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Neal Devins*

I. INTRODUCTION

What can Presidents do? A recent spate of books and articles suggest that Presidents should not simply manage the administrative state but should forcefully advance a vision of governmental authority and policy. Former Reagan Administration officials Douglas Kmiec and Terry Eastland, for example, speak of presidential power as being "best defined by the strength of presidential will"¹ and assert that a great President "will definitely risk his political future . . . [and] is not one that hoards popularity for the sake of reelection."² This perception, that Presidents must lead, is shared by liberals and conservatives alike.

"The vision thing," according to the now popular wisdom, explains the downfall of former-President George Bush. Instead of someone who embraced a notion of good government, Bush has been described as "amiable and aimless,"³ "less interested in doing anything special as president than in just *being* president,"⁴ a man who "often talks not about his convictions on difficult issues, but about how he wants to be 'positioned.'"⁵ For this reason, Bush was unceremoniously savaged by all sides. He was accused of being "a wimp" by *Newsweek*,⁶ "pretty, petulant, and unpresidential" by *Time* correspondents Michael Duffy and Dan Goodgame;⁷ and of "undermin[ing] his own popularity" by *Wash-*

* Professor of Law, Lecturer in Government, College of William and Mary. Thanks to Phil Runkel for exceptional research assistance on the 1991 Civil Rights Act and to Jan Thomas and Scott Zimmerman for valuable seminar papers on the 1990 Civil Rights Act. I am also indebted to Nelson Lund for his piercing commentary on an earlier draft of the Article. All mistakes are my own.

1 DOUGLAS W. KMEIC, *THE ATTORNEY GENERAL'S LAWYER* 47 (1992).

2 TERRY EASTLAND, *ENERGY IN THE EXECUTIVE* 306 (1992).

3 MICHAEL DUFFY & DAN GOODGAME, *MARCHING IN PLACE* (1992).

4 Jonathan Yardley, *The Amiable Mister Bush*, WASH. POST, Aug. 9, 1992, at BW3 (book review quoting Duffy and Goodgame).

5 DUFFY & GOODGAME, *supra* note 3, at 89.

6 *Id.* at 38.

7 Robert J. Samuelson, *The New Nixon*, WASH. POST, Aug. 5, 1992, at A23.

ington Post columnist Robert Samuelson.⁸ If anything, the President's harshest criticisms came from the right. George Will called Bush a "lap dog;"⁹ Irving Kristol warned that "[i]deological conservatives are simply tired of winning Presidential elections while remaining powerless to shape the future;"¹⁰ and *Wall Street Journal* editor Robert Bartley described Bush as the antithesis of an agent of change.¹¹ In an obituary to Bush's presidency, Republican speechwriter Peggy Noonan put it this way: "Serious people in public life stand for things and fight for them; the ensuing struggle is meant to yield progress and improvement. Mr. Bush seemed embarrassed to believe. It left those who felt sympathy for him embarrassed to support him."¹²

The civil rights area, particularly Bush's signing of the 1991 Civil Rights Act, is often singled out as a prime example of Bush's inability to lead. His posturing on the Act has been labelled the "biggest straddle" of his presidency, prompting the *Washington Post*, *New York Times*, and *Time* magazine to undertake news analyses of White House disarray.¹³ Conservatives and Republicans also joined this chorus. Clint Bolick thought Bush "bereft of a true moral compass on civil rights;"¹⁴ Chester E. Finn, Jr. spoke of the absence of "vigorous, principled leadership on this increasingly bitter front;"¹⁵ and Eddie Mahe spoke of the necessity of the White House to "stop the hemorrhaging with this disarray, this lack of planning, this lack of thought, this lack of vision, this lack of coherency."¹⁶ Civil rights leaders, such as William Coleman and Vernon Jordan, also saw the 1991 Act as a "flat out repudiation of the administration's longstanding position."¹⁷

8 *Id.*

9 Paul Berman, *Sound and Fury: The Washington Punditocracy and the Collapse of American Politics*, NEW REPUBLIC, Nov. 23, 1992, at 43 (quoting George Will).

10 Irving Kristol, *The State of Disunion*, N.Y. TIMES, Jan. 27, 1991, at D17.

11 Robert Bartley, *Mugwumps Battle Know-Nothings for GOP's Future*, WALL ST. J., Feb. 13, 1992, at A18.

12 Peggy Noonan, *Why Bush Failed*, N.Y. TIMES, Nov. 5, 1992, at A35.

13 See Maureen Dowd, *White House Isolation*, N.Y. TIMES, Nov. 22, 1991, at A1; Dan Goodgame, *The White House: Nervous and Nasty*, TIME, Dec. 2, 1991, at 18; Ruth Marcus, *What Does Bush Really Believe?: Civil Rights Issue Illustrates Shifts*, WASH. POST, Aug. 18, 1992, at A1.

14 See Marcus, *supra* note 13, at A1.

15 Chester E. Finn, Jr., *Quotas and the Bush Administration*, COMMENTARY, Nov. 1991, at 17, 23.

16 See Dowd, *supra* note 13, at A1.

17 William T. Coleman, Jr. & Vernon E. Jordan, Jr., *How the Civil Rights Bill was Really Passed*, WASH. POST, Nov. 18, 1991, at A21.

This portrayal of the Bush presidency as unfocused, rudderless, and reactive is persuasive. The invocation of the 1991 Civil Rights Act as exemplary of Bush's failings, however, goes too far. Although hardly bereft of the occasional flip-flop or policy indirection, the President stood more firmly on the 1991 Act than on any other civil rights matter. On the question of employment discrimination lawsuits grounded in numerical imbalance (disparate impact), for example, the White House withstood several opportunities to capitulate before compromising its position in the face of a possible veto override.

Why then is the President's signing of the 1991 Act typically viewed as an outright policy reversal? The answer is that Bush's obvious lack of policy preferences on civil rights created a culture of failed presidential leadership. In other words, by persistently refusing to play a leadership role on civil rights, Bush's steadfastness on the 1991 Act did not fit a pattern and was readily dismissed. Along these lines, the concessions that the White House won from congressional leaders are at once significant and easily ignored.

This Article will recast Bush's role in the shaping of the 1991 Act. However, it will not defend Bush's effectiveness as a civil rights policymaker, a role in which he demonstrated little leadership. He provided no direction himself, nor did his appointees speak in a single voice. Civil rights policymaking was instead discordant and often self-contradictory. Rather than be engulfed in the civil rights fires which consumed much of the Reagan administration, Bush settled on a distinctively nonideological approach toward civil rights. His civil rights strategy was consistently reactive and utilitarian. The White House never played a leading role in initiating civil rights reform; when forced to act, it sought either to maximize political advantage or to minimize political loss. That this cost-benefit analysis often led to erratic policymaking was a price the Bush administration clearly was willing to pay.

The failed leadership of the Bush White House is hardly a plea for a return to the leadership styles of supposedly ideologically pure visionaries such as Ronald Reagan. The Reagan administration also floundered in its efforts to reshape civil rights dialogue. Indeed, the Bush White House was correct in seeking to avoid some of the pitfalls which beset its predecessor. Bush, however, learned the wrong lessons from Reagan. Rather than sorting out how a President could advance his agenda in the face of an unre-

ceptive Congress, Bush simply abandoned civil rights as an issue that mattered to his presidency.

This Article will examine the nexus between and the lessons to be learned from Reagan and Bush approaches to civil rights. Part II will assess the Reagan administration to highlight the difficulties of White House centralization of civil rights. The discussion will also call attention to the limits of confrontational reform strategies, such as those embraced by the Reagan Justice Department, and the potential of incremental bureaucratic reforms, such as those embraced by the Reagan Equal Employment Opportunity Commission ("EEOC"). Part III will consider how the Bush White House responded to Reagan's civil rights legacy. Specifically, rather than be heartened by the prospects of bureaucratic reform, the Bush White House apparently dwelled on the costs of confrontational approaches. The outcome was a strategy of issue avoidance. Part IV will examine Bush's management of the 1991 Civil Rights Act. This examination will also contrast presidential authority to shape legislative content with presidential authority over implementation. Part V will offer a brief summary of the Article's findings.

II. THE LESSONS OF RONALD REAGAN¹⁸

The reaches and limits of White House civil rights efforts can be seen in Reagan's efforts to centralize civil rights policy. Reagan took office at the height of federal efforts to impose numerical measures of equality. During the Carter years, existing programs, such as Executive Order 11,246 requirements for federal contractors and Small Business Administration ("SBA") incentives for minority entrepreneurs, were strengthened; numerous race and gender-conscious initiatives were launched throughout federal departments and agencies.¹⁹ Reagan ran on a platform which made opposition to these Carter initiatives a centerpiece of his campaign, arguing that "equal opportunity should not be jeopardized by bureaucratic regulations and decisions which rely on quotas, ratios, and numerical requirements to exclude some indi-

18 Portions of this Part are adapted from Neal Devins, *The Civil Rights Hydra*, 89 MICH. L. REV. 1723, 1749-63 (1991).

19 See generally HERMAN BELZ, *EQUALITY TRANSFORMED: A QUARTER CENTURY OF AFFIRMATIVE ACTION* (1991); Chester E. Finn, Jr., "Affirmative Action" Under Reagan, *COMMENTARY*, Apr. 1982, at 17, 18-20.

viduals in favor of others, thereby rendering such regulations and decisions inherently discriminatory."²⁰

The manner in which Reagan sought to change these programs, however, belied his campaign rhetoric. Some programs were challenged, others left alone, and a few even defended. This lack of clarity evidences real limits in White House centralization efforts.²¹ First, federal civil rights enforcement sweeps throughout the executive branch; hence, effective White House coordination is almost impossible. Unless a President makes civil right enforcement the benchmark of his administration, discontinuity seems unavoidable. Second, once a law is enacted and the initial implementing regulations promulgated, it is extraordinarily difficult to reconsider *en masse* the enforcement schemes of prior administrations. Oversight committee and constituency interest opposition is simply too formidable here. Consequently, secondary devices such as reorganization and policy prioritization—which do not directly attack existing regulations—are often the best mechanism for change available to the White House. Admittedly, reliance on such secondary devices limits a President's civil rights legacy, for successor administrations can easily reset priorities and reorganize agencies. Nonetheless, during the Reagan years, entities such as the EEOC, which relied on secondary devices, advanced their agenda far more effectively than those such as the Justice Department, which launched frontal assaults against existing programs. Indeed, when Reagan left the White House, the entire scheme of bureaucratic regulations and decisions attacked by candidate Ronald Reagan withstood Justice Department efforts to actualize this campaign promise.²²

20 1980 Republican Platform, reprinted in 36 CONG. Q. ALMANAC 50-B, 62-B (1980). *Contra* 1980 Democratic Platform, reprinted in 36 CONG. Q. ALMANAC 91-B, 105-B (1980) ("[A]n effective affirmative action program in an essential component of our commitment to expanding civil rights protections."). Reagan, moreover, did not change his rhetoric once in office.

21 Curiously, one of the best demonstrations that the President is powerful but not omnipotent is that Reagan civil rights policy came under attack from both the left and the right. From the right, Jeremy Rabkin, pointing to the administration's support of numerous affirmative action programs, accused the Reagan administration of "wring[ing] what[ever] partisan advantage it can from the pattern of racial and ethnic spoils established in the 1970s." Jeremy Rabkin, *Reagan's Secret Quotas*, NEW REPUBLIC, Aug. 5, 1985, at 15, 17. From the left, the civil rights community issued numerous reports condemning the administration record as "absolutely deplorable," straining the relationship between the national government and black America. Finn, *supra* note 19, at 17.

22 See BELZ, *supra* note 19, at 181-207; Rabkin, *supra* note 21; EASTLAND, *supra* note 2 at 178-89.

A. *The Improbability of Centralization*

Every government agency, department, and commission is in the business of civil rights enforcement. Title VI requirements prohibiting nondiscrimination in federal assistance are enforced by all government agencies distributing federal largess; EEOC regulations call for sensitivity by all government agencies to numerical equality objectives in their own hiring. Moreover, freestanding civil rights enforcement projects exist within the EEOC, SBA, Federal Communications Commission, Civil Rights Commission, the Legal Services Corporation, and the Departments of Energy, Treasury, Labor, Education, Commerce, Transportation, and Justice. Given the pervasiveness of civil rights enforcement, centralization can occur only if the White House both makes coordination a primary objective and is extremely diligent in appointing to key government posts individuals who agree with the President's views on civil rights enforcement. Otherwise, competing regulatory agenda items will take precedence over civil rights enforcement and, correlatively, external pressures from oversight committees and constituency interests will dilute the White House agenda.

Reagan White House civil rights centralization efforts clearly suffered from internal and external coordination problems. Internal problems derived from the existence of several competing strategies of regulatory relief within the executive branch. The most visible strategy—commonly associated with the Department of Justice ("DOJ") in general and Civil Rights Division head William Bradford Reynolds in particular—was moralistic and rhetorically divisive. It viewed preferential treatment "based on nothing more than personal characteristics of race or gender . . . as [just as] offensive to standards of human decency today as it was some 84 years ago when countenanced under *Plessy v. Ferguson*."²³ It was also confrontational, calling for immediate and massive judicial, regulatory, and legislative reform.

The willingness of DOJ to launch a frontal assault on numerical proofs of discrimination and nonvictim relief is unique, howev-

²³ *Oversight Hearings on Equal Employment Opportunity and Affirmative Action, 1981: Hearings Before the Subcomm. on Employment Opportunities of the Comm. on Education and Labor, 97th Cong., 1st Sess. pt. 1, at 137 (1981) (citation omitted) (statement of William Bradford Reynolds); see also William Bradford Reynolds, Individualism vs. Group Rights: The Legacy of Brown, 93 YALE L.J. 995, 998-1001 (1984) (individual rights best protected through race-neutral means).*

er. The preferred strategy of other civil rights enforcement agencies was to leave existing programs on the books but to limit the effectiveness of those programs through a variety of enforcement strategies. Furthermore, agencies not principally in the business of civil rights enforcement—even if sympathetic to the DOJ's moral imperative—focused their attentions on other regulatory initiatives. Finally, at least with respect to minority business enterprise programs housed in the SBA as well as the Departments of Transportation and Commerce, the Reagan administration and its appointees favored some of the affirmative action initiatives launched by Presidents Nixon and Carter.²⁴

These varied strategies ensured a certain degree of disunity in Reagan civil rights policies. Ironically, this disunity can be explained, in part, by efforts towards White House centralization. Most significant, "movement conservatives" at DOJ and the White House saw themselves in the midst of a holy war that required uniform adherence to the Justice creed. As caricatured by former Education Secretary T.H. Bell, these "extremists" would say: "Let the chaos come This is part of the revolution! Pragmatism is cowardice and weakness!"²⁵ In the end, however, this absolutist approach undermined any chance of effective White House centralization.

The keys to this failure are three extraordinary policy blunders made by the President at the urging of the DOJ. First, Reagan's ostensible commitment to simple nondiscrimination was called into question when his administration sought in 1982 to restore the tax-exempt status of racially discriminatory private schools.²⁶ Second, in the midst of this fiasco, Reagan announced his opposition to provisions of the 1982 Voting Rights Act amendments which make disparate racial impact an important evidentiary tool in voting rights cases.²⁷ In explaining the administration's position, a "hearing room full of civil-rights activ-

24 See Robert Pear, *Administration Challenges Plan by Rights Panel*, N.Y. TIMES, Apr. 11, 1986, at A1.

25 Terrel H. Bell, *Education Policy Development in the Reagan Administration*, PHI DELTA KAPPAN, Mar. 1986, at 487, 491; see also TERREL H. BELL, THE THIRTEENTH MAN 99-113 (1988).

26 *Treasury Sets New Policy on Tax-Exempts, Alters Position on Private Schools*, Daily Exec. Rep. (BNA) No. 5, at G-3 (Jan. 8, 1982). See generally Jeremy A. Rabkin, *Taxing Discrimination: Federal Regulation of Private Education by the Internal Revenue Service*, in PUBLIC VALUES, PRIVATE SCHOOLS 133 (Neal Devins ed., 1989).

27 The Voting Rights Act Amendments of 1982 can be found at 42 U.S.C. § 1973b (1988).

ists erupted into laughter" when Attorney General Smith remarked that "the President doesn't have a discriminatory bone in his body."²⁸ Third, in 1983, President Reagan (unsuccessfully) sought to remove Mary Frances Berry and two of her colleagues from the allegedly "independent, bipartisan" United States Commission on Civil Rights.²⁹ In their stead, Reagan advanced three nominees who, according to Reagan, "don't worship at the altar of forced busing and mandatory quotas" and "don't believe you can remedy past discrimination by mandating new discrimination."³⁰ Although he had good reason to be fed up with the Commission's partisan attacks on his administration,³¹ Reagan's efforts here, as Senator Edward Kennedy put it, appeared to be "an unprecedented assault on the independence and integrity of the Civil Rights Commission."³²

This assault on the Commission, along with Reagan's efforts to grant tax breaks to discriminatory private schools, limit voting rights reform, and enable the DOJ to launch a frontal assault on preferential hiring, came at a significant political cost. The Leadership Conference on Civil Rights, for example, cast Reagan as a villain, arguing that "power and prejudice" rather than "fairmindedness and fidelity to law" "hold sway" in his administration.³³ Pragmatists within the administration thought it politically unwise for the White House itself to expend further political capital in this area. Furthermore, Reagan appointees at other agencies witnessed and learned from these events that confrontational politics came at a high cost. Consequently, although the DOJ persisted in its frontal assault upon race-conscious affirmative action, neither the White House nor other agencies assisted them.

The failure of the Reagan White House to centralize civil rights enforcement is not surprising. Despite Reagan's alleged ideological vision and his attempts to centralize government regu-

28 Finn, *supra* note 19, at 27.

29 See George Lardner Jr., 3 on *Rights Commission 'Terminated' by Reagan*, WASH. POST, Oct. 26, 1983, at A2.

30 See Juan Williams, *Reagans Offers Defense on Rights Record*, WASH. POST, Aug. 2, 1983, at 1.

31 See Finn, *supra* note 19, at 24-25; Chester E. Finn, Jr., *From Civil Rights to Special Interests*, WALL ST. J., Mar. 22, 1983, at 32.

32 See *Presidential Nominations to the Civil Rights Commission: Hearings on the Nominations of Morris B. Abram, John A. Bunzel, Robert A. Destro, and Linda Chavez Before the Comm. on the Judiciary of the Senate*, 98th Cong., 1st Sess. 219 (1983) (statement of Sen. Edward Kennedy).

33 LEADERSHIP CONFERENCE ON CIVIL RIGHTS, WITHOUT JUSTICE 75 (1982).

lation, numerous internal and external pressures undermined a coordinated civil rights enforcement strategy. Some of these pressures are endemic to all administrations. For example, the inevitably divergent interests of government agencies and departments had previously doomed Johnson, Kennedy, and Carter administration efforts at interagency coordination.³⁴ However, some of the problems the Reagan administration faced were unique unto it. A highly ideological group of "movement conservatives," Reagan's reliance on delegating authority to like-minded individuals to accomplish centralization objectives, and the simple fact that the Reagan administration was butting heads with mainstream civil rights interests were circumstances peculiar to the Reagan administration.

That the Reagan administration did not speak with one voice highlights the difficulty of coordinating civil rights policy in the modern administrative state. That difficulty, however, does not mean that the White House is without substantial power in this area.

*B. Bureaucratic v. Confrontational Approaches to
Alter Regulatory Policymaking*

The Reagan experiment tells a very revealing story about the limits of agency power to modify existing regulatory structures. Direct repeal of existing interpretations and regulations is unlikely to succeed. Indirect attacks launched through agency reorganization and policy prioritization are far more likely to succeed. The Reagan experience reveals that civil rights politics is the "art of the possible." Although DOJ efforts to change the face of civil rights were a highly visible political failure, that failure, in many respects, was one of politics, not ideology. At the EEOC, Chairman Clarence Thomas proved remarkably adept at advancing many of the same goals that made the DOJ the subject of public ridicule.

An administration must recognize both its potential, as well as its limitations. The repudiation of well-entrenched civil rights programs comes at a high political cost. Bitter confrontations with Congress, often resulting in the enactment of program-saving legislation, is a likely outcome of such direct challenges. The Reagan

³⁴ See HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA* 44, 64 (1990) (Kennedy administration); *id.* at 181-84, 192 (Johnson administration); U.S. COMM'N ON CIVIL RIGHTS, *THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT—1977* 331 (1977) (Carter administration).

DOJ bears this out. In sharp contrast, little political capital is expended in displacing disfavored policy through indirect techniques. The Thomas EEOC was a master at such policymaking. By shifting scarce agency resources from disfavored to preferred policy objectives, the agency proved adept at making policy inroads while eschewing counterproductive toe to toe battles with Congress.

Remarkably, while avoiding such battles, Clarence Thomas was an outspoken critic of race and gender preferences.³⁵ Indeed, in explaining initiatives which shifted agency resources away from group-conscious programs, Thomas spoke in one breath about the costs of affirmative action and the virtues of individual-centered relief. Ideology and political strategy then operated in tandem at the Thomas EEOC; Thomas both spoke and acted on an individualistic agenda. In sharp contrast, the Reynolds DOJ offered no constructive alternative. Its attacks on group relief were not counterbalanced by reform initiatives.

A comparison between the Thomas EEOC and the Reynolds DOJ reveals that an administration can advance a modest civil rights agenda inconsistent with legislative preferences without suffering devastating political costs.³⁶ To the extent that Bush's incoherent civil rights policies were rooted in the prohibitive costs of such an agenda, the Thomas EEOC serves as a telling counterexample.

35 He told Congress that "numerically based remedies which focus on sex, race or ethnic considerations have the potential to undermine the ultimate goals of nondiscrimination." *Policies Regarding Goals and Timetables in Litigation Remedies: Hearings Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 99th Cong., 2d Sess. 25 (1986) [hereinafter *Hearings*]. He also said that the 1978 guidelines "assume some inherent inferiority of blacks, hispanics, other minorities, and women, by suggesting that they should not be held to the same standards as other people." Juan Williams, *A Question of Fairness*, ATLANTIC, Feb. 1987, at 70. Furthermore, statistical proofs of discrimination fail to recognize "cultural differences . . . , education levels, commuting patterns, and other 'previous events'" that help explain disparities. *Id.* at 73.

36 The comparison between the DOJ and the EEOC is a fair one despite the many structural differences between these two entities. Admittedly, the bulk of DOJ policymaking is a by-product of adversarial litigation, not bureaucratic enforcement. At the same time, the most visible failures of the Reagan DOJ are tied to legislative and regulatory initiatives that the DOJ advocated before the White House and federal agencies. Moreover, like the DOJ, the EEOC—which lacks cease and desist authority—typically advances its policy objectives through litigation.

1. The EEOC

The Thomas EEOC, at first glance, seems hardly a model of successful policymaking. Although it had voiced objections to both affirmative action remedies and numerical measures of discrimination contained in the agency's 1978 Uniform Guidelines, the Thomas EEOC never formally modified pre-existing Carter EEOC regulations.³⁷ In fact, Thomas explicitly endorsed the use of goals and timetables, despite his personal objections, at Senate reconfirmation hearings.³⁸ Moreover, on several occasions, the EEOC locked horns with DOJ on the numerical equality issue.³⁹ Finally, despite the Office of Management and Budget's ("OMB") request that the agency undertake a cost efficiency review of the 1978 guidelines,⁴⁰ the EEOC balked—apparently because the political costs of revision were too high.

This reluctance to repudiate existing policies, however, masked the massive changes which took place at the EEOC. Indirect attacks launched through resource prioritization, reorganization, and an unwillingness to adopt new theories that might expand agency jurisdiction proved the mechanism of reform at the agency. At this game, the EEOC proved hugely successful.

Thomas, rather than rescind Carter initiatives, replaced this regime with enforcement strategies that sought relief for identifiable victims of discrimination. In September 1984, the agency announced it would place greater emphasis on litigation to secure redress for employment discrimination.⁴¹ In February 1985, the EEOC issued a policy statement which made clear that its pursuit of this litigation strategy would "eradicat[e] discrimination in the

37 Alternatively, the Thomas EEOC should instruct a liberal President how to advance his civil rights agenda when confronted with a conservative Congress.

38 See e.g., *Nomination of Clarence Thomas, of Missouri, to be Chairman of the Equal Employment Opportunity Commission: Hearing Before the Senate Comm. on Labor and Human Resources*, 99th Cong., 2d Sess. 44 (1986).

39 These disputes concerned the DOJ's representation of the EEOC before the Supreme Court, intervention in lower federal court cases in which the EEOC was a party, and refusal to comply with EEOC affirmative action guidelines for federal agencies and departments. For overview critiques, see U.S. COMM'N ON CIVIL RIGHTS, *FEDERAL ENFORCEMENT OF EQUAL EMPLOYMENT REQUIREMENTS* 40-42 (1987) [hereinafter 1987 CRC REPORT].

40 See Felicity Barringer, *Job Bias Debate is Reopened*, WASH. POST, Aug. 14, 1981, at A27; 1987 CRC REPORT, *supra* note 39, at 24.

41 *Statement of Enforcement Policy*, EEOC Compl. Man. (BNA) § III, at GC:3003 (Sept. 11, 1984).

workplace" by providing relief for identified victims of discrimination.⁴² Placing such emphasis on individual make-whole relief made fewer resources available to pursue class action cases (whose remedies often included goals, timetables, and quotas).⁴³ Correlatively, this new emphasis on "certainty and predictability in enforcement and the securing of full remedial, curative and preventive relief" brought with it the demise of a rapid charge system focusing on quick settlements of individual complaints.⁴⁴ At the same time, class action litigation was not eliminated, but simply reduced (from sixty-seven percent to thirty-five percent of all nonsubpoena cases).⁴⁵ However, the substance of class action awards did change dramatically. By focusing on individual victims within a class, the EEOC typically rejected goals and timetables in favor of backpay awards.⁴⁶ In a related development, the EEOC retooled its office in charge of so-called "systemic" discrimination lawsuits. Rather than using statistical proofs and targeting large employers such as AT&T and Sears, Thomas modified both the scope and sweep of the systemic effort by focusing on smaller employers and making use of on-site investigations.

While shifting the focus of EEOC activities, Thomas did not rest his case on the rhetorical arguments that lay at the heart of the DOJ's campaign against race preferences. Instead, he took an affirmative stance, arguing that the shift to an individual-centered approach would place greater pressure on employers to eradicate discriminatory practices.⁴⁷ Thomas also defended backpay and other individual make-whole relief as an effective deterrent to employment discrimination. Unlike goals and timetables, which

42 *Policy Statement on Remedies and Relief for Individual Cases of Unlawful Discrimination*, EEOC Compl. Man. (BNA) § III, at GC:3005 (Feb. 5, 1985).

43 Williams, *supra* note 35, at 70, 80.

44 See EEOC, EEOC'S NEW CHARGE PROCESSING APPROACH 2 (1984). By eschewing administrative conciliation in favor of a more scrutinizing examination of employee complaints, the Thomas EEOC dismissed twice as many (roughly 56%) of its cases as without merit. *Hearings*, *supra* note 35, at 193, 211 (report of Women's Employment Institute).

45 See 1987 CRC REPORT, *supra* note 39, at 38.

46 In fact, by narrowly reading Supreme Court decisions which approved of numerical remedies, the EEOC could find that circumstances in which preferential relief was on the table were virtually nonexistent. For example, during the period from October 1985 to July 1986, the EEOC did not approve a single case in which goals and timetables were "an issue." *Id.*

47 Systemic litigation rooted in statistical proofs, in contrast, was depicted as a costly failure. For example, in a systemic suit involving Sears, not only did the court accuse the agency of "present[ing] no credible evidence," but the case's costs were so great as to threaten an agency-wide staff furlough at one point. *EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264, 1302 (N.D. Ill. 1986).

shifted the cost from employers to those neither hired nor promoted, backpay awards came directly from employers' pockets.

Resource prioritization, which enabled the EEOC to displace problematic programs grounded in numerical proofs and classwide relief with preferred individual-oriented programs, proved the most significant mechanism for reform at the EEOC. The EEOC also accomplished change through two other nonconfrontational devices: agency reorganization and policymaking through the agency's stated refusal to discover new "vistas" of the law.

The ostensible purposes of agency reorganizations are to "maximize efficiency and economy, promote effective planning and coordination, reduce program fragmentation and overlap, eliminate unnecessary paperwork, and increase accountability."⁴⁸ Reorganizations, however, also enable political appointees to maintain greater control over their operations by staffing newly created offices with a cadre of trustworthy individuals. Through the creation of an Office of Legal Counsel charged with interagency coordination and the drafting of regulations, political appointees at the EEOC displaced careerists in controlling policy development.⁴⁹ The agency also made effective use of a reorganization by transferring systemic litigation from a separate office to political appointees within the Office of General Counsel, while moving systemic compliance to the newly structured Office of Program Operations.⁵⁰

The EEOC, moreover, proved adept at policymaking through inaction, that is, refusing to adopt reform initiatives. During the Reagan years, for example, the agency rejected comparable worth as a mechanism of determining job discrimination under Title VII, declined to extend Title VII to professional certification and licensing, and refused to adopt regulations extending the Age Discrimination in Employment Act to apprenticeship programs.⁵¹ The significance of these refusals, while not altering the status quo ante, are profound. Witness the comparable worth decision. The Thomas EEOC flatly rejected, as "[without] statutory basis or case

48 GEORGE C. EADS & MICHAEL FIX, RELIEF OR REFORM? REAGAN'S REGULATORY DILEMMA 156 (1984).

49 See 1987 CRC REPORT, *supra* note 39, at 18-19.

50 *Id.*

51 EEOC Decision No. 85-80, 1985 EEOC LEXIS 19 (July 12, 1985) (comparable worth decision); EEOC Decision No. 87-2, 2 Empl. Prac. Guide (CCH) ¶ 6869 (Aug. 31, 1987); Selected Statements Delivered January 28, 1988, to the House Select Comm. on Aging, Daily Lab. Rep. (BNA) No. 19, at E-1 (Jan. 28, 1988).

law support," equalizing the salaries of jobs held predominantly by women and the salaries of "comparable" jobs held predominantly by men.⁵² In stark contrast, the Carter EEOC had seemed ready to endorse this concept. In 1979, Eleanor Holmes Norton, chairman of the Carter EEOC, endorsed comparable worth,⁵³ later calling it the "cutting edge" labor issue of the 1980s because it addressed "the deepest, least-touched levels of discrimination."⁵⁴

EEOC policymaking through resource prioritization, reorganization, and inaction transformed the agency during Thomas' tenure. Thomas' success here is largely attributable to his policymaking strategy. Costly political battles associated with the repeal of existing regulations were rejected in favor of indirect techniques of resource prioritization, reorganization, and inaction. In other words, rather than launch an attack on civil rights constituencies and their friends on congressional oversight committees, Thomas proved skillful at working within a political culture.

Ultimately, the 1978 Affirmative Action Guidelines stayed in place despite White House pressures and an internal agency review. Race and gender goals and timetables were never formally examined. In fact, after Acting General Counsel Johnny Butler's oral instruction to staff attorneys not to include goals in new settlements caused an uproar in 1986, the EEOC formally endorsed goals and timetables.⁵⁵ In addition, over the objections of the DOJ, the EEOC continued to require that federal agencies submit to affirmative action plans.⁵⁶ Finally, Thomas appealed the EEOC's defeat in *Sears* and other systemic cases because if he hadn't "the liberals would be all over me."⁵⁷ This acquiescence to the Carter legacy led civil rights groups such as the National Urban League and NOW to admit at Thomas' 1986 reconfirmation hearings that "given this administration's record [we] have no illusions that a nominee committed to strong enforcement would replace [Thomas]."⁵⁸

52 EEOC Decision No. 85-80, *supra* note 51, at *9.

53 Carol Krucoff, *Money: The Question of Men, Women and "Comparable Worth,"* WASH. POST, Nov. 13, 1979, at B5.

54 CWA Conference Addresses Issue of Comparable Worth in Public Sector, Daily Lab. Rep. (BNA) No. 50, at A-5 (March 14, 1984).

55 *Back to Hiring Goals*, TIME, Aug. 4, 1986, at 29.

56 Williams, *supra* note 35, at 76.

57 *Id.*

58 *Id.* at 77.

Congressional action mirrored this begrudging acceptance of Thomas. While disapproving of the EEOC's displacement of class-wide strategies, the agency's shift from one legitimate policy objective to another did not raise legislative ire to the retaliation point. Congress simply could not repudiate Thomas' stated "intent to pursue quality investigation of charges, to make victims whole and to ensure that injustices are corrected not repeated."⁵⁹ Moreover, Thomas' arguments regarding the effectiveness of backpay and other make-whole remedies could not be rejected as either far fetched or mean spirited. Finally, since budgetary constraints resulted in the loss of more than fifty attorneys, EEOC attention to identifiable victims of discrimination necessarily resulted in decreasing attention elsewhere. Put simply: Thomas, by making a sound case for his policy initiatives, effectively put Congress on the defensive for failing to allocate adequate funding to the agency.⁶⁰

2. The Failure of Confrontational Strategies

The EEOC's success stands in marked contrast to the failures of the DOJ, the FCC, and the Civil Rights Commission. These agencies' efforts to repeal existing programs pushed Congress past the brink. Congress, for example, used its confirmation power to punish individuals within the administration who spearheaded confrontational operations—most notably Brad Reynolds whose appointment to the Associate Attorney General position at DOJ was turned down.⁶¹ Furthermore, FCC efforts to rescind the granting of preferences to minority broadcasters were greeted by the enactment of single year funding restrictions forbidding such reconsideration.⁶² This direct challenge to existing rulemaking, combined with the FCC's repeal of the Fairness Doctrine, "so poisoned relations between the two entities that it stimulated con-

⁵⁹ *Id.* at 74.

⁶⁰ Indeed, as Norman Amaker concluded in an Urban Institute study otherwise critical of Reagan civil rights: "The interpretation of the data [on the EEOC] ultimately depends on one's perspective of what is important for the agency to do—a matter of emphasis." NORMAN AMAKER, *CIVIL RIGHTS AND THE REAGAN ADMINISTRATION* 110 (1988).

⁶¹ See James R. Dickinson, *Running Scared in Pennsylvania: Sen. Spectre Aims to Survive in Democratic Territory*, WASH. POST, July 6, 1985, at A4; Paul Duke, *Senate Panel Rejects Reagan Nominee for Associate Attorney General Post*, WALL ST. J., June 28, 1985, at A3; Howard Kurtz, *Reynold's Nomination Voted Down*, WASH. POST, June 28, 1985 at A1.

⁶² See generally Neal Devins, *Congress, the FCC, and the Search for the Public Trustee*, LAW & CONTEMP. PROBS. (forthcoming fall 1993).

gressional oversight of a magnitude Washington insiders say is unprecedented."⁶³

Congress used its power of the purse in other ways to correct agencies which disregarded their past legislative preferences. This was the fate suffered by the Civil Rights Commission and its controversial chairman, Clarence Pendelton. The Commission was unwilling to play ball with Congress and so Congress subjected it to an extensive General Accounting Office ("GAO") audit, severely reduced its appropriations, directed it to pursue specified research priorities, and ordered it to allocate its appropriations internally according to a restrictive legislative formula (including limitations on travel and staff support for Pendelton).⁶⁴

The most visible failure of confrontational politics and the most vivid contrast to the EEOC, however, is the Department of Justice. Justice was aggressive in challenging—on both statutory and constitutional grounds—the legality of race and gender preferences, arguing that affirmative action was "at war with the American ideal of equal opportunity for each person to achieve whatever his or her industry and talents warrant."⁶⁵ In court, DOJ efforts proved a mixed success.⁶⁶ Most significantly, efforts to entirely discredit race and sex preferences clearly failed. During Reynolds' tenure, the Supreme Court validated a range of hiring and promotion schemes that benefitted nonvictims. In several of these cases, moreover, the Supreme Court rebuked the DOJ for departing from past governmental efforts that had supported affirmative action. At the same time, however, the Supreme Court barred state-sponsored nonremedial set-asides and layoffs of senior nonminority employees.

Outside of court, DOJ efforts to reshape federal affirmative action policy proved an unabashed disaster. Its positions on tax breaks for discriminatory schools and voting rights brought nothing but embarrassment and ridicule; its objections to the Civil Rights Restoration Act led Congress to override a presidential

63 *Micromanagement of the FCC: Here to Stay*, BROADCASTING, Dec. 26, 1988, at 56.

64 See David Brock, *Politicizing the Government's Watchdog*, WALL ST. J., July 16, 1986, at A22; Howard Kurtz, *Hill Slashes Funding for Rights Panel*, WASH. POST, Oct. 19, 1986, at A12.

65 See Mary Thornton, *Reagan, Aide Differ on Hiring Policy*, WASH. POST, Dec. 1981, at A8 (quoting William Bradford Reynolds, head of the Civil Rights Division of the Justice Department).

66 See generally Neal Devins, *Affirmative Action After Reagan*, 68 TEX. L. REV. 353 (1989); Herman Schwartz, *The 1986 and 1987 Affirmative Action Cases: It's All Over but the Shouting*, 86 MICH. L. REV. 524 (1987).

veto;⁶⁷ and its efforts to relitigate fifty-one affirmative action consent decrees involving state and municipal government provoked a rift between the DOJ and the states (as well as a series of striking defeats in court).⁶⁸ These failures, however, pale by comparison to the defeat the DOJ suffered within the executive branch.

Reagan appointees at other agencies witnessed and learned from the DOJ that confrontational politics come at a high cost. For example, Clarence Thomas, recognizing that Justice "blew it" politically with its "negative agenda,"⁶⁹ opposed DOJ intervention in EEOC litigation as well as Justice's refusal to comply with EEOC affirmative action guidelines.⁷⁰ Furthermore, the White House often discounted DOJ initiatives as too politically risky. Take the case of Justice's failed efforts to modify Executive Order 11,246 programs—requiring 325,000 government contractors to adopt affirmative action plans.⁷¹ Pragmatists within the administration like Labor Secretary Bill Brock thought it "politically crazy" for the White House to expend further political capital in this area. Donald Regan, Secretary of the Treasury during the tax exemption controversy and later Chief of Staff, agreed. As Brad Reynolds came to recognize, "*Bob Jones* was Don Regan's tar baby and he was not about to have another such fiasco."⁷² Ironically, as a result of this campaign, the Reagan administration reinstated Carter-era enforcement policies that it had earlier abandoned, thereby strengthening the executive order program.⁷³

The political failures of the DOJ, moreover, cannot now be justified as an acceptable short-term cost to change the face of civil rights policymaking. Reynolds' confrontational strategy was easily depicted as a civil rights retreat. The *Bob Jones* fiasco, the firing of politically incorrect Civil Rights Commissioners, and the attempt to run rough shod over state and local government by challenging pre-existing settlement agreements made it easy to cast

67 Message to the Senate Returning Without Approval the Civil Rights Restoration Act of 1987 and Transmitting Alternative Legislation, 1 PUB. PAPERS 345 (Mar. 16, 1988) (veto message); see also 124 CONG. REC. H1072, S2765 (daily ed. Mar. 22, 1988) (override); Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (codified at 42 U.S.C. §§ 1681, 1687 (1988)).

68 See Schwartz, *supra* note 66, at 525-26.

69 Williams, *supra* note 35, at 80.

70 See 1987 CRC REPORT, *supra* note 39.

71 For an insightful recount of this episode, see Gary L. McDowell, *Affirmative Inaction*, POL. REV., Spring 1989, at 32.

72 *Id.* at 35.

73 *Id.* at 33.

Reynolds as villain. As such, Reynolds was hard pressed to gain the upper hand in the battle over group preferences.

Justice's efforts to impose its imprimatur on Reagan civil rights enforcement undermined a more modest and potentially successful approach. Recurring enforcement strategies of the Reagan administration generally eschewed repudiation of existing programs in favor of, as George Eads and Michael Fix observed, "adoption of a new and more exclusive screening criteria for identifying potential violators; unwillingness to test new legal or economic theories that might expand the existing classes of violators; [and] reduced discretion for field enforcement personnel."⁷⁴ This more modest approach would have been less subject to political attack and, consequently, might well have withstood oversight committee and constituency group pressure. That is the very lesson of the Reagan EEOC—an agency which followed this model.

The Reagan experiment tells a very revealing story about the limits of agency power to modify existing regulatory structures. Once a law is enacted and the initial implementing regulations promulgated, it is extraordinarily difficult to reconsider *en masse* the enforcement schemes of prior administrations. Oversight committees and constituency interest opposition is simply too formidable at this point. Direct repeal of existing interpretations and regulations therefore is unlikely to succeed. These roadblocks, however, do not foreclose White House influences. Instead, they deny presidential supremacy and force an administration to supplement traditional policymaking through rulemaking with back-door policymaking devices like appointments, agency reorganization, and resource prioritization. Although such policymaking devices are necessarily temporary (for subsequent administrations can exercise the powers of appointment, resource prioritization, and reorganization to displace their predecessors' objectives), these devices play quite a large role in civil rights enforcement.

The Reagan years then tell a cautionary tale about executive power. Implementation strategies with modest objectives can move agency policymaking in the direction of administration priorities. However, once constituency and congressional expectations are well settled, efforts to replace existing approaches with a new regime will meet tremendous resistance. Since Congress holds the ultimate trump card with, among other things, its power of the purse, direct attacks such as those launched by the FCC, the Civil

⁷⁴ EADS & FIX, *supra* note 48, at 193-94.

Rights Commission, and especially the DOJ seem doomed to failure. Consequently, after the enactment of legislation and promulgation of initial agency regulations and interpretations, executive power lies principally at the margins. As such, White House centralization efforts cannot rewrite the nation's civil rights agenda. Furthermore, only a jerry-rigged structure can be assembled with the tools of executive power—appointments, reorganization, policy prioritization—and hence it is unlikely that a President will be able to establish a civil rights legacy.

However, these limits on executive power should not be overstated. Clarence Thomas nullified a great deal of Carter era numerical equality initiatives. Although the ephemeral nature of Thomas' weapons for reform makes his legacy vulnerable, the Reagan EEOC is a testament to the fact that an agency willing to swim against the political current nonetheless possesses substantial power.

III. GEORGE BUSH'S CIVIL RIGHTS AGENDA

The lessons of the Reagan era were lost to the Bush presidency. Rather than follow "in the tradition of Ronald Reagan,"⁷⁵ as the 1988 Republican platform promised, the Bush administration sought to distance itself from its predecessor. Had Bush—like Bill Clinton—disagreed with Reagan's rhetorical attack against preferences, such distancing would undoubtedly have been appropriate. Moreover, had Bush taken issue with the confrontational style of some of the Reagan officials, changes in executive political strategies too would be expected. An argument, I suppose, can be made that differences between the Reagan and Bush approaches to civil rights reflect such differences in personal philosophy and leadership style. These differences, however, are rooted in Bush's absence of vision rather than his endorsement of a competing vision.

Bush officials saw civil rights as a special interest mine field—better avoided than navigated. The negative publicity garnished by, and ultimate ineffectiveness of, the confrontational Reagan administration approaches likely figured in this calculation. That these controversies would dwarf the bureaucratic strategies advanced at the EEOC and elsewhere also comes as no surprise. Vice-President George Bush was directly involved in these Reagan-

⁷⁵ 1988 Republican Party Platform, *reprinted in* 46 CONG. Q. ALMANAC 2369, 2399 (1988).

era civil rights disputes, often advocating a position at odds with the ideologically driven Justice Department.⁷⁶ The day to day management of the EEOC, in contrast, was an unlikely target to appear on the radar screen of Bush or his staff.

Reagan-era controversies tell only part of the story. Bush never saw himself as either an ideological warrior or a keeper of the Reaganesque flame. His approach to domestic policymaking, as has been countless recounted in the wake of his 1992 electoral defeat, was reactive issue-avoidance.

Civil rights appears a model of Bush's lack of commitment and vision. The story begins well before 1988. From 1963 to 1970, when Bush served in the House of Representatives and ran for Senate, his civil rights perspectives varied to meet the needs of the prevailing political winds.⁷⁷ Bush opposed the 1964 Civil Rights Act because it "was passed to protect 14 percent of the people. I'm also worried about the other 86 percent." He likewise opposed open housing legislation in 1966, saying that there were "[already] wonderful alternatives in the field of housing"⁷⁸ Bush, however, vigorously supported fair housing legislation in 1968 and affirmative action in federal contracting in 1970.⁷⁹ The explanation for these inconsistencies—in a statement attributed to Bush—was that "I needed to get elected."⁸⁰ Jefferson Morley put a kinder—but nonetheless devastating—spin on Bush's civil rights record, namely, "George Bush isn't merely caught in the middle of this conflict [between Republican moderates and conservatives]—he embodies it."⁸¹

The Bush presidency clearly reveals that the past is prologue. Rather than stand for something (even rhetorically if not in fact), Bush sought to conciliate civil rights interests without alienating conservatives. This mish mash approach to policymaking, although intended to be risk adverse, ultimately proved disastrous. By the end of his presidency, neither civil rights groups nor conservatives shed tears at Bush's electoral defeat. Unlike Clarence Thomas, who consistently advocated individual-centered approaches and—while dodging policy initiatives he deemed politically coun-

76 See Marcus, *supra* note 13, at A1.

77 See Jefferson Morley, *Bush and the Blacks: An Unknown Story*, N.Y. REV. BOOKS, Jan. 16, 1992, at 19-26.

78 Marcus, *supra* note 13, at A20.

79 See *id.*; Morley, *supra* note 77, at 24-25.

80 Marcus, *supra* note 13, at A20.

81 Morley, *supra* note 77, at 26.

ter-productive—put his advocacy into action, Bush's civil rights strategy was inherently discordant and therefore carried little favor with any constituency.

Bush's willingness to break faith with his predecessor is most vividly revealed in his handling of the Civil Rights Commission and the FCC, two entities that were immersed in Reagan-era controversy. At the Civil Rights Commission, Bush appointees and key agency personnel disavowed the Reagan Commission's assertion that affirmative action "merely constitutes another form of unjustified discrimination . . . [and] offends the Constitutional principle of equal protection."⁸² Bush's choice for chairman, Arthur Fletcher, a personal friend of the President who also was a long time proponent of race-conscious hiring, perceived that "specifying the number of person-hours to be worked by minorities and women" as "typical contracting practice" and not a "quota."⁸³ Another Bush appointee, Charles Pei Wang, supported efforts by Actor's Equity to prevent a white actor from playing a Eurasian role in the Broadway production of "Miss Saigon."⁸⁴ In addition to these appointments, staffers hired by the Reagan administration were dismissed so that the new leadership could "select staff with whom it has personal confidence to carry out its policy goals."⁸⁵

These changes at the Commission were intended to demonstrate to the civil rights community dramatic differences between the Bush and Reagan presidencies. Bush wanted to tilt the balance of the Commission back again, so that—in the words of presidential spokesman Marlin Fitzwater—it "could be stronger and more forceful in representing the concerns of minorities" than its predecessor.⁸⁶

Here, rather than avoid his predecessor's mistakes, Bush affirmatively sought to distance himself from Reagan by returning the Commission to its past glory. At a White House ceremony honoring the newly constituted commission, Bush—borrowing a phrase from Senator Kennedy—spoke approvingly of the agency's historic role as "an independent, bipartisan voice for justice."⁸⁷ By em-

82 U.S. COMM'N ON CIVIL RIGHTS, TOWARD AN UNDERSTANDING OF STOTTS 54 (1985).

83 Arthur A. Fletcher, *For Civil Rights, It's Back to the Future*, N.Y. TIMES, Aug. 19, 1990, at D19.

84 See Press Release, U.S. Comm'n on Civil Rights, Aug. 10, 1990.

85 Letter from Wilfredo Gonzalez, Staff Director of the Commission on Civil Rights, to Brian D. Miller, Deputy General Counsel (June 12, 1990) (copy on file with author).

86 James Gerstenzag, *Bush Names Fletcher to Head Rights Panel*, L.A. TIMES, Feb. 24, 1990, at A18.

87 Remarks at a Meeting With the Comm'n on Civil Rights, 1 PUB. PAPERS 675 (May

bracing this characterization, Mr. Bush proved willing to shoot arrows at his predecessor. Ironically, when the President sought to moderate the Civil Rights Act of 1990, Commission Chairman Fletcher expressed "outrage" and questioned Bush's sincer[ity] about civil rights."⁸⁸

Bush's desire to work with civil rights interests is also revealed in his management of the Office of Federal Contract Compliance Programs ("OFCCP"), the governmental office which supervises Executive Order 11,246 compliance. Reagan took heat both for his management of this office and his willingness to reconsider the 11,246 program. Bush appointees, in contrast, were more active in enforcing 11,246. In fiscal year 1990, for example, 4,595 contractors were found to be in violation of OFCCP regulations—prompting 2,855 "conciliation agreements" and 1,700 firms committing to abide by OFCCP requirements.⁸⁹

Changes at the FCC were less dramatic but equally telling. Bush appointed three FCC Commissioners—Alfred Sikes, Sherrie Marshall, and Andrew Barrett—in the summer of 1989. All three expressly supported the race preference program repudiated by their predecessors in their confirmation hearings.⁹⁰ Before the Supreme Court, these appointees turned their words into deeds by vigorously (and successfully) defending diversity preferences in *Metro Broadcasting v. FCC*.⁹¹

Unlike Civil Rights Commission appointments, it is unlikely that Bush officials selected the FCC Commissioner in order to reverse Reagan-era approaches to civil rights. For the Bush administration, telecommunications policy hinged on the re-establishment of a dialogue between the FCC and Congress. Bush sought to soothe strained relations in many ways, including his sacrificing of ideological consistency on affirmative action.

The *Metro Broadcasting* litigation is telling for another reason. Before the Supreme Court, Bush appointees in the Justice Department took issue with the FCC position. Characterizing these preferences as "racial stereotyping that is anathema to basic constitu-

17, 1990) [hereinafter *Remarks*].

88 Ann Devroy & Michael Isikoff, *Administration Renews Threat to Veto Civil Rights Bill if Left Unchanged*, WASH. POST, Oct. 13, 1990, at A11.

89 See Finn, *supra* note 15, at 21.

90 See *Nominations-July: Hearings Before the Comm. on Commerce, Science, and Transportation, U.S. Senate*, 101st Cong., 1st Sess. 1, 341 (1989) (statement of Alfred C. Sikes); *id.* at 365 (statement of Andrew Barrett); *id.* at 380 (statement of Sherrie Marshall).

91 497 U.S. 547 (1990); see Devins, *supra* note 62.

tional principles,⁹² Solicitor General Kenneth Starr urged the Court to invalidate the FCC program.

The spectacle of Bush appointees squaring off before the Supreme Court on a matter as explosive as race preferences appears bizarre. It is not. FCC appointees needed to satisfy constituencies within Congress. Justice Department officials were not beholden to that constituency; instead, the Bush Justice Department, although unwilling to lead the charge of a civil rights counterrevolution, maintained its allegiance to the individuals and arguments of its predecessor. In many respects, the DOJ was Bush's calling card to movement conservatives who figured so prominently in the Reagan Revolution. To turn his back on that constituency, by ordering the Solicitor General to back away from the *Metro Broadcasting* case, was unthinkable. The Bush administration was far more comfortable allowing its appointees to engage in open battle before the Supreme Court. Rather than being schizophrenic, the conflicting Court argument of the DOJ and the FCC simply reveal Bush's desire to assuage opposing constituencies.

Bush's *laissez faire* attitude towards the DOJ, however, had its limits. Although willing to let the Department argue against preferences in court, Bush nonetheless expressed concern over a too rigid application of this position. On minority set-asides, he narrowly interpreted the DOJ's Supreme Court victory in *City of Richmond v. J.A. Croson Co.*⁹³ and spoke of being "committed to affirmative action" and, with it, his desire "to see a reinvigorated Office of Minority Business in Commerce."⁹⁴ Bush also demonstrated his support for mainstream civil rights interests by signing an executive order on historically black colleges and universities,⁹⁵ a cause the President supported since he led the campus drive for the United Negro College Fund as a college student in 1948.⁹⁶ This longstanding support was demonstrated in other ways. When the Solicitor General filed a brief opposing increased financial support to black colleges, because such aid may perpetuate segre-

92 Brief for the United States as Amicus Curiae, *Metro Broadcasting v. FCC*, 497 U.S. 547 (1990) (No. 89-453).

93 488 U.S. 469 (1989).

94 The President's News Conference, 1 PUB. PAPERS 21, 29 (Jan. 27, 1989); see also Sharon LaFraniere, *On Civil Rights, Bush Aides Let Conservative Crusade Fade*, WASH. POST, Mar. 18, 1991, at A1.

95 Exec. Order No. 12,677, 54 Fed. Reg. 18,869 (1989), reprinted in 20 U.S.C. 1060 (Supp. III 1991).

96 See Morley, *supra* note 77.

gation by encouraging minority enrollment, Bush directed a reversal of that position before the Supreme Court.⁹⁷ The triggering event here was a meeting in which black college presidents formally complained to the President about the Solicitor General's brief.⁹⁸

Recognition of constituency interests figured prominently in Bush's dealings with the DOJ, the FCC, and the Civil Rights Commission. These episodes are simply the tip of the iceberg. Interest balancing also explains Bush's treatment of several other civil rights issues. Witness Bush's strong backing of the Americans with Disabilities Act—legislation which both makes use of disparate impact proofs of discrimination (rooted in numerical imbalance) and requires state and private employers of fifteen or more to make "reasonable accommodations" necessary to employ otherwise qualified people with disabilities.⁹⁹ In supporting this legislation, Bush distanced himself from Reagan by endorsing a major civil rights initiative, offended no one, and won favor with an extraordinarily powerful constituency of over forty-three million disabled Americans. Bush has also appealed to this constituency through his appointments to the EEOC, the agency principally responsible for writing the implementing regulations for and enforcing the provisions of this law. Bush's choice for chairman of the EEOC, Evan Kemp, as well as its chief of staff, Robert Funk, both came to the agency from disability rights interests groups.¹⁰⁰

Bush's embrace of "reasonable accommodation" demands is telling.¹⁰¹ Although some employers might feel pressure to hire the disabled simply to avoid litigation and other expenses, Bush spoke of "equality, independence, and freedom" when he signed the Disabilities Act.¹⁰² This message, which is hard to square with

97 See Linda Greenhouse, *Bush Reverses U.S. Stance Against Black College Aid*, N.Y. TIMES, Oct. 22, 1991, at B6.

98 See *id.*

99 Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified in scattered sections of titles 29, 42, 47 of the U.S.C.).

100 See *EEOC Chairman-Designate Evan Kemp Will Bring New Perspective to Civil Rights Agency*, Daily Lab. Rep. (BNA) No. 34, at A-4 (Feb. 20, 1990).

101 Unlike Title VII, where statistical based disparate impact proofs are of extraordinary import, ADA plaintiffs might well make limited use of statistical proofs. As EEOC Chairman Evan Kemp put it: "[A] typical ADA case will involve the question of whether an individual's disability (which is often relevant) actually prevents him from doing the job." *EEOC Chairman Criticizes Danforth Proposal to Link Language of Civil Rights, ADA Act*, Daily Lab. Rep. (BNA) No. 185, at A-12 (Sept. 24, 1991).

102 Ann Devroy, *In Emotion-Filled Ceremony, Bush Signs Rights Law for America's Disabled*, WASH. POST, July 27, 1990, at A18.

Bush's subsequent attacks on the 1990 and 1991 Civil Rights Acts, dramatizes the White House's lack of coherence and control in civil rights decision making. Rather than advance a unified vision through its appointments or take steps to coordinate policy declarations in the White House, White House direction typically took the form of identifying which constituency to serve. Beyond that, enforcement agencies tended to operate as mini-feifdoms, beholden to no one in the executive branch. The Justice Department and the FCC's battle over race preferences or the DOJ's attack on historically black colleges in the face of a conflicting executive order fits this pattern.

Bush's approach to civil rights, like Hippocrates, was "do no harm." By placing the business of civil rights enforcement in the hands of individuals either a part of (Evan Kemp, Arthur Fletcher) or not opposed to (FCC appointees, Civil Rights Division head John Dunne) civil rights interests, Bush sought to separate himself from the costly controversies that engulfed his predecessor. Moreover, in the event of controversy, Bush typically favored the civil rights community over his own appointees. His intervention on behalf of historically black colleges fits this model. A more striking example of Bush's abandonment of his appointees in favor of special interests involved Department of Education opposition to race-designated scholarships.

On December 4, 1990, Michael Williams, the Department of Education's Assistant Secretary for Civil Rights, concluded that laws prohibiting "discrimination on the grounds of race, color, or national origin" extend to race exclusive scholarships.¹⁰³ This ruling disrupted Education's long-standing practice of authorizing minority scholarships. In the aftermath of this unexpected announcement, an avalanche of protests from higher education and civil rights groups flooded both the White House and the Education Department.¹⁰⁴

Bush's handling of the minority scholarship flap is a prime example of minimizing political loss. The reasonableness of Williams' interpretation was irrelevant. The prospect of the Department of Education disrupting a longstanding policy of better en-

103 See Letter from Michael L. Williams, Assistant Secretary for Civil Rights, to John Junker, Fiesta Bowl Executive Director (Dec. 4, 1990); U.S. Dep't. of Educ. Press Release, Dec. 4, 1990.

104 For descriptions of this episode, see EASTLAND, *supra* note 2, at 284-87; Finn, *supra* note 15, at 19-20.

abling disadvantaged minority youth to attend college offered no political advantage.

White House sources immediately informed reporters that Education acted unilaterally and that the President disagreed with Williams' interpretation. Within a few days of its minority scholarship announcement, the White House minimized potential damage by forcing Education to adopt a bizarre compromise of disallowing (after a four year transition period) federal race-specific support while authorizing all other race-specific designations.¹⁰⁵ While recognizing that race-specific scholarships may run contrary to the statutory prohibition against recipients of federal financial assistance discriminating "in any program or activity," the President trivialized this concern as a matter for the "courts to rule on," "for now . . . we can continue to have these kinds of scholarships."¹⁰⁶ Lamar Alexander, then Secretary of Education designate, went one step further.¹⁰⁷ At his confirmation hearings, he vowed to temporarily suspend restrictions on race-based scholarships and expressed regret that the Department of Education had "sent out exactly the wrong signal [to] minorities."¹⁰⁸

The Bush administration's discounting of subordinate legal interpretations on the minority scholarship question stands in sharp contrast to Reagan administration practices. Ronald Reagan created a firestorm of adverse publicity by defending controversial DOJ interpretations. Bush, unwilling to be saddled with the burdens that befell his predecessor, quickly distanced himself from his subordinates.

White House intervention here arguably is more than a politically expedient policy reversal. After all, as his intervention on behalf of historically black colleges suggests, Bush may well have long been committed to enhancing educational opportunities for minority students through race-exclusive measures. In other words, Bush may simply have advanced his own understanding of appropriate governmental policy in choosing to respond to civil rights constituencies rather than defend the legal interpretations of his appointees. Admittedly, like his support of minority set-asides, these outreach efforts do not jibe with Bush's charge that disparate impact proofs of discrimination improperly encourage race-

105 See U.S. Dep't. of Educ. Press Release, Dec. 18, 1990.

106 Karen De Witt, *U.S. Eases College Aid Stand*, N.Y. TIMES, Dec. 19, 1990, at A1.

107 Kenneth J. Cooper, *Review of Race-Based Scholarships Promised*, WASH. POST, Feb. 7, 1991, at A3.

108 *Id.*

conscious hiring. Something else—aside from inconsistencies in the President's civil rights vision—is at play, however. Bush never sought to centralize policymaking on this question in the White House. The Williams interpretation went forward because there were no established procedures for clearing alterations in executive policy through the White House. Bush, moreover, failed to maintain strong Secretary level control at Education. Rather than quickly replace Education Secretary Lauro Cavazos, a Reagan appointee described as "hapless" and "notoriously weak,"¹⁰⁹ Bush facilitated the circumstances in which an undersecretary could define executive branch policymaking.

The final resolution of this dispute further reveals Bush's penchant to leave civil rights policymaking in the hands of appointees. Rather than keep the minority scholarship issue on ice (as Bush's endorsement of "these kinds of scholarships" could suggest), Education proposed regulations in December 1991, specifying that "[a] college may consider race as one factor among several when awarding scholarships."¹¹⁰ Under intense pressure from Congress, Education again suspended rulemaking on this issue.¹¹¹ With Clinton's choice for Education Secretary, Richard Riley, describing minority scholarships as "valid, good and legal," this contentious issue—barring court action—appears put to rest through a return to the status quo ante.¹¹²

The minority scholarship flap reinforces how difficult it is to affect policymaking through confrontational strategies. The Bush administration understood this, correctly gleaning from the Reagan experience the pitfalls of an overly ideological, overly confrontational approach to civil rights. Bush's quick withdrawal from the Williams' interpretation, while prompting a conservative backlash, was understandable and appropriate. In the words of Education Secretary Alexander: "I heard once that it's not a good idea to turn over every rock that you can, and this might have been a rock that it was best not to turn over."¹¹³ Consequently, while laws prohibiting discrimination by recipients of federal largesse

109 Finn, *supra* note 15, at 19; EASTLAND, *supra* note 2, at 285.

110 Nondiscrimination in Federally Assisted Programs, 56 Fed. Reg. 64,548 (1990) (proposed Dec. 10, 1991). These standards track the Supreme Court's decision in *Regents of University of California v. Bakke*, 438 U.S. 265 (1978).

111 See *Judges Allow Race-Based Scholarships*, WASH. POST, Feb. 6, 1993, at A3.

112 *Id.*

113 Alexander, *Martin Face Clear Sailing for Cabinet Posts*, ATLANTA J. & CONST., Feb. 7, 1991, at A2.

may well forbid race exclusive scholarships, that interpretation is better left to the courts than to an agency. There is a second reason to prefer judicial over agency action. Where Congress can make life miserable for an agency through its oversight powers as well as its control over an agency's purse strings, Congress' only response to judicial action is the difficult task of enacting new legislation.

The Bush White House learned little more from the Reagan administration than to eschew confrontational repudiations of long-standing policies. Bush too eschewed the advancement of an individual-centered civil rights agenda through the bureaucratic techniques championed by the EEOC. Bush, instead, advanced an agenda of issue avoidance. Political appointees were not a group of like-minded individuals seeking to advance some shared vision of the public good. For the most part, appointees reflected the interests of the affected constituency.

This appointments strategy, needless to say, made for an incoherent civil rights agenda. Bush apparently did not care. Like Richard Nixon—who simultaneously sought to woo conservatives through his opposition to school desegregation and to appease the civil rights community through his support of minority hiring preferences¹¹⁴—Bush sought to have it both ways. This brinkmanship, by not displeasing either constituency too much, was designed to keep the President removed from the civil rights fires that so consumed both the Carter and Reagan administrations. Along these lines, the Bush White House left it to agency heads to run their programs. It intervened only when agency level decisions prompted an outcry from affected interests. Minority scholarships and historically black colleges are two such examples.

Bush was unable to have it both ways, however. Standing for something did matter. Events culminating in the Civil Rights Act of 1991 saw liberals and conservatives alike distancing themselves from Bush. Ironically, while deserving opprobrium for discounting civil rights, Bush was energetic, involved, and somewhat effective in shaping this legislative debate.

IV. THE 1991 CIVIL RIGHTS ACT

Presidents often play a leadership role in shaping the content of civil rights legislation. When the White House disagrees with

114 See generally GRAHAM, *supra* note 34.

the Congress, for example, the formidable task of overriding a veto encourages compromise. Of course, as was the case with the Americans with Disabilities Act, the White House may simply serve as a cheerleader to congressional initiatives. The 1991 Civil Rights Act was quite another matter, however. From April 3, 1990, less than two months after the legislation was first introduced, to October 23, 1991, two days before the announcement of a compromise agreement, the Bush administration steadfastly claimed that it would veto this behemoth package of civil rights reforms. During this period, the President once successfully exercised his veto power and on at least two dozen occasions publicly discussed this matter.

The principal disagreement between the administration and Congress concerned disparate impact proofs of discrimination. Arguing that proofs of employment discrimination sensitive to numerical imbalance "create a very real risk . . . of quotas,"¹¹⁵ the White House advocated inclusion of stringent evidentiary standards to dissuade hiring by numbers. Congress and civil rights leaders, in contrast, endorsed more liberal proofs of discrimination. An epic struggle was fought over this matter. The stakes were high and both sides fought tooth and nail for their position. When a compromise was worked out, however, Bush was widely accused of capitulating to congressional sponsors. Reflective of conservative sentiments, Douglas Kmiec claimed that "Bush flopped, flipped, and ultimately totally flopped over the Civil Rights Act of 1991."¹¹⁶ From the civil rights community, William Coleman and Vernon Jordan described the compromise as "a flat out repudiation of the administration's longstanding position."¹¹⁷ Indeed, the President's only defender was his controversial counsel, C. Boyden Gray. "Contrary to a rapidly congealing press myth," Gray wrote, "the Democrats beat a total retreat on quotas."¹¹⁸

The truth, as best I can tell, lies somewhere in the middle. Both sides made concessions and took calculated risks regarding future judicial interpretations. That Bush wound up with egg on

115 *Background Information and Text of Administration's Civil Rights Bill*, Daily Lab. Rep. (BNA) No. 43, at F-1 (Mar. 5, 1991).

116 Kmiec, *supra* note 1, at 167.

117 Coleman & Jordan, *supra* note 17, at A21.

118 C. Boyden Gray, *Civil Rights: We Won, They Capitulated*, WASH. POST, Nov. 14, 1991, at A23.

his face simply reflects the widely held (and well founded) belief that Bush did not believe his anti-quota rhetoric. Like the boy who cried "wolf" too often, Bush's claim of standing to principle occurred in a backdrop of political expediency. Amazingly, the one episode where Bush significantly shaped a civil rights dialogue by personally standing up to civil rights interests is widely heralded as Bush's greatest failure. For this reason, the Civil Rights Act of 1991 shows the necessity for a President to stake out a position.

The starting point here is *Wards Cove Packing Co. v. Atonio*.¹¹⁹ In *Wards Cove*, the Supreme Court dramatically altered the debate over disparate impact proofs of discrimination. Rather than demand that employment practices be related to job performance, *Wards Cove* concluded that "the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer."¹²⁰ *Wards Cove* also held that the burden of persuasion "remains with the disparate-impact plaintiff"¹²¹ and that the plaintiff-worker had to specifically identify the employment practice that was being challenged.¹²² It was *Wards Cove* and four other 1989 decisions that prompted congressional leaders to push for a new civil rights bill.¹²³ *Wards Cove*, however, raised the quota issue and became the principal sticking point in negotiations between the White House and the Congress.

A. 1990: Setting and Unsetting the Stage

On February 7, 1990, the Civil Rights Act of 1990 was introduced by Edward Kennedy in the Senate and Gus Hawkins in the House.¹²⁴ Also, on February 7, Attorney General Dick Thornburgh said in a written statement that *Wards Cove* was "rooted in the Court's opposition to racial quotas, which we share."¹²⁵

119 490 U.S. 642 (1989).

120 *Id.* at 659.

121 *Id.*

122 *Id.* at 657.

123 The other 1989 decisions are *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *Lorance v. AT&T Technologies*, 490 U.S. 900 (1989); *Martin v. Wilks*, 490 U.S. 755 (1989); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). The 1991 Act also overturned *Astoria Federal Sav. and Loan Ass'n v. Solimino*, 111 S. Ct. 2166 (1991); *West Virginia Univ. Hosps. v. Casey*, 111 S. Ct. 1318 (1991).

124 See 136 CONG. REC. S1018-21 (daily ed. Feb. 7, 1990) (text of S.2104 and accompanying remarks by Sen. Kennedy); 136 CONG. REC. H364 (daily ed. Feb. 7, 1990) (introduction of H.R. 4000 and accompanying remarks by Rep. Hawkins).

125 Statement by Attorney General Dick Thornburgh (Feb. 7, 1990) (on file with author).

The Justice Department "urged the Court to reach the decision . . . it did in [*Wards Cove*], we agree with [it], and will oppose any legislation that seeks to overturn [it]."¹²⁶ If Congress statutorily overturns *Wards Cove*, then "[employers] will make sure they have so many blacks, so many hispanics and be done with it . . . [they will think] that the only safe course is to have quotas."¹²⁷

The administration did agree with congressional sponsors that civil rights reform was necessary. On February 22, through Republican Senator Orin Hatch, an administration-backed bill was introduced.¹²⁸ The administration's proposal sought to overturn only two of the Court cases targeted by Kennedy-Hawkins, leaving intact *Wards Cove's* treatment of disparate impact cases. Congressional sponsors did not seriously consider the White House alternative; instead, on April 4, the Senate Labor Committee concluded that an employer must demonstrate that employment practices which have a disparate impact are "essential to effective job performance."¹²⁹ One day earlier, on April 3, Attorney General Thornburgh claimed that this standard places an impossible burden on employers and raised the spectre of a presidential veto.¹³⁰

The President stood behind this claim. On May 17, in a Rose Garden Ceremony welcoming his Civil Rights Commission appointees, Bush spoke out against quotas as "wrong [because] they violate the most basic principles of our civil rights tradition and the most basic principles of the promise of democracy." Although unwilling "to sign a bill whose unintended consequences are quotas," Bush spoke of the need for civil rights legislation "to obliterate consideration of factors such as race, color, religion, sex, or national origin from employment decisions."¹³¹ "I want to sign a civil rights bill," said Bush, "but I will not sign a quota bill."¹³²

126 Joan Biskupic, *A Bipartisan Hill Coalition Unveils Rights Measure*, 48 CONG. Q. ALMANAC 392 (1990) (quoting Deputy Attorney General Donald Ayer).

127 *Id.*

128 See 136 CONG. REC. S1497 (daily ed. Feb. 22, 1990) (introduction of S.2166).

129 S. REP. NO. 315, 101st Cong., 2d Sess. 2 (1990).

130 Letter from Attorney General Dick Thornburgh to Senator Edward M. Kennedy, Chairman, Committee on Labor and Human Resources (April 3, 1990) (on file with author).

131 *Remarks, supra* note 87, at 779.

132 *Id.*

The Rose Garden speech was a telling event. On one hand, Bush made clear his desire to work with the civil rights community. That this speech coincided with an event designed to bridge the Reagan-era gap between the civil rights community and the White House bolstered Bush's conciliatory message. On the other hand, Bush's anti-quota rhetoric cued civil rights leaders of the need to compromise on the *Wards Cove* issue.

Bush's firmness on the quota issue had its effect. On the day of his Rose Garden speech, Kennedy-Hawkins sponsors softened their demand that employment practices be "essential to effective job performance" with substitute language requiring employment practices to bear a "substantial and demonstrable relationship to effective job performance."¹³³ Two months later, Kennedy-Hawkins was again softened. A "significant relationship," rather than a "substantial and demonstrable relationship" would now suffice.¹³⁴ Moreover, instead of allowing an employee to rest her disparate impact claim on a group of employment practices, sponsors acceded to a particularity requirement prohibiting such a general allegation whenever a court finds that identification of specific practices is reasonably possible through examination of the employer's records.¹³⁵ Finally, the substitute added new language providing that "nothing in . . . this Act shall be construed to require an employer to adopt hiring or promotion quotas."¹³⁶

These concessions did not settle the issue. Although the White House was now willing to negotiate the terms of the statutory overturning of *Wards Cove*, Bush continued to speak of his desire to "sign the civil rights bill of 1990 and not a quota bill of 1990."¹³⁷ The revamped Kennedy-Hawkins would not do as Bush renewed his veto threat of this language. Instead, the White House endorsed a substitute measure requiring employment practices to bear a "manifest relationship" to the employment in question and that the employee has the burden of identifying specific employment practices which contributed to the disparate impact.¹³⁸

133 See H.R. REP. NO. 644, 101st Cong., 2d Sess., pt. 1, at 97 (1990); Joan Biskupic, *Bush Shifts on Job-Rights Bill But Differences Remain*, 48 CONG. Q. ALMANAC 1563 (1990).

134 See 136 CONG. REC. S9325-27 (daily ed. July 10, 1990) (text of Kennedy-Jeffords substitute).

135 *Id.* at S9325.

136 *Id.*

137 EASTLAND, *supra* note 2, at 341 n.4 (July 1990 remarks to National Council of La Raza).

138 For the text of the Michel-LaFolice substitute, see 136 CONG. REC. H6746-47 (daily ed. Aug. 3, 1990). For the President's letter supporting this measure, see *id.* at

Negotiations among administration officials, the civil rights community, and congressional sponsors of the bill, which took place over several weeks during the summer, were unable to overcome this impasse. Although negotiations nearly succeeded, the resolution of the *Wards Cove* issue ultimately proved impossible.¹³⁹ The key here was not President Bush's principled objection to either numerical measures of discrimination or quotas. The President's civil rights record was already mired in inconsistency on these very matters.

Like other civil rights matters, the President's practice was to delegate to his appointees and—if necessary—engage in damage control. The President then stood firm because his negotiating team included his counsel C. Boyden Gray and Department of Justice officials who strongly backed *Wards Cove*. The only member on the administration team without a strong interest in the preservation of *Wards Cove* was Chief of Staff John Sununu. Had Sununu controlled the negotiations a deal may well have been struck. According to one account, within hours of Kennedy and Sununu agreeing to a compromise, C. Boyden Gray submitted a conflicting offer.¹⁴⁰ Another account, however, suggests that Kennedy backed away from his agreement with Sununu after being pressured by civil rights interests.¹⁴¹ Irrespective of which of these accounts is accurate, it is nevertheless true that although the President's desire to work things out with civil rights interests had placed *Wards Cove* squarely on the bargaining block, the White House team proved stingy in their negotiations.

On September 25, House and Senate conferees agreed to file a conference report quite close to the softened Kennedy-Hawkins.¹⁴² Attorney General Thornburgh, in a letter dated October 12, indicated that the President "will be compelled to veto" the bill.¹⁴³ "As we have repeatedly pointed out," said Thornburgh, "the trouble with the bill is that it will inevitably result in quotas being adopted surreptitiously to avoid the cost

H6747-48.

139 See Joan Biskupic, *Deal on Civil Rights Measure Stymied by 'Quota' Issue*, 48 CONG. Q. ALMANAC 2225 (1990).

140 See Joan Biskupic, *Partisan Rancor Marks Vote on Civil Rights Measure*, 48 CONG. Q. ALMANAC 2312 (1990).

141 See *id.*

142 H.R. REP. NO. 755, 101st Cong., 2d Sess. (1990).

143 Letter from Attorney General Dick Thornburgh to Senator Robert Dole, Minority Leader (Oct. 12, 1990) (on file with author).

and trouble of disparate impact lawsuits."¹⁴⁴ When the conference report was passed by the Senate on October 16, and the House on October 17, a presidential veto seemed certain. On October 14, however, President Bush, following a phone conversation with Vernon Jordan, ordered his negotiating team to meet with Jordan and William Coleman on October 16.¹⁴⁵ The President wanted to compromise. Sunnunu, who recently had been embarrassed by his mismanagement of the 1990 budget summit, was also determined to reach an accord.¹⁴⁶

The Coleman-Jordan meeting proved a "disaster," however. Gray and Thornburgh, apparently, would not give in.¹⁴⁷ And why should they? The President had committed himself to vetoing a "quota bill" and the definition of whether the 1990 Act constituted a "quota bill" was in their hands. While the President may have preferred their concluding otherwise, Bush demanded only that the meeting take place. Bush's willingness to hold his position on *Wards Cove* was influenced by his having not only the votes in Congress to sustain the veto but also the pressure from Republicans who voted against the bill in anticipation of a White House veto. Bush also wanted to keep faith with conservatives who both strongly opposed the bill and doubted his commitment to their agenda. Put simply: Bush felt he would be better positioned by vetoing a "quota bill" than by signing controversial civil rights legislation.

On October 22, the President, as he had promised, vetoed the 1990 Civil Rights Act.¹⁴⁸ On October 24, the Senate, by a vote of 34-66, sustained the veto.¹⁴⁹

In his veto message, Bush devoted the bulk of his justification to *Wards Cove*. Claiming that "the bill actually employs a maze of highly legalistic language to introduce the destructive force of quotas into our Nation's employment system" and that "[i]t is neither fair nor sensible to give the employers of our country a

144 *Id.*

145 See Andrew Rosenthal, *Civil Rights Bill Gives Look at White House Split*, N.Y. TIMES, Oct. 22, 1990, at A15.

146 According to one source: "If the President wants a civil rights bill pretty bad, then Sunnunu wants one real bad. If the President wants a civil rights bill real bad, then Sunnunu is willing to play in traffic to get one." *Id.*

147 It is possible that Gray and Thornburgh were mistakenly under the impression that Coleman and Jordan were prepared to accede to White House demands.

148 Message to the Senate Returning Without Approval the Civil Rights Act of 1990, 2 PUB. PAPERS 1437 (Oct. 22, 1990) [hereinafter Message to the Senate].

149 136 CONG. REC. S16,562-02, S16,589 (daily ed. Oct. 24, 1990).

difficult choice between using quotas and seeking a clarification of the law through costly and very risky litigation," Bush concluded that "equal opportunity is not advanced but thwarted."¹⁵⁰

This high sounding rhetoric was quickly called into question. Legislation that Bush sent to Congress contemporaneously with his veto was surprisingly similar to the legislation he vetoed on the *Wards Cove* issue. With respect to employment practices that are defended as a measure of job performance, for example, both bills defined business necessity as practices which "bear a significant relationship to successful job performance," placed the burden of persuasion regarding business necessity on employers, and allowed employees to challenge a group of employment practices when they are unable to demonstrate that a particular employment practice causes disparate impact because "elements of a decision-making process are not capable of separation."¹⁵¹ Inconsistencies between the Bush veto message as well as an accompanying Attorney General analysis¹⁵² are so stark that it appears that one set of White House interests (Gray and Thornburgh) controlled the veto message and another set (possibly Sununu) the proposed legislation. This, of course, is not to say that there were no differences of substance between the two measures. Significant differences did exist on punitive damages, the right to a jury trial, and nonparty rights to challenge court-approved settlement agreements.¹⁵³ The administration's proposal, moreover, by extending its coverage to court-ordered remedies, affirmative action, and conciliation agreements raised doubts about Executive Order 11,246 as well as voluntary affirmative action programs that courts had found outside the bounds of Title VII.¹⁵⁴ These differences, while significant, do not explain how a veto message rooted in disparate impact proofs and quotas can be reconciled with similar language in the White House alternative.

150 Message to the Senate, *supra* note 148, at 1438.

151 Compare §§ 3 & 4 of the Bush bill, discussed *supra* note 128 with §§ 3 & 4 of 1990 Act, *supra* note 124. The Bush bill, however, embraced a more lenient definition of business necessity ("significant relationship to a significant business practice") in the case of other employment practices. See § 3 of the Bush bill, *supra* note 128.

152 See Memorandum from Dick Thornburgh, Attorney General to the President on the Civil Rights Act of 1990 (Oct. 22, 1990).

153 See *Significant Differences Remain Between Vetoed Civil Rights Bill and White House Proposal*, Daily Lab. Rep. (BNA) No. 214, at C-1 (Nov. 5, 1990).

154 See *id.*

The notion that Bush held strong personal views about quotas in employment does not explain the 1990 Act veto. Indeed, within weeks of his veto, Bush spoke passionately of his belief for race-based scholarships. Ironically, the Bush appointee responsible for the minority scholarship flap, Michael Williams, mistakenly understood Bush's antiquota rhetoric as a White House signal to do away with race-based scholarships.¹⁵⁵ At that time, however, Bush was probably more interested in mending fences with those civil rights interests who were disappointed by his veto.

Bush's positioning on the 1990 Civil Rights Act—even if unintentional—proved a political windfall. By labelling the civil rights bill a "quota bill," Bush maximized political advantage, standing tall in the face of minority group pressure while speaking of expanding guarantees of equal opportunity and eliminating prejudice in the workplace.¹⁵⁶ Indeed, the civil rights veto proved a political bonanza for the President.¹⁵⁷ Party spokesman Charles Black depicted the quota issue as a "very salient," "galvanizing issue among core Republicans and conservative Democrats."¹⁵⁸ Furthermore, by making the enactment of civil rights legislation one of his 1991 domestic priorities, Bush sought both to take the moral high ground and to control the debate on this volatile issue.

B. The Civil Rights Act of 1991

No time was wasted in efforts to enact a civil rights bill in 1991. On January 3, Representative Jack Brooks introduced H.R. 1¹⁵⁹ and thus commenced the saga of the 1991 Civil Rights Act. Like *deja vu*, the bill proceeded in a parallel universe to its 1990 predecessor—including legislative compromises, anti-quota rhetoric, veto threats, and marathon summer negotiations. History did not repeat itself, however. Late appearing and unforeseen changes in the political climate transformed gridlock into an eleventh hour agreement. Throughout this episode, including the decisive last minute negotiations, the Bush White House held firm on congressional efforts to replace *Wards Cove* with an explicit statutory stan-

155 See Paul A. Gigot, *One Man's Mettle Proved by Muddle in White House*, WALL ST. J., Dec. 21, 1990, at A10.

156 Message to the Senate, *supra* note 148, at 1438.

157 Fred Barnes, *The Race Card*, NEW REPUBLIC, Dec. 17, 1990, at 10.

158 *Id.*

159 H.R. 1, 102d Cong., 1st Sess. (1991).

dard. Whether these presidential efforts ranked a significant legislative compromise or a resounding political defeat is another matter.

H.R. 1, on the disparate impact issue, lifted the standard used in the vetoed 1990 Act. Not surprisingly, the White House rejected this approach out of hand. In fact, the administration continued to claim that *Wards Cove* should not be overturned. Pointing to post *Wards Cove* cases, Assistant Attorney General John Dunne told Congress in February that these cases "demonstrate that legitimate disparate impact claims can still be brought and won."¹⁶⁰ Dunne also reminded Congress of Bush's successful 1990 veto, noting that the administration "would not accept a bill that results in quotas or other unfair preferences."¹⁶¹

On March 12, the Bush administration introduced its own civil rights legislation. Gone were the compromises contained in the legislation transmitted with the President's veto proposal. Arguing that proof of employment discrimination sensitive to numerical imbalance creates a very real risk of quotas, the White House endorsed the inclusion of stringent evidentiary safeguards to discourage hiring by numbers. The Bush bill, for example, forbade employers who use ability tests from adjusting test scores or using different cut-offs for members of different groups.¹⁶² Moreover, the bill imposed a strict specificity standard, demanding that an employee "demonstrates that a *particular* employment practice causes a disparate impact,"¹⁶³ and allowed employers to escape liability by demonstrating "business necessity," so long as the alleged practice advances "*legitimate* employment goals."¹⁶⁴ Only on the noncontroversial burden of proof issue, where the White House bill placed the burden on the employer, was the administration willing to overrule *Wards Cove*.¹⁶⁵ Bush's position here was a marked departure from his earlier willingness to allow exceptions to the "particular employment practice" demand and to

160 *Hearings on H.R. 1, The Civil Rights Act of 1991, Before the House Comm. on Education and Labor*, 102d Cong., 1st Sess. 545 (1991) (memorandum for the Attorney General).

161 *Statement of Assistant Attorney General John Dunne Before House Judiciary Subcomm. on Civil Rights on the Civil Rights Act of 1991 (H.R. 1)*, Daily Lab. Rep. (BNA) No. 27, at F-1 (Feb. 8, 1991).

162 H.R. 1375, S. 611, 102d Cong., 1st Sess. (1991).

163 *Id.* § 4(k) (emphasis added).

164 *Id.* § 3(n) (emphasis added).

165 See *supra* note 151 and accompanying text.

require employers to demonstrate that hiring practices are significantly related to "successful job performance."¹⁶⁶

The battle lines drawn between the President and Congress were hardly surprising. Congressional civil rights advocates advanced a bill that nearly overrode Bush's veto and hoped for the best. Bush, in contrast, was less willing to compromise. He and his spokesmen also turned up the familiar anti-quota rhetoric. Attorney General Thornburgh said the administration bill would encourage employers to "provide equal opportunity for all workers without resorting to quotas or other unfair preferences."¹⁶⁷ Bush also echoed this familiar refrain. "I am not going to sign a bill that will foster quotas, directly or indirectly," said Bush, "the small employer [must not be driven] into a state of frenzy because of fearing mindless legislative action against him."¹⁶⁸ Bush had good reason to pound this theme; his veto had proven politically popular and there was reason to think it had taken some wind out of bill sponsors' sails. Bush's new found bravado, according to press accounts, was also revealed in his alleged pressuring of business leaders who sought a compromise on H.R. 1 independent of the White House.¹⁶⁹ This hardball tactic, as one observer put it, ensured that "if a bill is to pass [in 1991], it will only be through a deal with President Bush."¹⁷⁰

H.R. 1 sponsors recognized the power of the administration's rhetorical advances. Ralph Neas, director of the Leadership Conference on Civil Rights and target of presidential rebuke, bemoaned that "the overwhelming concern [in Congress] has been the quota issue, much more politically than substantively."¹⁷¹ To shore up legislative support, and a realistic veto override threat, H.R. 1, in late May, was amended. The amendment limited some punitive damages awards; more significant, business necessity was

166 See *supra* notes 132-33 and accompanying text.

167 *White House Civil Rights Bill Would Expand Harassment Awards, But Reject Jury Option*, Daily Lab. Rep. (BNA) No. 43, at A-4 (Mar. 5, 1991) (citing a letter Thornburgh sent to congressional leaders accompanying the administration's bill).

168 Remarks to the National Retail Federation, 1 PUB. PAPERS 549, 551 (May 23, 1991).

169 Joan Biskupic, *Job Discrimination Legislation Roils Business Community*, 49 CONG. Q. ALMANAC 989 (1991).

170 Joan Biskupic, *With Business Talks Stalled, Bush Holds Best Hand*, 49 CONG. Q. ALMANAC 1063 (1991).

171 Joan Biskupic, *Democrats Scramble for Cover Under GOP 'Quota' Attacks*, 49 CONG. Q. ALMANAC 1378 (1991) (quoting Ralph G. Neas, Director of the Leadership Conference on Civil Rights).

moderated to "a significant and manifest relationship to the requirements of effective job performance" and the specificity requirement was reinstated unless a court concludes that, "after diligent effort," the specific practices cannot be isolated from the group.¹⁷² The amended bill, finally retained language specifying that the amendments should not be construed "to require, encourage, or permit . . . quotas."¹⁷³

The White House flatly rejected the amended H.R. 1. Thornburgh depicted the bill as "a hoax" and said it "excludes from the definition of quotas the only kind of quotas . . . already in existence."¹⁷⁴ "Nothing has changed," warned the Attorney General, "[t]he president will veto any legislation which has undergone only cosmetic changes and which still forces quotas."¹⁷⁵ President Bush likewise attacked the bill as the "road to lawsuits and discord," for "[e]ven the section that supposedly outlaws quotas endorses quotas."¹⁷⁶ "[I]t's a quota bill, regardless of how its authors dress it up. You can't put a sign on a pig and say it's a horse."¹⁷⁷ Lamenting his inability to compromise and the short shrift given his alternative (which would "encourage people to work together, rather than employing quotas"), Bush criticized "[t]he beltway interest groups and their spokespersons [for wanting] to make me accept or veto a quota bill."¹⁷⁸

On June 5, the amended H.R. 1 passed the House by a vote of 273-158, a slightly narrower margin than the 1990 Act and fifteen short of a veto proof majority.¹⁷⁹ Noting that "the number of votes in opposition . . . indicates strong support for sustaining a Presidential veto," the White House, not H.R. 1 sponsors, claimed "grati[tude]" and victory by the House vote.¹⁸⁰

172 H.R. 1, 102d Cong., 1st Sess. §§ 101(o)(1), 102(k)(b), 106 (1991) (as amended on June 5, 1991).

173 *Id.* § 111.

174 *Three Versions of Civil Rights Reform Will Be Considered By House Next Week*, Daily Lab. Rep. (BNA) No. 105, at A-5 (May 31, 1991).

175 *Id.*

176 Remarks at the Federal Bureau of Investigation Academy Commencement in Quantico, Virginia, 1 PUB. PAPERS 581, 583 (May 30, 1991).

177 Remarks at the United States Military Academy Commencement Ceremony in West Point, New York, 1 PUB. PAPERS 589, 591-92 (June 1, 1991).

178 Remarks to the National Federation of Independent Business, 1 PUB. PAPERS 596, 598 (June 3, 1991).

179 Legislative Profile Report (102d Congress) (Lexis, Legis Library, Cngvot file).

180 See Statement by Press Secretary Fitzwater on Civil Rights Legislation, 1 PUB. PAPERS 613, 613 (June 5, 1991).

Enter John Danforth, a Republican Senator from Missouri. Danforth introduced compromise legislation in June which went over like a lead balloon with the administration. By defining business necessity as "a manifest relationship to the requirements for effective job performance,"¹⁸¹ EEOC chairman Kemp informed Chief of Staff Sununu that employers would "have little choice but to revert to [quotas]"¹⁸² and Attorney General Thornburgh chided Danforth for demanding more than the "established" legal standard of "manifest relationship to the employment in question."¹⁸³ In September, Danforth tried again. This time borrowing language from the Bush-supported Americans with Disabilities Act.¹⁸⁴ The White House, although somewhat receptive to borrowing from the ADA, rejected this effort.¹⁸⁵ Press Secretary Marlin Fitzwater depicted Danforth's latest compromise as an invitation to quotas and the OMB issued a statement of administration policy savaging the bill as a "quota bill" and noting that the President's "senior advisers would recommend a veto."¹⁸⁶ The use of the Disabilities Act language was considered irrelevant, both because that law treats "business necessity" as an undefined term and because the Danforth compromise limits nonparty rights to challenge "quotas" contained in extant content decrees.¹⁸⁷

At summer's end, the prospects for compromise seemed bleak. Bush, buoyed by the House vote, held to his position. In a series of speeches, moreover, Bush also made clear that it was the "lawyers" in his administration—Dick Thornburgh and C. Boyden Gray—who were defining administration policy on the 1991 Act. In explaining his objections to the amended H.R. 1, Bush—who had earlier and proudly declared his ignorance on legal matters—emphasized that "[a]s far as our experts can tell . . . the changes that they're proposing are strictly cosmetic."¹⁸⁸ When

181 S. 1208, 102d Cong., 1st Sess. (1991).

182 *Administration Officials Target Moderate Republican Civil Rights Bill*, Daily Lab. Rep. (BNA) No. 124, at A-15 (Jun. 27, 1991).

183 *Text of Letter from Attorney General Thornburgh to Sen. Danforth, Jun. 21, 1991*, Daily Lab. Rep. (BNA) No. 124, at E-1 (Jun. 27, 1991).

184 *EEOC Chairman Criticizes Danforth Proposal to Link Language of Civil Rights, ADA Act*, Daily Lab. Rep. (BNA) No. 185, at A-12 (Sep. 24, 1991) (draft version of S. 1745).

185 The administration viewed their own proposal as the only framework within which to incorporate the ADA language. See *White House Trades Charges with Danforth; Conservatives Tinker with Administration Bill*, Daily Lab. Rep. (BNA) No. 187, at A-6 (Sept. 26, 1991).

186 *Statement of Administration Policy on S. 1745 October 23, 1991*, Daily Lab. Rep. (BNA) No. 206, at F-1 (Oct. 24, 1991).

187 *Id.*

188 Remarks to the National Retail Federation, 1 PUB. PAPERS 549, 551 (May 23,

Danforth introduced compromise legislation a few weeks later, the President remarked in an exchange with reporters that "[o]ur attorneys and the Attorney General are looking at it."¹⁸⁹ Correspondingly, when he opposed the original Danforth compromise, Bush remarked "don't inflict the American people with something that inevitably, in the opinion of the Attorney General, our own counsel . . . lead[s] to quotas."¹⁹⁰ Finally, in explaining his views on a further modified Danforth compromise, Bush simply referred to "the Attorney General's opinions."¹⁹¹ With Thornburgh and Gray having led the veto charge in 1990, the prospects of another presidential veto loomed as late as October 23, the date of the OMB statement.

The very next day, however, "marathon negotiations" resulted in a compromise that the President proclaimed he would "enthusiastically sign."¹⁹² "It does not resort to quotas, and it strengthens the cause of equality in the workplace," said Bush.¹⁹³ The key to the compromise was the bill's failure to conclusively define business necessity. Instead, by reference to an interpretive memo, the 1991 Act said that judicial interpretation of "business necessity" should be governed by the "concepts enunciated by . . . Supreme Court . . . decisions prior to *Wards Cove Packing Co. v. Atonio*."¹⁹⁴ The compromise also included concessions from both sides on specificity and damage awards as well as broad concessions from bill sponsors on attorney fees and from the White House on nonparty challenges to consent decrees, punitive damages, and the availability of jury trials.¹⁹⁵

1991).

189 Exchange with Reporters Aboard Air Force One, 1 PUB. PAPERS 657, 657 (June 14, 1991).

190 Exchange with Reporters, 1 PUB. PAPERS 694, 695 (June 19, 1991).

191 The President's News Conference, 2 PUB. PAPERS 1013, 1017 (Aug. 2, 1991).

192 The President's News Conference, 2 PUB. PAPERS 1328, 1328 (Oct. 25, 1991).

193 *Id.*

194 Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1075 (1991), referring to 137 CONG. REC. S 15276 (daily ed. Oct. 25, 1991) (interpretive memorandum as introduced by Sen. Danforth) (citation omitted).

195 On the issue of damage awards, the Act allows victims of intentional discrimination to recover compensatory and punitive damages in addition to relief already available under existing legislation. Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1072 (1991). In addition, the Act limits damage awards, although not to the levels the Bush Administration sought. *Id.* On the issue of specificity, the Act requires a complainant to demonstrate the specific practice or practices that caused the disparate impact. The Act does provide an exception if the worker "can demonstrate to the court that the elements of a [company's] decisionmaking process are not capable of separation

Why did the White House team, after nearly two years of steadfast opposition to a compromise civil rights measure, agree to this arrangement? One account sees Bush as politically expedient, someone who never cared about the quota issue and, consequently, quite willing to shift his stance once it appeared his hard line position was politically unpopular. This recounting places great weight on two October 1991 events that may well have changed popular perceptions of a second Bush veto.¹⁹⁶ On October 11-13, Anita Hill's allegations of sexual harassment against Supreme Court nominee Clarence Thomas played out before the nation. On October 19, former Ku Klux Klansman and reborn Republican David Duke became one of two candidates who would participate in a November run-off election for governor of Louisiana. The emergence of the Hill-Thomas and Duke controversies clearly raised the symbolic stakes of a Bush veto. Given Bush's erratic track record on civil rights and his apparent desire to place political popularity ahead of a principled vision, it is not inappropriate to conclude that the October 24 compromise was a political capitulation. Under this view, compromises made by bill sponsors were an unimportant bone tossed the President's way so that he could try to save some face.

A more charitable interpretation of the October 24 compromise was that the Bush team was politically pragmatic. The Hill-Thomas and Duke episodes affected not only popular opinion but congressional votes. On October 23, two Republican Senators that Bush counted on to sustain his veto, John Warner of Virginia and Ted Stevens of Alaska, informed the President that they might not support him in a veto override fight.¹⁹⁷ With fears of his coalition collapsing, Bush was compelled to strike a deal with bill supporters.

The truth probably lies somewhere in the middle. The October 23 OMB memo suggests that—even after Hill-Thomas and Duke—there was some fight in the administration. That is not to say that the President—whose earlier efforts at compromise with William Coleman and Vernon Jordan suggest—did not want to

for analysis." *Id.* § 105, 105 Stat. at 1074. Contrary to Bush proposals, the Act both allows for jury trials and limits nonparty rights. *Id.* §§ 102(c), 108, 105 Stat. at 1076.

196 Pamela Fessler, *Rights Bill Rises From the Ashes of Senate's Thomas Fight*, 49 CONG. Q. ALMANAC 3093, 3124 (1991).

197 *Id.* On the relationship between White House-Congress negotiations and the prospects of a veto override, see William N. Eskridge Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613 (1991).

reach an accord with the civil rights community and sign reform legislation. Indeed, on October 18 (after Hill-Thomas but before Duke's October 19 second place finish in Louisiana's gubernatorial primary), Bush is reported to have "strongly expressed" to Gray and others his desire to sign a bill.¹⁹⁸ With Duke's electoral success and the communiques from Stevens and Warner, that strong expression was more likely to spur a legislative compromise. At the same time, the President was not willing to completely give in to the other side. He would not, for example, sign a bill that he had previously characterized as a quota bill. With Gray and Thornburgh on the President's negotiating team and with the veto override too close to call, bill sponsors needed to take into account the possible failure of compromise and ultimate defeat in an override battle.

The stage was then set for successful negotiations. Although the bargaining power of the Bush team was severely compromised, civil rights supporters were too vulnerable to disregard the threat of a presidential veto. The peculiar solution was the endorsement of language so devoid of meaning that both sides could claim victory. Supreme Court decisions pre-dating *Wards Cove* had alternatively embraced both the White House proposal ("manifest relationship to the employment in question") and the original H.R. 1 ("significantly related to job performance").¹⁹⁹

What courts would do in the future was a calculated risk for both sides. The White House team hoped that a 1992 Bush victory would keep DOJ and EEOC interpretations in their corner as well as ensure a further strengthening of a judiciary principally controlled by Reagan and Bush appointees. With some luck, the courts might well settle on an interpretation of disparate impact proofs quite close to *Wards Cove*. Civil rights interests, needless to say, hoped that courts would take a skeptical view of the President's post-hoc propaganda campaign and, instead, pay attention to their own post-hoc propaganda campaign.

Bill supporters, however, did not place much stock on the expectation that a Democrat would win the White House and advance an expansive view of disparate impact proofs through DOJ

198 See Ann Devroy, *Bush Saw Gains in Deal, Officials Say*, WASH. POST, Oct. 26, 1991, at A1.

199 Both of these standards are contained in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Supreme Court's leading disparate impact decision prior to *Wards Cove*. See *Griggs*, 401 U.S. at 426 ("significantly related"); *id.* at 432 ("manifest relationship").

and EEOC litigation. Had civil rights interests perceived that Bush would lose the 1992 elections, it is unlikely that they would have compromised on disparate impact standards or attorney fees. Instead, they would have risked an unsuccessful veto override knowing that a Democratic President would likely back the original H.R. 1 package. In the fall of 1991, however, it was unreasonable to expect either the fall of Bush or the ascendancy of Clinton.

On November 21, the President signed the Civil Rights Act of 1991. While proudly proclaiming that his leadership resulted in a law that "will not lead to quotas, which are inconsistent with equal opportunity and merit-based hiring; nor does it create incentives for needless litigation,"²⁰⁰ the day was a bittersweet one for Bush. His anti-quota stance, in many respects, hinged on his assertion that *Wards Cove* was only overturned insofar as the new law shifted the burden of persuasion from employee to employer and that an interpretive memorandum prepared by Senate minority leader Robert Dole be treated as "authoritative interpretive guidance by all officials in the executive branch."²⁰¹ The Dole memo, however, was no more than a floor statement advancing one plausible interpretation of the statute. Bush's interpretation of the legislation's explicit overturning of *Wards Cove*, moreover, was at least highly speculative.

The ceremony was bittersweet for other reasons. Several Democratic sponsors of the law and civil right groups boycotted the signing ceremony in protest of a draft signing statement which called for the elimination of federal affirmative action programs "that may be inconsistent with the new law or with the principle of discouraging quotas and unfair preferences."²⁰² The President distanced himself from the proposed signing statement and proclaimed his support of affirmative action.²⁰³ The signing statement episode, however, once again demonstrated the President's lack of conviction and leadership. He was again left with egg on

200 Statement on Signing the Civil Rights Act of 1991, 1 PUB. PAPERS 1504, 1504 (Nov. 21, 1991).

201 *Id.* at 1702 (referring to 137 CONG. REC. S 15,472-78 (daily ed. Oct. 30, 1991)). Dole's memo asserted that "the bill is no longer designed to overrule the meaning of business necessity in *Wards Cove*." *Id.* at S15,475. Bush also used his signing statement to direct federal agencies to treat the Act as having only prospective, not retroactive, force. See *Dispute Over Retroactivity of Civil Rights Act Stems from Legislative History, Hill Staffer Says*, Daily Lab. Rep. (BNA) No. 14, at A-13 (Jan. 22, 1992).

202 Draft Signing Statement, reprinted in AMERICAN LAW INSTITUTE, THE CIVIL RIGHTS ACT OF 1991 317 (1992).

203 See William Raspberry, *Bush's Missing Drummer*, WASH. POST, Nov. 25, 1991, at A21.

his face as both civil rights and conservative interests defiled his lack of vision and courage.

The 1991 Civil Rights Act is generally considered a policy debacle for the Bush White House. Aside from the signing statement fiasco and the legislative proposal Bush sent Congress with his 1990 veto, however, administration policy was quite consistent and clearly effective. No doubt, the White House retreated quite a bit from its original position. But so did congressional backers, especially when one considers the original Kennedy-Hawkins' proposal. Had it not been for growing fears of a successful veto override, moreover, it is quite possible that Bush would have refused to agree to many of the concessions he made and again vetoed the 1991 Act.

That no one describes Bush's conduct here as political pragmatism is itself revealing. In the end, the President lost the battle over symbols and, given the vacuousness of his civil rights policy, symbols were all he had. That his hard line negotiators may have both kept his policy fairly consistent and secured something more than a pyrrhic victory did not matter. His last minute compromise seemed a complete capitulation because his anti-quota rhetoric was obviously self-contradictory and self-serving. On too many occasions the President had made the politically expedient choice, making it difficult to view his 1991 Act compromise as something other than a political sellout.

V. CONCLUSION: THE PROSPECTS OF CONSTRUCTIVE COUNTER-ADVOCACY

Twelve years of Republican rule accomplished very little in the disassembly of group-conscious goals and timetable as well as numerical proofs of discrimination. If anything, the evolution of judicial doctrine, statutory language, and agency regulation has not dented group-conscious approaches. What explains this state of affairs? Are group-conscious approaches so entrenched that White House opposition was doomed to failure? Alternatively, did Reagan and Bush secretly support group-conscious approaches so that the current state of affairs actually matches White House preferences? Both of these propositions are not without force. Reagan's eventual support of the 1982 voting rights reforms as well as his refusal to rescind Executive Order 11,246 are in part explained by widespread support for both measures. White House support of preferences is evidenced by Bush's position on minority set-asides

and race-exclusive scholarships as well as his appointments to the FCC, Civil Rights Commission, and other government agencies.

The current state of affairs is also—and I believe more fundamentally—explained by the political failures of the Reagan and Bush administrations. The Reagan White House impeded its own effectiveness by taking a too confrontational, too ideological stance on such issues as the private school tax-exemption controversy and the Civil Rights Commission. Reagan's ability to constructively participate on voting rights reform, revisions to Executive Order 11,246, and the like were hampered by these initiatives. The Bush White House's failings were the flip-side of this coin. Rather than seeing—as one Bush White House official put it—the Reagan era as “a valiant effort not done right, the opposite lesson was taken, which was: Let's not engage on civil rights . . . let's not stake out a principled view.”²⁰⁴ The consequence of the purposeful absence of leadership, not surprisingly, was a failed presidency (on civil rights at least). Bush simply did not understand that civil rights policymaking implicates fundamental moral concerns so that it is necessary for a President to have some position on questions of numerical proofs of discrimination as well as on race and gender preferences. It cost the Bush administration dearly that it did not figure out “that the American public would welcome vigorous, principled leadership on this increasingly bitter front.”²⁰⁵

What then should Presidents do? The Reagan EEOC, I think, provides an answer of sorts. Clarence Thomas, by understanding that having a civil rights vision does not mean acting on it at all times, accomplished a lot. Through resource prioritization, agency reorganization, and refusing to discover new vistas in the law, the Reagan EEOC adeptly advanced an individual-centered approach towards civil rights enforcement. Admittedly, by not directly challenging disfavored approaches, the EEOC kept on the books regulations that it disliked. This approach, however, does not concede complete incoherence in governmental decisionmaking nor does it evidence a refusal to lead by ducking politically costly approaches. Rather, the Reagan EEOC model offers the greatest likelihood of enduring presidential leadership.

Let me explain. Clarence Thomas sought to re-shape the civil rights debate by advocating an individual-centered approach and putting that advocacy into practice through new agency initia-

204 Marcus, *supra* note 13, at A20.

205 Finn, *supra* note 15, at 23.

tives.²⁰⁶ Thomas also criticized the pre-existing group-conscious regime.²⁰⁷ This dual advocacy offered the best opportunity for diminishing resistance to the dismantling of group-conscious approaches and replacing them with individual-centered programs that are already in place and are effective. This proposition, admittedly, is difficult to prove. Yet, the clear failure of confrontational strategies suggests that—had Bush truly favored individual approaches—the Thomas model would have been a worthwhile gambit.

The lessons of the EEOC are not limited to conservative Presidents seeking to swim against a prevailing liberal current. Bill Clinton too can make good use of the lessons of the past twelve years. These lessons, in no particular order, are: (1) Be careful in picking fights with Congress and its constituents; (2) Bureaucratic approaches such as resource prioritization and agency reorganization may advance policy objectives without risking costly political battles; (3) Stand for something; and (4) Expect some inconsistencies in the civil rights approaches taken by the White House and governmental agencies. By viewing civil rights as the "art of the possible," a President can effectively affect government decisionmaking on this volatile issue.

206 See *supra* note 41 and accompanying text.

207 See *supra* note 35 and accompanying text.