced in the House by Representative John Joseph Moakley.298 However, these bills were no more responsive than the enactment, because they were also disclosure-only bills.299 The advocacy effort for more responsive measures came almost exclusively from community and civil rights groups.300

Senator Brooke, the only black member of the Senate in 1975, was the only Republican on the Senate Banking Committee to vote to approve the Proxmire bill instead of a proposal by Republican Senator Jake Garn (R. Utah) simply to require the Federal Home Loan Bank Board to study redlining problems in selected cities.301 Just as he had done in connection with the 1968 Fair Housing Act, Senator Brooke was willing to ignore party positions in order to support measures more protective of minority interests. In the House, the only advocacy effort for a more responsive enactment was the proposed amendment by Andy Jacobs, Jr. to require disclosure by lenders not only of mortgage loans approved, but also of written loan requests.302

In the 1976 amendment to the ECOA, the primary advocate for more responsive legislation was Representative Sullivan, who repeatedly criticized the 1974 ECOA and the subsequent House proposals aimed at strengthening its provisions, and repeatedly pressed for more responsive amendments.303 A secondary advocate might be Representative Frank Annunzio (D. Ill.), who brought the bill to the floor under a suspension of rules procedure in order to avoid any weakening of the bill via floor amend-

296. See Banking Insurance, Credit Bill Cleared, supra note 197, at 167.  
297. See Bowman, supra note 200, at 1040. Senator Proxmire was described as "an important ally" of community groups targeting redlining. See id.  
298. See id. at 1042.  
299. See id. at 1040.  
300. See id. at 1040-41.  
302. See Congress Clears Redlining Legislation, supra note 122, at 463.  
303. See Equal Credit Opportunity, supra note 207, at 583.
ments. The bill was further strengthened in the Senate and in conference, but no particular individual is identified in the source materials as responsible for these changes.

Senator Proxmire was the source of the 1977 community reinvestment initiative. He sponsored an anti-redlining bill, and as chair of the Senate Banking Committee, caused its provisions to be included in the proposed amendment to the Community Development Act. His proposal was only slightly more responsive than the enacted initiative, containing more reporting requirements. Nonetheless, his initiation of the enactment demonstrates concern for minority interests. In conference, Senators Williams and Brooke advocated use of an aid formula that would benefit older cities.

During the 1974-1977 period, there were two black or Hispanic Senators and nineteen to twenty black or Hispanic members of the House. Once again, only Senator Brooke demonstrated advocacy efforts for more responsive legislation. A few black and Hispanic members spoke in favor of the more responsive legislation, but only in general terms, not in a way that would distinguish their efforts from any other member who voted for passage.

c. The Second Period of Turbulence: 1988-91

Congress revised the enforcement provisions of the FHA in 1988. Representative Don Edwards again urged enactment of strong enforcement provisions in the FHA, a measure which the civil rights community desired. In the House, Representative Hamilton Fish, Jr. also played an important role. He was

304. See id.
305. See Kathryn Waters Gest, Senate Action Slated on Urban Aid Bill, 35 CONG. Q. WKLY. REP. 1121, 1122-23 (1977) [hereinafter Gest, Senate Action Slated]; Kathryn Waters Gest, Senate Extends Urban Aid, Housing Programs, 35 CONG. Q. WKLY. REP. 1193 (1977).
306. See Gest, Senate Action Slated, supra note 305, at 1122.
307. See Kathryn Waters Gest, Compromise Reached on Urban Aid Bill, 33 CONG. Q. WKLY. REP. 2079 (1977) (naming Senators Williams and Brooke as co-sponsors).
309. See id.
the sole Republican voting in committee to approve the administrative law judge procedure that civil rights groups preferred, rather than a trial procedure.\textsuperscript{310} His approval was crucial during the final committee mark-ups.\textsuperscript{311}

In the Senate, the chief sponsor of the legislation was Edward Kennedy (D. Mass.).\textsuperscript{312} The only other advocates who played key roles in forging a compromise were Vice President George Bush\textsuperscript{313} and HUD Secretary Samuel R. Pierce, Jr.\textsuperscript{314} Of course, their support was merely for the compromise measure, but it was nevertheless important in making action possible.

The 1989 amendments to the CRA and the HMDA were championed by two members of the House, Henry B. Gonzalez (D. Tex.) and Joseph P. Kennedy II (D. Mass.). Both had sought to introduce the provisions into the House thrift bailout bill while it was being considered by the House Banking Committee, but their proposals were rejected.\textsuperscript{315} Kennedy raised the issue again when the House was considering the bill and was able to secure a close victory for an amendment adding the provisions to the final bill adopted by the House.\textsuperscript{316} The provisions survived the House-Senate conference, no doubt due to the continued ef-

\begin{itemize}
\item \textsuperscript{310} See id.
\item \textsuperscript{311} See Nadine Cohodas, \textit{Fish Plays Pivotal but Difficult Judiciary Role}, \textit{46 Cong. Q. Wkly. Rep.} 1160 (1988) (stating that Edwards would not proceed until Fish, the ranking Republican on the House Judiciary Committee, told him that he was satisfied with the bill's major provisions).
\item \textsuperscript{312} See \textit{Compromise Fair-Housing Bill Is Cleared}, \textit{44 Cong. Q. Almanac} 68, 73 (1988).
\item \textsuperscript{313} See id. at 68. Bush urged President Reagan to endorse the bill, which he did, enabling the vice president to claim credit for enactment of an important civil rights measure. See id.
\item \textsuperscript{314} See id. at 73 (observing that the final compromises in the Senate were settled during a round of meetings, with most of the negotiations taking place in Secretary Pierce's conference room).
\item \textsuperscript{315} See Cranford, supra note 222, at 1025. Gonzalez was able to obtain committee approval of an amendment to the bill to "require the Federal Home Loan Banks to earmark a portion of the loans they make to thrifts to help finance mortgages for low-income families." See John R. Cranford, \textit{Fight To Relax Capital Rules Expected on House Floor}, \textit{47 Cong. Q. Wkly. Rep.} 1306, 1308 (1989). This provision was contained in the bill finally enacted. See \textit{Sweeping Thrift Bailout Bill Cleared}, supra note 224, at 121.
\item \textsuperscript{316} See \textit{House Votes}, \textit{47 Cong. Q. Wkly. Rep.} 1584 (1989). The vote was 214 to 200, divided as follows: Republicans voted 42 to 127; Democrats split 172 to 73; with Northern Democrats voting 140 to 29 and Southern Democrats 32 to 44. See id.
\end{itemize}
forts of Banking Committee chair Gonzalez, as well as Committee member Kennedy.\textsuperscript{317}

In 1991, there were two distinct pressures for change, one involving the ECOA and the other involving the CRA. The former led to the 1991 amendment to the ECOA and had its genesis in the Senate. In 1990 Senator Dixon (D. Ill.) had sponsored a bill, reported by the Senate Banking Committee, to further strengthen the ECOA's enforcement provisions.\textsuperscript{318} Many of its provisions found their way into the Senate bank overhaul bill that Congress took up in 1991.\textsuperscript{319} The Senate counterpart of that bill, with its fair lending amendments, was championed by Donald Riegle, Jr. (D. Mich.), chairman of the Senate Banking Committee. Riegle also fought to retain the bill's consumer protection provisions, including fair lending, when an amendment to strike them was raised on the floor.\textsuperscript{320}

Another pressure point was the CRA. Two contrary movements surfaced, one to scale back the CRA and another to strengthen it. Representative Joseph P. Kennedy II was the chief proponent of the latter course of action. In subcommittee, he obtained an amendment to impose new antiredlining standards on banks opening branches across state lines or affiliating with securities firms.\textsuperscript{321} When the full Committee rejected this proposal, Kennedy vowed to press the issue on the House floor.\textsuperscript{322} In committee, Kennedy also successfully moved to strike from the bill a provision that would have exempted more than half of all banks from the HMDA's reporting requirements.\textsuperscript{323} Finally, on the House floor, Kennedy sponsored an amendment to force banks to develop minority-lending plans in cases where data revealed a disparity in their lending patterns, but this proposal also was rejected.\textsuperscript{324}

\begin{thebibliography}{9}


\bibitem{321} See Cranford, \textit{supra} note 230, at 1649.

\bibitem{322} \textit{See id.} at 1650-51.


\bibitem{324} \textit{See John R. Cranford, Banking Overhaul Losing Ground to Complexity, Contro-}
The House Banking Subcommittee on Financial Institutions had also accepted a proposal to scale back the CRA. However, through the efforts of Henry B. Gonzalez, chair of the House Banking Committee, and led by Maxine Waters (D. Cal.), consumer advocates on the committee brokered a deal to strike all amendments to the CRA, including both those curtailing its reach (sponsored by Kanjorski) and those strengthening its provisions (sponsored by Kennedy). The Democratic leadership, who refused to accept any roll-back in the protections afforded by the CRA, supported this effort.

In the 1988-1991 period, there were no black or Hispanic senators and thirty-one to thirty-six black or Hispanic members of the House, excluding nonvoting delegates. During this period, only Henry B. Gonzalez and Maxine Waters emerged as strong advocates. Other black or Hispanic legislators made many general statements in support of more responsive proposals, but none of these general statements qualifies as a strong advocacy effort.

Implications of the evidence regarding advocacy efforts of individual members of Congress are discussed in Part III.C of this Article. For the moment, the analysis requires one additional piece of evidence, the last part of the puzzle.

3. Voting Records Generally

This section updates Swain's analysis of voting record ratings of black members of Congress and expands it to include Hispanic members. In her study, Swain analyzed COPE and Leadership Conference on Civil Rights (LCCR) ratings for the 100th Congress (1987-1989). This was the period before the substantial increase in minority House membership that resulted

325. See John R. Cranford, House Panel's Overhaul Bill Is a Sweep for White House, 49 CONG. Q. Wkly. Rep. 1355, 1357 (1991). A pair of amendments by Representative Kanjorski (D. Pa.) would have had the effect of exempting 92% of banks from the scope of the CRA. See id. This included an amendment granting a two-year "safe harbor" to any bank with a "satisfactory" or better CRA rating. See id.
326. See Cranford, supra note 230, at 1650.
327. See id.
328. See supra notes 64-66 and accompanying text.
329. See SWAIN, supra note 5, at 14.
from race-based redistricting. This Article analyzes the same data for the 103d Congress (1993-1995), the period following the increase in minority membership.

Two ratings were collected: AFL-CIO ratings\(^3\) and LCCR ratings\(^3\). The former measures support for redistributive policies. The latter measures support for civil rights initiatives. Table Five contains the results for all black and Hispanic members of Congress.

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\(^3\) The source of the ratings was \textit{Politics in America: 1996, 104th Congress.}
\(^3\) The source of the ratings was Leadership Conference on Civil Rights, \textit{Civil Rights Voting Record for the 103rd Congress.}
### B. Black Members of the Senate

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### C. Hispanic Members of the House

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<tr>
<td>Robert Menendez (NJ)</td>
<td>100</td>
<td>89</td>
<td>100</td>
</tr>
<tr>
<td>Bill Richardson (NM)</td>
<td>92</td>
<td>78</td>
<td>86</td>
</tr>
<tr>
<td>Nydia M. Velazquez (NY)</td>
<td>100</td>
<td>100</td>
<td>100</td>
</tr>
</tbody>
</table>
For black members of the House, Table Five confirms the uniformly high ratings found by Swain. Excluding Republican Gary Franks (R. Conn.), the AFL-CIO voting record ratings average 97.8 for 1993 and 90.7 for 1994, while the LCCR voting record ratings for the two year period 1993-1994 average 95.6. This compares with an average score of 99.3 and 90.8 for AFL-CIO and LCCR ratings respectively, reported by Swain in the 100th Congress. Table Five also reveals that these very high individual ratings exist for both Northern and Southern black members. Swain found that among Democrats, the disparity between black members generally, or between black Southern members and white Southern members, was quite large. The 103d Congress contained many more black Southern members than the 100th Congress studied by Swain. Table Five demonstrates the same very high AFL-CIO and LCCR voting record ratings among black Southern Democrats. Evidence of the large difference between the LCCR and AFL-CIO voting record ratings of black Southern Democrats and Southern Democrats in the 103d Congress is found in Appendix A. The differences in voting record ratings thus are found not only in a single year or session, but are found in many years.

Table Five contains similarly high ratings among Hispanic members of the House, although not as high as those of black members. Excluding Republican members, the average AFL-CIO voting record ratings were 93.5 for 1993 and 78.4 for 1994. The average LCCR ratings were 89.4 for the 1993-1994 period. This is closer to the average found by Swain for all white Northern

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332. See SWAIN, supra note 5, at 234-35 app. C.
333. Swain found that the average AFL-CIO and LCCR voting record ratings for white Southern Democrats were 80.2 and 72.7, respectively. See id. at 57 tbl.3.3. There were three black Southern Democrats in Swain's sample, and their AFL-CIO and LCCR ratings averaged 96.8 and 91, respectively. See id. at 234-35 app. C.
Democrats in the 100th Congress.\textsuperscript{334} Excluding Texas Hispanic Democrats, the average AFL-CIO voting record ratings of Hispanic members rose to 96.0 in 1993 and 81.8 in 1994, while the average LCCR rating for 1993-1994 rose to 95.8. Both figures are higher than the average ratings found by Swain for white Northern Democrats in the 100th Congress.\textsuperscript{335} The AFL-CIO and LCCR voting record ratings of Texas Hispanic Democrats are, on average, about the same as those earlier found by Swain for white Southern Democrats.\textsuperscript{335}

Table Five reveals a final indicator of strong legislative heart, apart from these numerical differences in average ratings. A substantial number of individual black and Hispanic members received a rating of 100 for every year in question. The individuals with a 100 rating are often the same in each year.

\textbf{TABLE SIX}

\textit{Percentage of Democratic Black or Hispanic Members Receiving a 100 Rating}

<table>
<thead>
<tr>
<th>Voting Record Ratings</th>
<th>Black House Members</th>
<th>Hispanic House Members</th>
</tr>
</thead>
<tbody>
<tr>
<td>AFL-CIO - 1993</td>
<td>76.5</td>
<td>42.8</td>
</tr>
<tr>
<td>AFL-CIO - 1994</td>
<td>47</td>
<td>21.4</td>
</tr>
<tr>
<td>LCCR 1993-94</td>
<td>55.9</td>
<td>50</td>
</tr>
</tbody>
</table>

Similarly, in Swain's analysis of the voting record ratings in

\textsuperscript{334} In the 100th Congress, the ratings for white members of the House were:

<table>
<thead>
<tr>
<th></th>
<th>AFL-CIO Rating</th>
<th>LCCR Rating</th>
</tr>
</thead>
<tbody>
<tr>
<td>Northern Democrats</td>
<td>92.7%</td>
<td>90.3%</td>
</tr>
<tr>
<td>Southern Democrats</td>
<td>80.2</td>
<td>72.7</td>
</tr>
<tr>
<td>Northern Republicans</td>
<td>37.5</td>
<td>43.1</td>
</tr>
<tr>
<td>Southern Republicans</td>
<td>14.6</td>
<td>13.1</td>
</tr>
</tbody>
</table>

\textit{See id.} at 57.

\textsuperscript{335} See \textit{id.}

\textsuperscript{336} See \textit{id.} The AFL-CIO voting record ratings of the Democratic, Hispanic members from Texas averaged 87.25 for 1993 and 69.75 for 1994, or 78.5 for the combined 1993-1994 period. Their LCCR voting record ratings averaged 73.25 for the 1993-1994 period. Florida Hispanic members were all Republicans. No Southern state had a Hispanic Democratic member. \textit{See id.}
the 100th Congress, she found that nineteen of twenty-two (86.4%) black representatives had AFL-CIO ratings of 100.337 She also found that ten of twenty-two (45.4%) black representatives had LCCR ratings of 100.338

What would be the effect of race-based districting that would further raise the number of minority members? Cameron, Epstein, and O'Halloran have provided one answer to the question by estimating the expected effect on LCCR scores.339 They concluded:

[I]n states with few districts or few minority voters [the drawing of district boundaries has] little effect on the representation scores of the state's congressional delegation. Gerrymanders would make an appreciable difference, however, in states with a high percentage of black voters, especially in the South. In Louisiana the difference is 21.3 points, in Mississippi, 23.3 points, in South Carolina, 19.9 points, and so on. The overall national effect on LCCR scores, weighing the swing in each state by its seats in the U.S. House, would be 13.1. We therefore conclude that the representation effects estimated above are not only statistically significant but also substantively important in a number of states.340

C. Phase Transitions: Nonlinearity and Critical Mass

Like so much of chaos itself, phase transitions involve a kind of macroscopic behavior that seems hard to predict by looking at the microscopic details. When a solid is heated, its molecules vibrate with the added energy. They push outward against their bonds and force the substance to expand. The more heat, the more expansion. Yet at a certain temperature

337. See id. at 234-35 app. C.
338. See id.
339. See Cameron et al., supra note 32, at 808-09 & tbl.7. Their estimates are based on increasing the number of minority candidates elected to office, by using districts with the percentage of black voters that they calculate would maximize election possibilities. See id. at 807. These districts would contain less than 65% minority populations, but nonetheless would be gerrymandered based on race. See id. at 807-08.
340. Id. at 808.
and pressure, the change becomes sudden and discontinuous. . . . Crystalline form dissolves, and the molecules slide away from one another. They obey fluid laws that could not have been inferred from any aspect of the solid. The average atomic energy has barely changed, but the material—now a liquid, or a magnet, or a superconductor—has entered a new realm.  

During 1967-1991, the number of black and Hispanic members of Congress increased. The recognizable role of these members on the fair lending policy debate changed very little, however. White members of Congress were primarily responsible for advocacy of the initiatives enacted, as well as other more responsive initiatives that were the subject of negotiation and debate.

One might conclude that individual white members of Congress demonstrated a strong legislative heart for minority interests and served those interests as well as black or Hispanic members. This conclusion would support the Supreme Court’s opinion in Shaw v. Reno, stating that race should not matter. However, two pieces of evidence raised questions about this conclusion even during the 1967-1991 period, suggesting a greater desire and commitment to serve minority interests among black and Hispanic members than among even liberal white members. First, voting record ratings by the AFL-CIO and by the LCCR were significantly higher for black members, and voting record ratings by the SWVRI were higher for Hispanic members than for Congress generally. They were also higher than the voting record ratings of any subcategory, particularly Southern Democrats, but even including Northern Democrats. Second, black and Hispanic members consistently proposed more responsive bills, in numbers disproportionate to their membership numbers in the Congress.

After the race-based redistricting following the Supreme Court’s Voting Rights Act decisions and the elections of 1992,

341. GLEICK, supra note 87, at 127.
344. See supra note 66 and accompanying text.
345. See supra notes 254-58 and accompanying text.
the number of black and Hispanic members of the House jumped from thirty-four in 1988-1989 and thirty-six in 1991, to between fifty-five and fifty-eight in the 1993-1994 and 1995-1996 sessions. What was the result? Did the number of minority members reach a critical mass that led to a difference in the impact of black and Hispanic representatives on the legislative process? I answer this question by completing the analysis of participants in the fair lending debate during the 1993-1996 period.

1. Critical Mass: Committee Viewpoint

The first effect of achieving a critical mass would be on the viewpoint and agenda of particular committees affected by the change. For example, there was a change in the overall philosophy of the House Banking Committee during the 1993 legislative session.

With a slew of retirements, defeats and defections, and a freshman class that makes up nearly half its membership, the House Banking Committee has a new look—and what promises to be a new agenda less friendly to the nation's financial institutions.

The committee has lost a core of moderate Democrats who were strong allies of the financial services industry. Replacing them are a host of urban Democrats, many of them black and Hispanic, with sharply different priorities. . . .

The upshot is likely to be a stronger focus on housing, community development and consumer and small-business credit issues, with less interest in the traditional priorities of the banking industry. 347

In interviews with new black members of the Committee, the repeated focus was on more loans for neighborhoods as well as small and minority-owned businesses. 348

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348. See id. at 209-10.
Achieving a critical mass is particularly important in the House. Richard Fenno has documented that policy individualism is actually reinforced by conditions in the Senate. 349 In the House, it is less likely to be allowed, either on the floor or in committee. 350 Moreover, individual House members’ influence on chamber decisions occurs almost entirely within committees. 351 A policy initiative strongly favoring minority interests that is not supported by the House or by a noticeable portion of committee members often does not receive attention, being characterized as merely policy individualism. An initiative typically needs to be favored by at least a sizable number of committee members in order to receive committee attention, indicating that a critical mass of support is needed to demand attention. The size of that critical mass will vary from committee to committee, and it certainly may include white members who favor more responsive initiatives than the House may favor generally. A single member or even several members, however, will not be sufficient to create that critical mass.

Table Seven charts the size of the House committees that considered the fair lending legislation discussed in this Article, and the number of black and Hispanic members in each of these committees. It also charts the membership trends of such com-

349. See FENNO, supra note 104, at 145-46.
350. See id. at 170.
351. See id. at 147-48.
mittees after the 1992 elections. After these elections, black and Hispanic membership on the House Banking Committee exceeded twenty percent for the first time.

**TABLE SEVEN**

*Number of Black and Hispanic Members on House Committees Considering Fair Lending Initiatives*

<table>
<thead>
<tr>
<th>Year</th>
<th>Committee</th>
<th>Number of Members</th>
<th>Number of Black and Hispanic Members</th>
</tr>
</thead>
<tbody>
<tr>
<td>1967</td>
<td>Judiciary</td>
<td>35</td>
<td>1</td>
</tr>
<tr>
<td>1968</td>
<td>Judiciary</td>
<td>35</td>
<td>1</td>
</tr>
<tr>
<td>1974</td>
<td>Banking &amp; Currency</td>
<td>40</td>
<td>4*</td>
</tr>
<tr>
<td>1975</td>
<td>Banking, Currency &amp; Housing</td>
<td>43</td>
<td>3*</td>
</tr>
<tr>
<td>1976</td>
<td>Banking, Currency &amp; Housing</td>
<td>44</td>
<td>3*</td>
</tr>
<tr>
<td>1977</td>
<td>Banking, Finance &amp; Urban Affairs</td>
<td>47</td>
<td>4*</td>
</tr>
<tr>
<td>1988</td>
<td>Judiciary</td>
<td>34</td>
<td>2</td>
</tr>
<tr>
<td>1989</td>
<td>Banking, Finance &amp; Urban Affairs</td>
<td>51</td>
<td>6*</td>
</tr>
<tr>
<td>1990</td>
<td>Banking, Finance &amp; Urban Affairs</td>
<td>51</td>
<td>5*</td>
</tr>
<tr>
<td>1991</td>
<td>Banking, Finance &amp; Urban Affairs</td>
<td>52</td>
<td>5</td>
</tr>
<tr>
<td>1993</td>
<td>Banking, Finance &amp; Urban Affairs</td>
<td>51</td>
<td>11</td>
</tr>
<tr>
<td>1994</td>
<td>Banking, Finance &amp; Urban Affairs</td>
<td>51</td>
<td>11</td>
</tr>
</tbody>
</table>

* including Walter E. Fauntroy, nonvoting delegate from the District of Columbia

Chaos theory teaches us that effects are nonlinear. An increase in the number of minority members, from three in 1976 to six in 1989, does not translate into a doubling of impact on committee viewpoint. Similarly, a rise from six members in 1989

352. See supra notes 87-98 and accompanying text.
to eleven members in 1993 does not translate into another doubling of the original level of impact. Not only are effects nonlinear, but at some point a transition phase is passed and the effect becomes different in nature. The same would be true in reverse, as minority members are lost.

2. Critical Mass: Individual Advocacy

Achieving a critical mass would also affect visible advocacy efforts, which may no longer be characterized as extreme policy individualism. The post-1992 Congress supplies evidence of this effect. Analysis of individuals' advocacy efforts protective of minority interests found far greater participation by black and Hispanic members after 1992 than in all prior periods, even the 1988-1991 period.

The fair lending proposals during 1993-1996 chiefly involved the CRA. The first session following the 1992 elections in which fair lending was a serious issue on the legislative agenda was in 1994. First, Congress was considering an interstate bank branching bill.\textsuperscript{353} Consumer groups wanted to include enhanced community reinvestment requirements in the bill.\textsuperscript{354} These groups viewed the House Banking Committee as more sympathetic to their interests than the Senate Banking Committee, primarily because of the House Committee's "more liberal and urban-oriented membership."\textsuperscript{355} The consumer movement included proposals to force banks benefiting from interstate branching to make specific commitments to grant more loans in underdeveloped neighborhoods, and to provide basic banking and check-cashing services.\textsuperscript{356} Another proposal would deny new interstate branching powers to banks that previously had demonstrated a pattern of closing branches in low- and moderate-income areas.\textsuperscript{357} These proposals were more responsive to minority interests than the bill that eventually was en-

\begin{flushleft}
\textsuperscript{353} See Andrew Taylor, With Major Hurdle Gone, Prospects for Branching Bill Look Bright, 52 CONG. Q. WKLY. REP. 425 (1994).
\textsuperscript{354} See id.
\textsuperscript{355} See id.
\textsuperscript{356} See Andrew Taylor, What Opponents Seek, 52 CONG. Q. WKLY. REP. 462 (1994).
\textsuperscript{357} See id.
\end{flushleft}
acted. The “pro-consumer fight” was led by Joseph P. Kennedy (D. Mass.), Kweisi Mfume (D. Md.), and Maxine Waters (D. Cal.). In addition, Cleo Fields (D. La.) was an active advocate in committee for one of these consumer proposals. For the first time, a majority of the advocates in Committee (three out of four) were black members.

A second fair lending proposal on the legislative agenda in 1994 was a bill to combat insurance redlining. Past fair lending initiatives had targeted banks and mortgage companies. The 1994 initiative targeted insurance companies, and the additional barrier they posed to equal availability of credit. The House approved a bill in July of 1994 after Representative Lucille Roybal-Allard (D. Cal.) unsuccessfully attempted to strengthen the measure through a floor amendment. Two bills had been reported. One bill was reported by the House Energy and Commerce Committee, and that bill developed under the guidance of floor manager Cardiss Collins (D. Ill.). A stronger bill had been reported by the newly constituted House Banking Committee, with strong support from chairman Henry B. Gonzalez and Representative Joseph P. Kennedy II. Three of the four advocates in the attack against insurance redlining were Hispanic or black members.

When the interstate banking bill was approved by the House in August 1994, it was a clean bill, without any additional measures, including heightened CRA requirements. In the brief House debate on the measure, several House members criticized the absence of consumer provisions, including Joseph P. Kenne-

358. See id.
359. See Andrew Taylor, Bill To Allow Interstate Branching Cruises Through House Panel, 52 CONG. Q. WKLY. REP. 589 (1994) (noting that Fields proposed an amendment to require banks to provide affordable basic banking and check cashing services).
361. See id.
362. See id.
363. See id.
364. See id.
dy II and Kweisi Mfume.\textsuperscript{366}

The conclusion that individual advocacy efforts of black and Hispanic members had experienced a phase transition does not mean that such advocacy must be universal or uniform. Of course, not all black and Hispanic members supported the most responsive fair lending positions.\textsuperscript{367} Individual variations are inevitable.

A study of the Congressional Black Caucus after the 1992 redistricting, conducted by Canon\textsuperscript{368} reached a similar conclusion regarding the phase transition experienced in the legislative voice of individual black members of Congress. Canon concluded that "the new size of the CBC [Congressional Black Caucus] has substantially increased its political clout while simultaneously pushing it into the political mainstream . . .\textsuperscript{369}

The November 1994 elections caused control of the House to shift to the Republican party. As a result, black and Hispanic members, who are almost all Democrats, became part of the numerical minority on House committees. The 1995 initiatives proposed to scale back the CRA. No particular House Democrats were singled-out as leaders in the fight against these measures. The votes in favor of scaling back the CRA, however, were always divided along party lines.\textsuperscript{370}

\textsuperscript{366} See id.
\textsuperscript{367} For example, Representative Floyd H. Flake (D. N.Y.) has advocated strongly for community development, but has been willing to support concessions on the CRA as a trade-off for such measures. See Andrew Taylor, Community Lending Proposal Challenges Clinton Plan, 51 CONG. Q. WKLY. REP. 2029 (1993).
\textsuperscript{368} See David T. Canon, Redistricting and the Congressional Black Caucus, 23 AM. POL. Q. 159 (1995).
\textsuperscript{369} Id. at 160-61. Canon concluded, for example, that the CBC provided the margin of victory on 9 of the 16 "key votes" identified by Congressional Quarterly in the first section of the 103d Congress. Id. at 166. This is not itself a measure of legislative voice when advocating minority interests, but it can lead to greater receptiveness. Canon's second conclusion was that newly elected African-American members of Congress were more likely to provide equal protection without special treatment for any single group. See id. at 161.
\textsuperscript{370} The House Banking Financial Institutions Subcommittee, by a vote of 13 to 6, approved a bill granting a "safe harbor" to any bank with a "satisfactory" CRA rating, with only one Democrat, Bill Orton of Utah, voting with the Republicans. See Andrew Taylor, Bill Freeing Banks of Numerous Rules Would Be Their Biggest Victory in Years, 53 CONG. Q. WKLY. REP. 1722, 1722-23 (1995). The subcommittee also approved a bill limiting the Justice Department's ability to enforce fair lending laws, in an 8 to 5 vote divided along party lines. See id. at 1723.
Strong policy responsiveness might exist at the individual level without the Congress as a whole following that lead. In the long-term, policy responsiveness on the part of Congress as a whole is desired, even if it takes the form of compromise measures. However, such responsiveness is not expected on a regular basis. The legislative process is too complex and unpredictable, and the legislative body is changing continually. Elected officials must demonstrate strong desire and commitment for the interests of their constituents on a regular, consistent basis. This legislative voice is a desired end in itself.

IV. CONCLUSION.

In the legislative process, race does matter. Black and Hispanic members of Congress have demonstrated greater legislative heart—a desire and commitment to minority interests that is greater in degree than the commitment demonstrated by white members of Congress. That consistently greater desire and commitment is found in black and Hispanic members' higher voting record ratings on civil rights and redistributive policy issues. It is found in their formulation of more responsive legislative proposals, in numbers out of proportion to their membership. When a point of critical mass is reached, black and Hispanic members' commitment to minority interests is found in their over-representation, among policy advocates, of positions strongly protective or supportive of minority interests. In sum, minority members of Congress demonstrate greater legislative heart, and this legislative heart becomes a recognizable presence once a critical mass is reached. As a consequence, when the United States Supreme Court asks whether race-based redistricting serves a compelling state interest, there is a need to pause and reconsider the importance of minority representation.

The House Banking Committee did not support the bill with the Justice Department provision, but did approve the CRA safe harbor provision by a 27 to 23 vote along party lines. See Andrew Taylor, Panel Broadens "Relief" for Banks; Delicate Balance Now Teetering, 53 CONG. Q. WKLY. REP. 1909 (1995). The committee also approved a bill allowing small banks to self-certify compliance with the CRA, by a 26 to 20 party-line vote. See Andrew Taylor, Banking Panels Move Toward Dissolving Thrift Industry, 53 CONG. Q. WKLY. REP. 2870, 2870-71 (1995).
## APPENDIX

### VOTING RECORD RATINGS OF HOUSE SOUTHERN DEMOCRATS*

<table>
<thead>
<tr>
<th></th>
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<tr>
<td><strong>Alabama</strong></td>
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<td><strong>Black Member</strong></td>
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</tr>
<tr>
<td>Hilliard</td>
<td>100</td>
<td>100</td>
<td>93</td>
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<tr>
<td><strong>White Members</strong></td>
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<td></td>
<td>Hefner</td>
<td>92</td>
<td>89</td>
</tr>
</tbody>
</table>

**South Carolina**

**Black Member**

- Clyburn: 100, 88, 100

**White Members**

- Derrick: 92, 67, 64
- Spratt: 83, 88, 64

**Virginia**

**Black Member**

- Scott: 100, 89, 100

**White Members**

- Pickett: 42, 56, 43
- Sisisky: 75, 67, 43
- Payne: 50, 33, 43
- Moran: 92, 67, 79
- Boucher: 100, 67, 71
- Byrne: 100, 89, 93

* Arkansas is not included because it had no black representatives in the 103rd Congress.