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## The Civil Rights Hydra

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# THE CIVIL RIGHTS HYDRA

*Neal Devins\**

THE CIVIL RIGHTS ERA. By *Hugh Davis Graham*. New York: Oxford University Press. 1990. Pp. x, 578. \$29.95.

The story of federal civil rights enforcement may be impossible to chronicle. Antidiscrimination requirements bind all federal agencies<sup>1</sup> and each agency brings to this drama its own unique experiences. Indeed, during the Reagan years, significant civil rights enforcement controversies emerged in such unlikely places as the National Endowment for the Humanities,<sup>2</sup> the Federal Communications Commission,<sup>3</sup> the Department of the Treasury,<sup>4</sup> and the Department of Transportation.<sup>5</sup> There were also controversies involving the usual suspects — the Department of Justice,<sup>6</sup> the Equal Employment Opportunity Com-

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1. See *infra* notes 142-43.

2. See *Hearing on Reauthorization of the National Foundation on the Arts and Humanities Act of 1965: Hearing Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor*, 98th Cong., 2d Sess. (1985) (questioning NEA refusal to file an affirmative action plan with the EEOC).

3. See *Hearings on H.R. 5373 Before Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 99th Cong., 2d Sess. (1986) (oversight hearings questioning propriety of FCC reexamination of race and gender preferences); see also Devins, *Metro Broadcasting v. FCC: Requiem for a Heavyweight*, 69 TEXAS L. REV. 125 (1990).

4. See *Administration's Change in Federal Policy Regarding the Tax Status of Racially Discriminatory Private Schools: Hearing Before the House Comm. on Ways and Means*, 97th Cong., 2d Sess. 193-94, 213-14, 218-20, 236, 237 (1982) (testimony of R.T. McNamar, Deputy Secretary, Treasury; Edward C. Schmults, Deputy Attorney General; and William Bradford Reynolds, Asst. Attorney General, questioning propriety of IRS rescission of nondiscrimination rules governing receipt of federal tax exemptions); see also Rabkin, *Behind the Tax-Exempt School Debate*, PUB. INT., Summer 1982, at 21.

5. See *The Disadvantaged Business Enterprise Program of the Federal-Aid Highway Act: Hearing Before the Subcomm. on Transportation of the Senate Comm. on Environment and Public Works*, 99th Cong., 1st Sess. (1985); *Reauthorization of the Federal-Aid Highway Program: Hearing Before the Senate Comm. on Environment and Public Works*, 99th Cong., 2d Sess. (1986); SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS, FEDERAL-AID HIGHWAY ACT OF 1986, S. REP. NO. 369, 99th Cong., 2d Sess. (1986).

6. Controversy and dissatisfaction with the Department of Justice is best reflected in the Senate's failure to confirm William Bradford Reynolds, Reagan's Assistant Attorney General for civil rights, as Associate Attorney General. See *Nomination of William Bradford Reynolds to be Associate Attorney General of the United States: Hearings Before the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. (1985). For overview critiques, see U.S. COMM. ON CIV. RIGHTS, FEDERAL ENFORCEMENT OF EQUAL EMPLOYMENT REQUIREMENTS 45-65 (1987) [hereinafter

mission,<sup>7</sup> the Department of Labor,<sup>8</sup> the Small Business Administration,<sup>9</sup> the Department of Education,<sup>10</sup> the Department of Housing and Urban Development,<sup>11</sup> and the U.S. Commission on Civil Rights.<sup>12</sup> This complex web does not lend itself to generalization and, not surprisingly, scholars have been reluctant to undertake the arduous task of a comprehensive treatment of this topic.

A recent and welcome attempt at a far-ranging examination of federal civil rights enforcement is Hugh Davis Graham's *The Civil Rights Era*.<sup>13</sup> Graham examines the years 1960-1972 and makes his subject the executive branch. The executive branch is chosen in order to examine the "full policy cycle."<sup>14</sup> As Graham aptly notes: "[W]hile presidents and congresses come and go, the federal agencies abide, defining through administrative law and regulation the precise meaning of broad statutory provisions that Congress could not conceivably tailor to the nuances of America's workaday life" (p. 7). Graham chose the 1960-1972 time period for two reasons. First, in Graham's estimation, comprehensive federal attention to civil rights begins with the 1960 Kennedy election and by 1972 the "new order" of comprehensive civil rights enforcement was set in place (p. 4). Second, during this period, civil rights policy evolved from a focus on individualized fair

1987 CRC REPORT]; Reynolds, *The Reagan Administration's Civil Rights Policy: The Challenge for the Future*, 42 VAND. L. REV. 993 (1989).

7. See, e.g., *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1986: Hearings Before the Subcomm. on the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies of the House Comm. on Appropriations*, 99th Cong., 1st Sess. 354 (1985) [hereinafter *Hearings*] (statement of Clarence Thomas, Chairman, Equal Employment Opportunity Commission, a Reagan appointee criticizing Carter-era guidelines as a "rigid and mechanical mathematical approach" concerning discrimination); STAFF OF HOUSE COMM. ON EDUCATION AND LABOR, 99TH CONG., 2D SESS., REPORT ON THE INVESTIGATION OF CIVIL RIGHTS ENFORCEMENT BY THE EQUAL EMPLOYMENT OPPORTUNITY COMM. (Comm. Print 1986) [hereinafter REPORT] (criticizing EEOC pattern and practice charge processing).

8. See *Affirmative Action and Federal Contract Compliance: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. (1985) (reviewing White House examination of Executive Order 11,246); see also McDowell, *Affirmative Inaction*, POLY. REV., Spring 1989, at 32.

9. See *supra* note 5.

10. See HOUSE COMM. ON GOVERNMENT OPERATIONS, FAILURE AND FRAUD IN CIVIL RIGHTS ENFORCEMENT BY THE DEPARTMENT OF EDUCATION, H.R. REP. NO. 334, 100th Cong., 1st Sess. (1987) (criticizing Department of Education enforcement of civil rights laws); see also N. AMAKER, CIVIL RIGHTS AND THE REAGAN ADMINISTRATION 33-59 (1988).

11. See N. AMAKER, *supra* note 10, at 79-101.

12. 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 Committee on the Judiciary of the Senate*, 98th Cong., 1st Sess. (1983) [hereinafter *Nomination Hearings*]; see also Comment, *The Rise and Fall of the United States Commission on Civil Rights*, 22 HARV. C.R.-C.L. L. REV. 449 (1987).

13. Hugh Davis Graham is Professor of History at the University of Maryland, Baltimore.

14. "Full policy cycle," in addition to examining "the formulation and enactment phases of the policy cycle," considers "the obscure and complex phase of implementation." P. 5.

treatment objectives to emphasis on group claims for proportionate representation (p. 5).

Graham's objective is lofty and he accomplishes much. *The Civil Rights Era* is a gripping, literate account of landmark civil rights legislation governing employment, housing, and voting. The executive branch focus is also useful both in demonstrating the fundamental role played by the White House in the enactment of these legislative reforms and in providing insightful glimpses into the Kennedy, Johnson, and Nixon administrations. Graham, moreover, provides revealing looks at several executive initiatives, many of which are as influential as civil rights legislation.<sup>15</sup> For these reasons, *The Civil Rights Era* is a highly accessible and quite worthwhile addition to the literature.

Graham's undertaking is only a mixed success, however. Graham's suggestion that civil rights policy shifted from simple nondiscrimination to group rights between 1966 and 1968 (p. 456) is subject to question. Although — as Graham convincingly demonstrates — Congress rejected both numerical proofs of discrimination and quota hiring in passing the 1964 Civil Rights Act,<sup>16</sup> ample evidence exists that civil rights activists both inside and outside the Executive were interested in numerical equality from the start.<sup>17</sup> The great transformation of civil rights policy then is more a reflection of how the administration of law transcends the letter of the law. This important point buttresses Graham's "full policy cycle" emphasis, *but* it is not made in *The Civil Rights Era*. More significantly, Graham does not meet the challenge he sets for himself through his use of "full policy cycle" analysis, namely, the demonstration of the stranglehold possessed by the permanent civil rights establishment over the White House and its appointees. Neither the relationship between interest groups and enforcement agencies nor the relationship between oversight committees and enforcement agencies is given serious treatment. Moreover, relative to the extensive treatment given the enactment of civil rights legislation and the promulgation of executive orders, agency enforcement decisions are given short shrift. In some respects, this failing is inevitable. The story of implementation begins *after* the enactment of legislation. *The Civil Rights Era* is fundamentally a book about a period in which elected branch efforts focused on the enactment stage. Furthermore, Graham seems only marginally interested in the politics of implementation during the 1960-1972 period.

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15. Graham clearly deserves accolades for his exhaustive research of White House sources available through the Kennedy, Johnson, and Nixon libraries. See pp. 477-79 (describing research methodology).

16. Pp. 125-52. Quota hiring mandates the employment of a predetermined percentage of some group (women, racial minorities, etc.) in the workplace; numerical proofs of discrimination pay attention to group imbalance in determining whether an employer has engaged in illegal discrimination.

17. See *infra* notes 64-73 and accompanying text.

These omissions are truly unfortunate. The 1960-1972 period is a benchmark for the administrative presidency. The twilight of the imperial presidency associated with the New Deal was the Johnson presidency, and the Nixon administration marked the imperial presidency's demise.<sup>18</sup> From 1958 to 1974, Congress became more liberal and more assertive.<sup>19</sup> This change was caused in large measure by the weakening of conservative southern Democrats in Congress associated with 1960s civil rights reform.<sup>20</sup> Congress' rising assertiveness, during the Nixon years at least, also was reflected in increasing legislative oversight of policy implementation. Recognizing that Congress has ultimate power over program content and funding, agency heads proved responsive to committee concerns. By the early 1970s, Richard Nixon launched the so-called "administrative presidency"<sup>21</sup> in an effort to restore White House control of the administrative state.

These dramatic sea changes in government are hardly noticeable in *The Civil Rights Era*. Graham's work is too much about specific events and too little about changing landscapes. In the end, it is an excellent book that dares to be great but does not quite make it. Indeed, Graham's ambitions and his skillful presentation of an epic story of civil rights reform make the book's inability to reach its intended heights a bit surprising.

This review serves as a partial bridge between what Graham intends and what he delivers. Part I describes some of the book's ample lessons. Attention is placed in Part I on Graham's too-short discussion of agency policymaking and administration. Part II supplements this discussion by referring to pertinent 1960-1972 era policymaking and administration not given serious treatment in the book. Part III — consistent with Graham's inadequately proven thesis — argues that it is extremely difficult for a president to centralize civil rights enforcement. This Part focuses on the Reagan White House's limited success in changing the face of civil rights enforcement.

The Reagan experience, however, suggests a far more complicated story than the one depicted by Graham. The presidency, despite the difficulties of centralization, is neither enfeebled nor captured by civil rights interest groups. An administration with a clear ideological vi-

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18. Prior to the middle or late 1960s, according to Martin Shapiro, the norm was that "[c]ourts should defer to Congress, Congress should defer to the President. So courts really were to defer to the Executive." Shapiro, *A.P.A.: Past, Present, Future*, 72 VA. L. REV. 447, 451 (1986).

19. See Melnick, *The Courts, Congress, and Programmatic Rights*, in *REMAKING AMERICAN POLITICS* 188 (R. Harris & S. Milikis eds. 1989).

20. See *id.*

21. R. NATHAN, *THE PLOT THAT FAILED: NIXON AND THE ADMINISTRATIVE PRESIDENCY* (1975). With respect to the fundamental importance of administration, see P. ARNOLD, *MAKING THE MANAGERIAL PRESIDENT* (1986). It is Arnold's position that "the president ought to be concerned with administration, not because he is a manager but because administration is part of the system through which his choices become policy." *Id.* at 363.

sion, a commitment to that vision, and political savvy *can* effectively centralize its civil rights enforcement efforts. The Reagan administration, contrary to popular wisdom, lacked both a clear ideological vision with respect to civil rights and a commitment to pursue that vision. Instead, the administration viewed civil rights as a matter to be worked out through the tugs and pulls of politics. Consequently, civil rights centralization took a back seat to tax reform, federalism, and deregulation objectives.

Reagan administration civil rights enforcement efforts also were marred by political ineptitude. Unwilling to work within the political culture they inherited, Reagan political appointees sacrificed gains in enforcement by engaging in pitched and counterproductive battles with Congress and the civil rights community. A more adept administration, contrary to Graham's assertions, would have made far more progress in advancing its agenda.

Conservatives who bemoan the death of the presidency are in error. The presidency — albeit constrained — remains potent. By summarizing and extending Graham's work, this review provides a glimpse into the exercise and management of presidential power.

## I. THE CIVIL RIGHTS ERA DESCRIBED

Graham describes his work as a story about a "social movement[ ]" which "broke the back of the system of racial segregation" (p. 3). As such, Graham considers all federal action in the civil rights arena fair game for investigation. From this huge smorgasbord, Graham has chosen employment, voting, fair housing, and the equal rights amendment. By book's end, however, it is apparent that only one issue truly matters to Graham. The dominant target of Graham's study is employment — both the enactment and enforcement of statutory antidiscrimination prohibitions and executive initiatives to increase minority employment among government contractors.

Graham accomplishes much through this choice of emphasis. First, employment best reveals the "full policy cycle" that Graham seeks to penetrate. Unlike court-driven school desegregation and voting, employment policy is fundamentally the domain of the administrative state. Second, the shift from individual protection to group rights was played out more explicitly in the employment context than in any other area.

The inclusion of other select topics, then, enriches and provides a broader frame for understanding the establishment and evolution of employment policy. To the extent that Graham intends to tell a comprehensive story of 1960-1972 reforms, moreover, these otherwise ancillary matters are essential. In any event, Graham's discussion of voting, housing, and equal rights — even if tangential — provides important insights to these topics. The housing chapter, for example,

clarifies the common misperception that the 1968 Civil Rights Act was enacted to stave off racial unrest in the wake of the April 1968 King assassination. In March 1968, after President Johnson had effectively given up on open housing legislation due to prior legislative disinterest, the Senate "astonishing[ly]" pursued the matter with vigor — including invoking cloture on a southern filibuster (p. 270). While the King murder accelerated House action, Congress' action appears not to have been driven by expediency.

In contrast, expediency had very much to do with President Nixon's "stewardship" of the equal rights amendment. Graham's insightful discussion reveals that the Nixon White House's interest in gender issues was spurred by Urban Affairs Council head Daniel Patrick Moynihan's recommendation that Nixon "take advantage of a surging force that was ripe for creative leadership" (p. 400). The White House responded by creating a Women's Task Force whose report (favoring E.R.A.-type solutions to gender inequality (p. 405)) languished until a coalition of prominent Republican women pressured the White House (p. 406). The upshot of this was the White House "fastening on any positive action it could safely take to rally the aroused women's support" (p. 408), for example, supporting the E.R.A.<sup>22</sup>

Expediency also plays a large role in Graham's account of the Nixon administration's handling of voting rights. As part of his strategy to woo southern Democrats to the Republican party, Nixon unsuccessfully sought repeal of the 1965 Voting Rights Act requirement that southern states "preclear" any electoral changes that would adversely affect minority interests.<sup>23</sup> Nixon's efforts in voting rights also reveal the close nexus between bureaucratic structure and civil rights policy. In 1969, the Civil Rights Division of the Justice Department was reorganized from sections corresponding to geographic regions to sections organized by function. With respect to voting, the reorganization "had the *unanticipated* consequence of producing an experienced team of attorneys dedicated to furthering [preclearance objectives]."<sup>24</sup>

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22. Interestingly, the only Nixon official to oppose the E.R.A. vigorously was then Assistant Attorney General William Rehnquist who viewed the overall effect of the amendment as "nothing less than the sharp reduction in importance of the family unit, with the eventual elimination of that unit by no means improbable." P. 408 (quoting Garment to Ehrlichman, Memorandum for the President, May 25, 1970). Indeed, in congressional testimony recognizing that "President Nixon and this Administration support the goal of establishing equal rights for women," Rehnquist nonetheless argued against the propriety of the amendment. P. 417 (quoting H.R.J. Res. 208, 92d Cong., 1st Sess. (1971) (statement of William H. Rehnquist)).

23. Pp. 356-60. The administration also sought to win favor in the South by highlighting the hypocrisy of dual north-south standards. Noting that a higher percentage of minorities voted in the South than in either New York or California, the administration sought a nationwide — as opposed to a South-only — ban on literacy tests. Pp. 354-55.

24. P. 362 (quoting S. LAWSON, PURSUIT OF POWER 162-63 (1985) (emphasis added)).

Voting is important for another reason. The preclearance provision in the 1965 Act, according to Graham, was the first "hint[] of a radical shift from procedural to substantive criteria in civil rights law, from intent to effect, from equal opportunity as a right to equality as a fact and as a result" (p. 174). The story of this shift lies at the heart of *The Civil Rights Era*. It is a story told by reference to executive fair employment initiatives, antidiscrimination laws passed by Congress, and agency initiatives.

### A. *The Kennedy Years*

The Kennedy era, despite Graham's meticulous one hundred-page account, reveals surprisingly little about the shift from fair treatment to just result objectives. "Insecure in his relations with Congress" (p. 65), Kennedy ducked an activist role in civil rights issues until his hand was forced by racial violence in the South (p. 66). Indeed, Kennedy balked at including an antidiscrimination-in-employment provision in proposed federal civil rights legislation.<sup>25</sup> The White House, instead, endorsed a combination of voluntary efforts by private business (Plans for Progress), in which the administration served as cheerleader,<sup>26</sup> and an interagency committee headed by Vice President Johnson designed to ensure nondiscrimination in the awarding of federal grants. Without real authority over federal grants or loans, affected agencies subordinated antidiscrimination objectives to their own interests in efficient procurement and "back-scratching mutuality" with existing contractors (p. 44). As Graham notes, "the President's unifying command and power" (p. 44) is prerequisite to centralization of otherwise diffuse agency interests. Without strong presidential leadership, as the Kennedy experience reveals, department and agency heads will view themselves as kings over their discrete domains.

The Kennedy years are revealing for another reason. The origins of affirmative action can be traced to a Kennedy executive order requiring government contractors to take "affirmative action to ensure that applicants [and] . . . employees are treated . . . without regard to their race, creed, color, or national origin."<sup>27</sup> Graham is quick to point out the irony that this "affirmative action" demand called for nothing more than the fair treatment objective of eliminating discriminatory employment practices (pp. 34, 41). Indeed, when asked his views of demands by black leaders for "job quotas by race," Kennedy responded, "I don't think we can undo the past . . . [While] the past

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25. Pp. 95-99. Kennedy, however, did issue an executive order in November 1962 mandating nondiscrimination in federally assisted housing. See R. MORGAN, *THE PRESIDENT AND CIVIL RIGHTS* 60-78 (1970).

26. Pp. 50-54. The administration ultimately withdrew its support for this voluntary approach in favor of more traditional compliance and enforcement. *Id.* at 54-59.

27. Exec. Order No. 10,925, 26 Fed. Reg. 1972 (1961).



is going to be with us for a good many years . . . [w]e have to do the best we can now . . . . I don't think quotas are a good idea."<sup>28</sup>

There were foreshadowings of measures of numerical equality during the Kennedy years, however. The Labor Department, in responding to discrimination in apprenticeship training, proposed that apprenticeship lists "be disregarded to the extent necessary to provide opportunities [for qualified minorities] . . . for a significant number of positions."<sup>29</sup> Rescinded under intense union pressure, the labor action seems a precursor to the race conscious apprenticeship training program approved fifteen years later by the Supreme Court in *United Steelworkers v. Weber*.<sup>30</sup> Graham also notes divisions among civil rights leaders on the quota question (pp. 116-21), but he dismisses this evidence, concluding that "the debate [during the Kennedy years] over racial quotas elicited a virtually unanimous public condemnation of the notion of racial preference" (p. 120).

### B. *The Johnson and Nixon Administrations*

A different saga is told concerning the Johnson administration which, according to Graham, transformed the goal of civil rights policy toward the achievement of numerical equality. This transformation involved both White House and agency initiated programs. That this transformation occurred during the Johnson years is hardly surprising. Unlike Kennedy, Johnson cared passionately about racial equality and made it a centerpiece of his administration.<sup>31</sup>

President Johnson's views are best revealed in a June 1965 speech at Howard University. At this speech, Johnson exclaimed that "freedom is not enough" and that "the next and more profound stage of the battle for civil rights . . . [is] not just equality as a right and a theory but equality as a fact and equality as a result."<sup>32</sup> For Johnson, a remedy promising fair outcomes was the only way to "wipe away the scars of centuries."<sup>33</sup> This speech, in the eyes of Johnson official Joseph Califano, demonstrates Johnson's "unabashed[ ] [support] for special help and affirmative action."<sup>34</sup> Graham, while more circumspect, rec-

28. PUB. PAPERS: JOHN F. KENNEDY, 1963, at 633-34 (1964) (Aug. 20, 1963 Press Conference).

29. P. 115 (quoting U.S. Dept. of Labor press release, June 6, 1963).

30. 443 U.S. 193 (1979) (upholding voluntary one minority for one nonminority promotion plan promulgated in response to pervasive union discrimination).

31. See J. CALIFANO, GOVERNING AMERICA 230 (1981) (describing Johnson's commitment to civil rights as "passionate").

32. 2 PUB. PAPERS: LYNDON B. JOHNSON, 1965, at 636 (1966).

33. *Id.* For Johnson, one mechanism of ensuring fair outcomes was the race-specific designation of certain political appointments. See, e.g., p. 226 (discussing Johnson's desire to replace EEOC Commissioner Aileen Hernandez from a "list of Mexicans" prepared by John Connally).

34. J. CALIFANO, *supra* note 31, at 231.

ognizes the speech to be a foreshadowing of a "crucial transition" (p. 174).

Ironically, the true precursors to the shift to numerical equality are two events soundly rooted in fair individual treatment objectives. First, in a nonpolicy-driven reorganization of federal civil rights enforcement (p. 184), President Johnson entrusted with the Secretary of Labor the responsibility to ensure that government contractors "as an initial part of their bid" comply with the preexisting demand that "affirmative action" be taken to root out discrimination on the basis of "race, creed, color, or national origin."<sup>35</sup> Better known as Executive Order 11,246, this reorganization ultimately set in motion the demand for adequate minority representation among federal contractors.<sup>36</sup>

Second, a White House team comprised of Robert Kennedy, Nicholas Katzenbach, and Burke Marshall worked with Republican Senator Everett Dirksen to assure passage of Title VII of the 1964 Civil Rights Act and, with it, to create the EEOC. Graham convincingly shows that Title VII was designed both to avoid the imposition of numerical hiring demands on employers and to limit the sweep of EEOC power (pp. 125-52). Title VII provisions require proof of discriminatory intent,<sup>37</sup> prohibit the granting of "preferential treatment" to attain racial balance,<sup>38</sup> and protect an employer's right to use professionally developed ability testing unless it was "designed, intended, or used to discriminate."<sup>39</sup> The EEOC was denied the "cease and desist" powers of investigation, litigation, and adjudication typically associated with independent agencies. Instead, the EEOC's role was limited to complaint-processing associated with private enforcement.<sup>40</sup> According to Graham, this limited role was pushed by Dirksen to protect employers from "harassment" by "a new mission agency like the EEOC" (p. 146). Despite these structural and statutory limitations,

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35. Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (1965). Executive Order 11,246 was typical of the Johnson administration practice of using reorganizations to accomplish efficiency rather than policy objectives. See E. REDFORD & M. BLISSETT, *ORGANIZING THE EXECUTIVE BRANCH* 107-41 (1981). For discussion of policymaking by way of reorganization see *infra* notes 180-82 and accompanying text.

36. Ironically, liberals at the time criticized Executive Order 11,246 for dissolving a White House Coordinating Council chaired by Hubert Humphrey in favor of Labor Department enforcement. P. 188.

37. Civil Rights Act of 1964 § 706(g), 42 U.S.C. § 2000e-5(g) (1988). In explaining this provision, Hubert Humphrey noted that "the respondent must have intended to discriminate," and "inadvertent or accidental discrimination will not violate the title." 110 CONG. REC. 12724 (1964).

38. Civil Rights Act of 1964 § 703(j), 42 U.S.C. § 2000e-2(j) (1988).

39. Civil Rights Act of 1964 § 703(h), 42 U.S.C. § 2000e-2(h) (1988). For further discussion, see *infra* notes 69-73 and accompanying text.

40. The Act also authorized the Department of Justice to file "pattern or practice" claims of systematic discrimination, § 707, and recognized broad authority in existing state fair employment agencies, §§ 706(c),(d), 709(b),(d).

the EEOC emerges as *the* lead actor in pursuing numerical measures of equality.

Surprisingly, while EEOC enforcement efforts and Executive Order 11,246 demands are rooted in the activist Johnson presidency, the Nixon administration proved more than complicit in advancing these Johnson initiatives. Graham's tale of the transformation of civil rights policy from nondiscrimination to group rights, then, is a story of two administrations. Indeed, as *The Civil Rights Era* amply demonstrates, Nixon administration efforts often proved as important as Johnson initiatives in cementing both EEOC efforts and the 11,246 program.

### 1. *The EEOC*

Graham's portrait of the EEOC, albeit incomplete,<sup>41</sup> is revealing on several fronts. It shows that an agency's nascent stages play an extraordinary role in shaping agency policy. Authorizing legislation is often a *tabula rasa* to be fleshed out by the agency through its implementing regulations and interpretations. In the words of Alfred Blumrosen, a key staffer during the EEOC's early years: "A new administrative agency has vast opportunities to demonstrate creative intelligence in its initial decisions. These decisions, made by a handful of men and women who comprise the initial staff, reverberate through time and space in a tidal wave of consequences for both procedure and substance."<sup>42</sup> With respect to the EEOC, Graham demonstrates that the early years at the agency set in stone critical agency interpretations of both its own authority and substantive Title VII law. These interpretations, moreover, are emblematic of early EEOC efforts to transform Title VII from what was — according to Jack Greenberg — a "weak, cumbersome, [and] probably unworkable" set of provisions<sup>43</sup> into *the* most powerful civil rights statute. Finally, although this point is subject to question,<sup>44</sup> Graham concludes that White House indifference allowed the EEOC to be captured by the "increasingly militant civil rights constituency."<sup>45</sup>

Graham's account also shows that the life of the law is its imple-

41. See *infra* note 44.

42. A. BLUMROSEN, *BLACK EMPLOYMENT AND THE LAW* 51 (1971).

43. P. 189 (quoting Harwood, *Battling Job Bias*, Wall St. J., May 28, 1965, § 1, at 1, col. 1).

44. Indeed, in many instances, the EEOC, not the NAACP, played the lead role in advancing broad-ranging interpretations of Title VII. For example, EEOC lawyers initiated the substitution of disparate impact standard for intent-based proofs. P. 250. In fact, one of the most surprising revelations in Graham's account is early NAACP opposition to minority identification in institutional records. Although the EEOC intended to monitor equal employment efforts aggressively through such identification, NAACP officials cautioned that "the minute you put race on a civil service form, the minute you put a picture on an application form, you have opened the door to discrimination." P. 199.

45. P. 157. This phenomenon — whether it be described as "capture" or merely extraordinarily amicable relationships between the EEOC and its constituents — is revealed in EEOC efforts to assist civil rights organizations in their litigation efforts. P. 244.

mentation. Senator Dirksen's efforts to limit the EEOC's role statutorily to complaint-processing were subverted by artful interpretations of Title VII. For example, statutory language disfavoring general recordkeeping requirements was sidestepped by agency claims that state data is too inexact to support systematic national monitoring (pp. 193-97). This interpretation was later characterized by Alfred Blumrosen as a creative reading of the statute "contrary to the plain meaning."<sup>46</sup> A more striking example is the EEOC's filing of amicus briefs to express its substantive views on Title VII law *despite* Congress' explicit prohibition of EEOC-initiated litigation.<sup>47</sup> This enabled the EEOC to argue in court that Title VII outlawed employer practices "which prove to have a demonstrable racial effect."<sup>48</sup> The EEOC recognized that its "constructive proof of discrimination" reading was at odds with explicit statutory language and hence unlikely to receive judicial approval.<sup>49</sup> To the agency's and the civil rights community's delight and surprise, in *Griggs v. Duke Power*, the Supreme Court validated this broad reading.<sup>50</sup>

Implementation is a two-edged sword, however. Whereas EEOC efforts to eradicate race discrimination reveal the power of aggressive enforcement, early EEOC lack of interest in gender discrimination made a mockery of this statutory prohibition. As Representative Martha Griffiths observed in 1966, the EEOC was "'wringing its hands about the sex provision'" so as not to "'interfere with the

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46. P. 195 (quoting A. BLUMROSEN, *supra* note 42, at 72). Before the EEOC put this broad reading into effect, a meeting was arranged to see whether Senator Dirksen would be troubled by this breach of the legislative bargain. Dirksen said no, and the reporting system was put into place. A. BLUMROSEN, *supra* note 42, at 73.

47. See 42 U.S.C. § 2000e-4(g)(6) (1988) (1972 Amendments granted EEOC authority to intervene in civil actions brought against nongovernment respondents under Title VII; prior to these amendments the EEOC was authorized only to refer matters to the Attorney General with recommendations for the Attorney General either to intervene or to institute civil actions).

48. P. 249 (emphasis omitted) (quoting Jackson, *EEOC vs. Discrimination, Inc.*, THE CRISIS, Jan. 1968, at 17). The argument's architect was Commission attorney Sonia Pressman. Recognizing both that her argument was a stretch and that some legitimate personnel decisions would come under fire, Pressman advocated that the "active pursuit of an equal opportunity policy" necessitated that blacks be "recruited, hired, transferred, and promoted in line with their ability and numbers." P. 247 (quoting memo from Pressman to Duncan, May 31, 1966, at 8). This revealing discussion of internal agency decisionmaking on this critical question is one of the book's highlights. See also H. BELZ, EQUALITY TRANSFORMED: A QUARTER-CENTURY OF AFFIRMATIVE ACTION 45-46 (1991) (discussing similar argument advanced by EEOC staff member Alfred Blumrosen).

49. According to Graham, the Commission's administrative history concluded that "[e]ventually this will call for reconsideration of the amendment [requiring proof of intent] by Congress' . . . 'or the reconsideration of [this broad] interpretation by the Commission.'" P. 250 (quoting EEOC administrative history).

50. 401 U.S. 424 (1971). Interestingly, the EEOC thought the facts of *Griggs* favored industry and hence recommended that the NAACP wait for a less vulnerable case. P. 385. This *ex parte* dialogue between the EEOC and the NAACP is one more example of the identity of interest between the EEOC and the civil rights community.

EEOC's 'main' business of eliminating racial discrimination.'<sup>51</sup> Graham's remarkable account of EEOC ambivalence about women-only ("Jane Crow") classified ads suggests an agency desire to disregard — initially at least — the sex discrimination prohibition altogether.<sup>52</sup> Although the agency eventually outlawed single-sex ads in 1968 (p. 231), Graham's account of Jane Crow is a counterpoint to racial enforcement that ironically makes the same point about the *right-defining* nature of the implementation power.

In addition to the power of both early interpretation and implementation, a third key lesson is discernible from *The Civil Rights Era*: the judiciary is a key player in the modern administrative state. Since court action and not administrative enforcement governs Title VII, the judicial branch plays a leading role in this area. Consequently, by deferring to early EEOC interpretations of Title VII, the Court enacted EEOC's recreation of Title VII — a feat EEOC could not accomplish on its own.

The courts' complicity is revealing in other ways. When Title VII was amended in 1972, EEOC chair William Brown and former agency official Alfred Blumrosen both preferred agency authority to initiate litigation over the granting of "cease and desist" authority to the agency. Brown characterized the agency as a civil rights advocate in need of an activist forum — specifically, the judiciary.<sup>53</sup> Blumrosen, emphasizing the dangers of regulatory agencies becoming "captive" to the regulated industry, argued that a weaker institutional framework (one in which the agency did *not* have cease and desist authority) enables civil rights activists to use federal courts " 'which are favorable to their demands' " (p. 431). Ironically, as Graham describes it, the Nixon administration favored judicial enforcement for exactly opposite reasons, namely, "the Republicans' vintage judicial strategy of maximizing the role of adversary proceedings in court so as to minimize the judgmental discretion of New Dealish regulatory agencies."<sup>54</sup>

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51. P. 225 (quoting 112 CONG. REC. 13693, 13694 (1966) (remarks of Rep. Griffiths)). For further discussion of the tension between race and sex discrimination claims, see pp. 211-18.

52. The EEOC's November 1965 answer to the problem of sex segregated ads was to require that advertisers indicate in the "Jobs of Interest-Female" column whether men were eligible and vice-versa. P. 217. The EEOC reasoned that "[c]ulture and mores, personal inclinations, and physical limitations will operate to make many job categories primarily of interest to men or women." P. 217 (quoting EEOC Chairman Franklin D. Roosevelt, Jr.). In April 1966, the EEOC shockingly modified this weak policy to make it less burdensome on publishers. Pp. 218-21.

By the end of the Johnson administration, however, "the EEOC seemed settled on a path that would tightly link race and sex in EEO enforcement." P. 232.

53. Pp. 429-30. Brown flip-flopped on this matter and eventually came to endorse the more traditional "cease and desist" model. P. 433.

54. Pp. 426-27. Curiously, with the sole exception of Assistant Attorney General Rehnquist, the Nixon administration never raised doubts about the propriety of strengthening Title VII in 1972. For Rehnquist's observations, see pp. 424-25. Belz attributes Nixon's "uncritical" acceptance of judicial enforcement "notwithstanding the drastic revision of the law [through court

The 1972 amendments, among other things, endorsed the judicial enforcement model. They fortified the judiciary's leadership role in the Title VII arena. As such, Congress denied itself some of the traditional tools of oversight (for example, confirmation, appropriations, legislative veto) in shaping the development of Title VII. Congressional dissatisfaction with substantive judicial rulemaking, instead, could only be expressed through statutory amendment.<sup>55</sup> Graham, although incorrectly presuming an activist judiciary predisposed to furthering the interests of civil rights groups,<sup>56</sup> correctly characterizes the EEOC model as a significant break from traditional regulatory structures (pp. 469-70).

Graham's portrayal of the EEOC reinforces themes well known to students of the modern administrative state: the identity of interests between interest groups and agencies, the transient nature of original legislative intent in the face of conflicting agency priorities, the sweep of agency power in its early statutory constructions, policymaking by way of resource prioritization, and the power of the judiciary to "codify" agency constructions. Graham's depiction also suggests that the law as put into effect by an administrative agency may not be a law that would receive prior congressional approval. Indeed, the Dirksen compromise so central to Title VII's enactment stands in striking contrast to the *Griggs*-era EEOC. Agency subversion of legislative purpose is only half of the story told by *The Civil Rights Era*; the other is de facto presidential legislation by way of executive order.

## 2. *Executive Order 11,246*

The true embodiment of the shift from nondiscrimination to group rights is Executive Order 11,246.<sup>57</sup> Although numerical disparities played a central role in EEOC enforcement, these disparities were deemed a proxy for purposeful discrimination. In contrast, the numerical targets of Executive Order 11,246 are a requirement for contractors who do business with the federal government. Specifically, the order demands an "acceptable" affirmative action program that requires adequate "utilization of minorities and women, at all levels and in all segments of [the] work force where deficiencies exist."<sup>58</sup>

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opinion] that was then taking place" to Nixon's preoccupation with "opposing the grant of cease and desist authority." H. BELZ, *supra* note 48, at 73.

55. During the period of Graham's study, this changed dynamic proved irrelevant, for agency and oversight committee desires were furthered by court interpretations. In recent years, however, this judicial empowerment has proved the focal point of Title VII enforcement controversies.

56. P. 470. Judicial activism in this area frequently came at the behest of the EEOC. While the EEOC and civil rights groups shared the commonality of interests, there is no reason to think that the courts were principally beholden to the civil rights community.

57. See *supra* note 35.

58. 41 C.F.R. § 60-2.10 (1990). Executive Order 11,246 is implemented through regulations known as Revised Order No. 4, which lists eight factors to determine whether there is minority

The story of Executive Order 11,246 begins in the final months of the Johnson administration. Troubled by racially discriminatory labor unions that effectively cut off the supply of minority workers to government contractors, Department of Labor officials held up contracts in Philadelphia and other select industrial cities until contractors submitted pledges to hire minority workers (p. 289). The General Accounting Office, Congress' budgetary watchdog, objected to this maneuvering, however. Claiming that the failure to make such pledges does not invalidate low bids,<sup>59</sup> the GAO argued against "the creation of a new sub-empire in the DOL without a shadow of authorization."<sup>60</sup> In response, the Labor Department rescinded the so-called Philadelphia Plan. Indeed, Johnson administration officials advised the Nixon transition team that the Office of Federal Contract Compliance Programs (OFCC) was too ineffective to operate independently and recommended that it be transferred from Labor and folded into the EEOC (p. 296).

With the advent of the Nixon administration, the prospects for the revitalization of the Philadelphia Plan seemed nonexistent. But revitalize the Plan is precisely what the Nixon administration — including the President himself — did. The "why" behind this surprising Nixon initiative is brilliantly told by Graham.

Graham begins by asking the obvious: "Why, then, did such a man [who thought affirmative action 'simply would never do any good' and] who would appeal to southern and suburban whites on the busing issue . . . begin his new administration by reviving the liberal Democrats' explosively controversial Philadelphia Plan?" (p. 322). Two factors seem at work here. First, Nixon Labor Secretary George Shultz, after Everett Dirksen's criticisms of the OFCC placed him in a defensive posture, decided to respond affirmatively by strengthening the OFCC rather than transferring it to the EEOC (pp. 324-25). Shultz's solution was to revitalize the Philadelphia Plan. Second, President Nixon recognized that Shultz's suggestion created a "political dilemma" for the Democrats, namely, the division of two tradi-

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underutilization, including: (1) the minority population of the labor area surrounding the facility, (2) minority unemployment in the surrounding area, (3) availability of minorities with requisite skills, and (4) potential for training minorities in requisite skills. 41 C.F.R. § 60-2.11 (1990). Employers who fail to comply with the order run the risk of losing vital government contracts. This threat, of course, is extremely effective. As one contract compliance officer explained: "All that is needed is to take the employer to the cliff and say, 'Look over, baby.'" *Hearings on Equal Employment Opportunity Procedures, Senate Committee of the Judiciary*, 91st Cong., 1st Sess. 293 (1969).

59. For an insightful summary of this issue, see Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. CHI. L. REV. 723, 726-32 (1972).

60. P. 293 (quoting Melvin E. Miller to J. Edward Welch memo, Dec. 11, 1967). The GAO — interested in establishing its final authority to review the legality of federal expenditures — argued that bidding requirements must be specific and definite. At this time, OFCC — fearing Title VII's prohibition of preferential treatment — perceived it could not frame its affirmative action demands in terms specific enough to satisfy the GAO. See p. 296.

tional Democrat constituencies — labor unions and civil rights groups (p. 325). Graham claims Nixon's blatant opportunism here is emblematic of Nixon's approach towards social policy issues: "Lacking any internally consistent model of civil rights theory, the Administration was free to pursue contradictory policies for short-term tactical gains" (p. 302). While this characterization is disputable,<sup>61</sup> Graham reveals a quite plausible groundwork for this daring initiative.

*The Civil Rights Era* provides revealing looks at the saga of Executive Order 11,246, the EEOC, voting rights, and other civil rights initiatives. In so doing, it provides insightful glimpses into both White House management of executive policymaking and congressional-executive relations. Graham's examination of a twelve-year period also permits examination of the role of the president's civil rights vision (or lack thereof) in shaping national policy. Kennedy's tentativeness explains the lack of progress in his administration; Johnson's assertiveness points to the enactment of significant legislation in 1964, 1965, and 1968 as well as aggressive administrative initiatives in the Department of Labor and the EEOC; Nixon's expediency points to compromise proposals on voting rights legislation and Title VII amendments, as well as apparently contradictory positions on busing and Executive Order 11,246. Graham, finally, succeeds in offering a historical narrative which suggests a model of the modern administrative state — legislation principally designed by Congress and the White House, interpretation and implementation by agencies, and court review of agency action.<sup>62</sup>

Nonetheless, by limiting his focus almost entirely to the enactment of critical pieces of legislation or the establishment of White House policy, Graham pays a heavy price. The White House's ability to oversee agency implementation and, correlatively, agency relations with interest groups and oversight committees, are hardly explored in *The Civil Rights Era*. Consequently, despite Graham's assertion that a principal focus of the book is the "full policy cycle" with attendant lessons about the White House's ability to centralize civil rights enforcement, the book falls short on its promise to examine the full policy cycle.

The balance of this review helps flesh out Graham's central thesis about bureaucratic structures and White House control. Part II, by highlighting various federal programs that are an outgrowth of the 1960-1972 era, but are *not* discussed in *The Civil Rights Era*, reveals the enormous sweep of federal civil rights enforcement, and with it, the attendant difficulty of centralization. Part III further considers the

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61. See *infra* notes 116-25 and accompanying text.

62. See also Blumrosen, *The Crossroads for Equal Employment Opportunity: Incisive Administration or Indecisive Bureaucracy*, 49 NOTRE DAME L. REV. 46, 47-48 (1973) (proposing a similar model for administrative implementation of equal employment opportunity policy).



prospects of White House centralization by examining Reagan administration efforts in this area.

## II. 1960-1972: THE STORY NOT TOLD

Graham's account of the civil rights era suggests that the shift from individual to group concerns emerged during the latter stages of the Johnson presidency and was solidified during the early Nixon years. A strong argument can be made, however, that this transformation predates the 1964 Civil Rights Act and that it had fully taken place prior to the promulgation of the first set of EEOC guidelines in 1966. In other words, the line separating equality of treatment from equality of results was blurred from the start.<sup>63</sup>

From the early days of the Kennedy administration, civil rights groups advocated race preferences.<sup>64</sup> Indeed, while President Kennedy argued against "hard and fast quotas," he also advised employers to "look over employment rolls, look over areas where we are hiring people and at least make sure we are giving everyone a fair chance."<sup>65</sup> The seeds of race preference, then, were planted before the 1964 Act. With the establishment of the EEOC, civil rights advocates both inside and outside of government argued for use of numerical proofs to show discrimination. In August 1965, one month after the Commission formally came into existence, a White House Conference on employment discrimination set the tone for EEOC policy.<sup>66</sup> Participants included civil rights groups, state fair employment commissions, employers, and EEOC officials. As Herman Belz's review of the Conference transcript suggests, the conclusion reached — at least by EEOC officials — was that "discrimination should be defined as patterns of social and economic disadvantage caused by employment practices and social in-

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63. Consequently, the Reagan administration's call to return to mid-1960s "soft" affirmative action techniques of recruitment and training is a bit of a misnomer. See Abram, *Affirmative Action: Fair Shakers and Social Engineers*, 99 HARV. L. REV. 1312 (1986). Indeed, reliance on "hard" affirmative action techniques such as goals, quotas, and timetables is explainable in part by the fact that no good alternatives to such "hard" devices were ever put into effect.

64. In 1961, a Chicago Urban League official told a congressional committee that "[w]hat we need to be is positively color conscious." *Hearings on Equal Employment Opportunity, Before the Subcomm. on Labor of the House Comm. on Education and Labor*, 87th Cong., 1st Sess. 190 (1961) (statement of Edwin C. Berry, Executive Director, Chicago Urban League). In 1962, the Congress of Racial Equality advocated the employment of a representative number of blacks and that black candidates be preferred over equally qualified whites. *Equal Employment Opportunity: Hearings on S. 773, S. 1210, S. 1211, and S. 1937 Before the Subcomm. on Employment and Manpower of the Senate Comm. on Labor and Public Welfare*, 88th Cong., 1st Sess. 204-05, 221-25 (1963); see also A. MEIER & E. RUDWICK, *CORE: A STUDY IN THE CIVIL RIGHTS MOVEMENT 1942-1968*, at 191-92, 232-35 (1973). See generally H. BELZ, *supra* note 48, at 7-41.

65. The President's News Conference of Aug. 20, 1963, reprinted in PUB. PAPERS: JOHN F. KENNEDY, 1963, at 633-34. Graham's excerpt from this press conference deletes Kennedy's suggestion that employers measure whether they are giving "everyone a fair chance" by "look[ing] over employment rolls." See p. 106.

66. For a comprehensive — albeit biased — review of this Conference, see *Where Civil Rights Law is Going Wrong*, NATION'S BUS., Nov. 1965, at 60.

stitutions in general” and consequently employers should “conduct racial surveys, generate and publicize profiles of under-representation problems, and hire minorities.”<sup>67</sup> In its report on the Conference, the Commission noted that with respect to preferential treatment “the question was not whether we are meeting the letter of the law, as pertains to Title VII, but whether we are meeting the spirit of the law.”<sup>68</sup>

The ultimate embodiment of this sensibility was the EEOC’s August 1966 guidelines on employee selection procedures. Although the 1964 Act excludes from coverage “any professionally developed ability test . . . not designed, intended or used to discriminate,”<sup>69</sup> the EEOC guidelines, in preferring the “spirit” to the letter of the law, urged employers to recruit minorities and demanded that job screening and interviewing be undertaken by individuals fully committed to equal employment opportunity.<sup>70</sup> The guidelines, moreover, required statistical validation for any test that rejected blacks at a higher rate than whites.<sup>71</sup> The key to this aggressive agency posture was a dislike of testing. Perceiving that cultural factors may affect performance on many employment-related tests, the Commission argued that job performance and actual job requirements, not test scores, should be the focus of hiring decisions.<sup>72</sup> Indeed, in 1970, an agency official vowed to fight “[t]he cult of credentialism . . . in whatever form it occurs.”<sup>73</sup>

*The Civil Rights Era* both gives short shrift to early EEOC initiatives and deemphasizes the significance of the early endorsement of group rights by civil rights groups. As a result, Graham goes too far in suggesting that, over time, the EEOC was captured by its clientele interests.<sup>74</sup> The truth, instead, is that the EEOC was an agency with a mind of its own.<sup>75</sup> Graham also errs in suggesting that forces of nature inexplicably coalesced in the latter stages of the Johnson presidency and, suddenly, civil rights enforcement was transformed from its liberal individualistic base to a group rights approach. While their

67. H. BELZ, *supra* note 48, at 28-29.

68. See *Where Civil Rights Law is Going Wrong*, *supra* note 66, at 70.

69. Civil Rights Act of 1964 § 703(h), 42 U.S.C. § 2000e-2(h) (1988).

70. See Lyons, *An Agency With a Mind of Its Own: The EEOC’s Guidelines on Employment Testing*, *NEW PERSP.* Fall 1985, at 20, 22; see also H. BELZ, *supra* note 48 at 116-18.

71. See Lyons, *supra* note 70, at 22.

72. See *id.* at 21-22.

73. See *id.* at 22 (quoting EEOC Chief Psychologist William Enneis).

74. In addition to the White House Conference and employee testing, EEOC recordkeeping requirements support this claim.

75. This phrase derives from the title of Phil Lyons’ article on EEOC testing. See Lyons, *supra* note 70. In saying that the EEOC has a “mind of its own,” I do not mean to suggest that the EEOC operated in a vacuum. For example, key EEOC staff came from the civil rights community. This commonality helps explain the lead role that the EEOC played in advancing the agenda of civil rights interest groups. However, the EEOC was not involuntarily “captured” by these advocacy groups. This distinction is not merely semantic. A “captured” agency does not determine its policy agenda; an agency that sees eye-to-eye with interest groups may well control its policy agenda.

potency increased over time, the use of numerical proofs seemed evident at the 1965 White House Conference. Ironically, the EEOC's ability to disregard the delicate political compromise of 1964 lends force to Graham's assertions of agency power. Consequently, these criticisms suggest that Graham's arguments are even stronger than his own presentation reveals.

Graham's history is also subject to attack for its selectivity. School desegregation, the tax exempt status of private schools, and Nixon administration efforts to provide special assistance to minority entrepreneurs are hardly mentioned in this volume. This is unfortunate. Aside from being three of the most significant issues of the 1960-1972 period,<sup>76</sup> these topics bear directly on several of *The Civil Rights Era's* central concerns: the rise of numerical measures of equality, executive policymaking without legislative authorization, and the rising significance of the dialogue between the judiciary and the elected branches.

*Race and Education.* The face of school desegregation was transformed from 1960 to 1972. In 1960, *Brown v. Board of Education's*<sup>77</sup> impact was principally symbolic. Indeed, in the decade following *Brown*, less actual desegregation of southern schools occurred than in 1965 alone.<sup>78</sup> The implementation of the Elementary and Secondary Education Act of 1965 (ESEA),<sup>79</sup> coupled with the issuance and enforcement of guidelines for Title VI of the Civil Rights Act of 1964, marked a significant shift in federal power over state education systems.<sup>80</sup> Rather than playing a minimalist role in helping schools better educate their students, the federal government became a major player in pushing schools to provide equal educational opportunity to black children.

Surprisingly, Title VI, which prevents discriminatory institutions from receiving federal dollars, was originally a mere bargaining chip in

76. Graham, of course, should not be expected to provide a detailed discussion of every civil rights issue to emerge from 1960-1972. But he sets out as his objective the examination of bureaucratic structures and their impact on White House centralization. Cf. pp. 5, 7-8. He can, therefore, be criticized for failing to examine secondary topics that highlight the principal points he makes about Title VII and Executive Order 11,246. Race and education, as well as minority business enterprise, are such topics. In view of Graham's "full policy cycle" approach, see *supra* note 14 and accompanying text, as the balance of this section makes clear, these topics are at least as important as housing, the ERA, and Kennedy-era developments.

77. 347 U.S. 483, (1954).

78. For the 1965-1966 school year, the percentage of black children in biracial schools in the 11 southern states rose from 2% to 6%. See S. BAILEY & E. MOSHER, ESEA: THE OFFICE OF EDUCATION ADMINISTERS A LAW 153 (1968); see also Devins & Stedman, *New Federalism in Education: The Meaning of Chicago School Desegregation Cases*, 59 NOTRE DAME L. REV. 1243, 1246-51 (1984).

79. Pub. L. No. 89-10, 79 Stat. 27 (1965) (codified as amended at 20 U.S.C. §§ 2701-3386 (1988)).

80. With these enactments, the primary purpose of federal financial assistance for education was no longer to help schools do better what they were already doing; rather, it was to remedy their failure to provide equal educational opportunity to black children. See Hartle & Holland, *The Changing Context of Federal Education Aid*, 15 EDUC. & URB. SOC. 408, 418-21 (1983).

the package of civil rights legislation submitted to Congress.<sup>81</sup> However, with Title VI's demand that federal grant recipients not discriminate, Congress became willing to pump billions of dollars of aid for the compensatory education of educationally deprived children. (Indeed, this conditioning of federal aid upon the nondiscriminatory status of the aid recipient prompted strong resistance to ESEA by southern members of Congress who were concerned that the money would be used to force desegregation.) These billions of dollars were sufficient incentive for many school systems to comply with the Department of Health, Education, and Welfare's Office for Civil Rights (OCR) non-discrimination standards.

The story of early enforcement of Title VI by the OCR parallels EEOC efforts to strengthen Title VII: agency interpretation in tandem with court action mandating change. As OCR read Title VI's legislative history, its requirements were consonant with current court rulings.<sup>82</sup> As a result, it interpreted Title VI's desegregation requirements as being both flexible and potentially expansive. Regulations issued by OCR in December 1964 stated that districts would be considered in compliance with Title VI if they were subject to a court order or if they submitted a desegregation plan subsequently approved by the Commissioner of Education.<sup>83</sup> As judicial standards developed calling for the immediate elimination of dual school systems, and as the passage of ESEA in 1965 made Title VI enforcement in southern school districts of particular concern to HEW officials, "a device for gradual transition" was converted "into an engine of revolution."<sup>84</sup>

The initial Title VI guidelines, issued in 1965, required the desegregation of all grades by 1967.<sup>85</sup> In 1966, OCR issued revised guidelines setting performance standards for desegregation in affected districts; these guidelines also mandated faculty integration.<sup>86</sup> The revised guidelines set more rigorous standards for freedom of choice plans, reflecting increasing concern that these plans were intended primarily to maintain dual school systems, not dismantle them.<sup>87</sup>

The parallel between the OCR and the EEOC ends here. By the third year of Title VI's enforcement, the resistance of state and local

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81. See G. ORFIELD, *THE RECONSTRUCTION OF SOUTHERN EDUCATION: THE SCHOOLS AND THE 1964 CIVIL RIGHTS ACT* 35, 39 (1969).

82. See *id.* at 43, 93.

83. 21 CONG. Q. ALMANAC 568 (1965). See *infra* note 85.

84. G. ORFIELD, *supra* note 81, at 45.

85. See CONG. Q. ALMANAC, *supra* note 83, at 569. They specified that, at a minimum, affected districts would have to desegregate four grades (five in some instances) for the 1965-1966 academic year. Districts could demonstrate their compliance by filing an assurance of compliance (not acceptable for districts with continuing dual system practices), coming under a court order, or filing an acceptable desegregation plan. See *id.*

86. See G. ORFIELD, *supra* note 81, at 146.

87. See *id.*; see also SENATE SELECT COMM. ON EQUAL EDUCATIONAL OPPORTUNITY, 92D CONG., 2D SESS., *TOWARD EQUAL EDUCATIONAL OPPORTUNITY 196-97* (Comm. Print 1972).

officials, as well as congressional restiveness over OCR's heightened demands for desegregation, was strong enough to freeze the guidelines. No changes were made for the 1967-1968 school year.<sup>88</sup> At that time, OCR requirements exceeded the requirements of federal court rulings on school desegregation.<sup>89</sup>

In 1969, with the Nixon administration in office, both the executive and legislative branches increasingly opposed the federal courts and the OCR on school desegregation questions.<sup>90</sup> Increasing emphasis on numerical measures of equality by both the OCR (to measure discrimination) and the courts (to remedy discrimination), as well as mounting concern over the extension of desegregation to districts outside the South and heightened opposition to busing, provoked a political reaction ultimately resulting in the taming of federal school desegregation enforcement efforts. Congress, with the President's blessing, enacted legislation curbing the OCR's enforcement of Title VI, particularly with regard to mandatory reassignments.<sup>91</sup>

This legislation reveals the obvious; that is, in a true battle between elected government and bureaucratic administrators played out on a statutory field, elected government will prevail.<sup>92</sup> By emphasizing the primacy of bureaucratic structures, *The Civil Rights Era* does not fully recognize that Congress (through amending legislation or funding restrictions) and the Executive (through appointments) hold trump cards in contests with renegade agencies.<sup>93</sup> The manner in which this

88. See G. ORFIELD, *supra* note 81, at 258.

89. The OCR, for example, rejected freedom of choice plans prior to the Supreme Court's *Green* decision. See SENATE SELECT COMM. ON EQUAL EDUCATIONAL OPPORTUNITY, *supra* note 87, at 197.

90. The Nixon administration, for example, sought to limit OCR enforcement both by threatening not to withhold federal funds to ensure Title VI compliance and by instructing the OCR — as well as the Department of Justice — that "they are to work with individual school districts to hold busing to the minimum required by law." Naughton, *Nixon Disavows H.E.W. Proposal on School Busing*, N.Y. Times, Aug. 4, 1971, at A15, col. 3.

91. Nevertheless, by the end of the 1960s, the efforts of the federal government had dramatically eroded southern school segregation. For example, between 1963 and 1968, the percentage of black children in all-black schools in the South dropped from 98% to 25%. G. ORFIELD, *PUBLIC SCHOOL DESEGREGATION IN THE UNITED STATES, 1968-80*, at 5 (1983).

92. Interestingly, when OCR enforcement waned, civil rights plaintiffs went to court claiming OCR enforcement inconsistent with Title VI demands. This lawsuit, *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973), was the first step in the judiciary's "capture" of the OCR. As described by Jeremy Rabkin: "Launched in 1970, the case was still generating new briefs and new judicial orders at the end of the 1980s, having expanded by then to encompass every facet of the enforcement responsibilities of the defendant agency." J. RABKIN, *JUDICIAL COMPULSIONS* 147 (1989). For a more extensive discussion of this legislation's effect on the OCR, see generally *id.* at 147-81. For an analysis of the related issue of whether the executive can sign onto a consent decree which limits the policy discretion of successor administrations, see Rabkin & Devins, *Averting Government by Consent Decrees: Constitutional Limits on the Enforcement of Settlements with the Federal Government*, 40 STAN. L. REV. 203 (1987).

93. The all-important dialogue which takes place between agencies and oversight committees is strikingly absent from *The Civil Rights Era*.

trump is (or is not) exercised is an important matter not addressed by Graham.

The OCR experience is revealing in quite another way. Despite its overt reliance on numerical proofs, the EEOC was not subject to the same limitations as the OCR during this period, for Title VII — unlike Title VI — was enforced through the courts by private parties. In other words, since the EEOC did not directly enforce its interpretations of Title VII, the structural relationship between the courts, the elected branches, and the agency was different here than with the OCR. Where the OCR — like most federal offices — is especially vulnerable to presidential appointments and congressional funding, the judicial enforcement model of the EEOC provides an important layer of insulation between Title VII and elected government.<sup>94</sup> *The Civil Rights Era* recognizes this critical distinction (pp. 469-70); but, by failing to compare the EEOC to other enforcement agencies, Graham's work is inadequate to the task of explaining the relationship between bureaucratic structure and agency performance.

Federal equal educational opportunity enforcement also can be contrasted to Title VII enforcement with respect to the related question of tax exemptions for racially discriminatory private schools. Segregated private schools, sometimes aided by state subsidies, significantly impeded the achievement of nondiscrimination objectives in education during the 1960-1972 period (and in the present day).<sup>95</sup> From 1966 to 1972, enrollment in segregated private schools in districts subject to desegregation orders rose from 25,000 to 535,000.<sup>96</sup> Yet before 1970, federal enforcement efforts were generally limited to the Title VI prohibition of direct financial assistance to discriminatory private schools.<sup>97</sup>

The rise of segregated private schools contributed to the racial stratification of public education by removing white children from public school systems. Making matters worse, the IRS indirectly supported this undermining of public school desegregation through tax breaks to segregated schools.<sup>98</sup> Consequently, in 1967, the U.S. Civil

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94. Another difference is that EEOC enforcement is, for the most part, a factor worked into the initial hiring decision. The EEOC influence then affects a limited number of people in an undetectable way. In contrast, the busing issue is extraordinarily visible and raises concerns that affect everyone, namely, the safety and schooling of children.

95. See Chemerinsky, *The Constitution and Private Schools*, in PUBLIC VALUES, PRIVATE SCHOOLS 274 (N. Devins ed. 1989).

96. See Note, *Segregation Academics and State Action*, 82 YALE L.J. 1436, 1441 (1973).

97. One exception to this was a 1967 IRS rule that tax exemptions be denied to schools whose operations violate the laws of the United States. I.R.S. News Release, Aug. 2, 1967, reprinted in 1967 Stand. Fed. Tax. Rep. (CCH) ¶ 6734. This nondiscrimination policy was of limited value, however. Its application extended only to private schools that had contracted with the Army to teach the children of Army personnel.

98. For competing views on the impact of such tax breaks on public school desegregation, compare Chemerinsky, *supra* note 95 with Rabkin, *Taxing Discrimination: Federal Regulation*

Rights Commission urged the Johnson IRS to deny tax breaks to any private school practicing racial discrimination.<sup>99</sup> The Johnson administration, however, concluded that the IRS was without legal authority to deny tax exemptions, reasoning that the discriminatory admissions practices of *private* schools violated no law.<sup>100</sup>

The Johnson administration's decision here is puzzling. Although the Internal Revenue Code does not specify nondiscrimination as a condition of federal tax exempt status, its tax exemption provision arguably mandates nondiscrimination through its use of the word "charitable"; Title VI's nondiscrimination mandate arguably extends to both direct and indirect support; and the Constitution arguably prohibits indirect governmental support of private discrimination.<sup>101</sup> Indeed, since the IRS demand would be one of simple nondiscrimination, the Johnson IRS position seems somewhat surprising.

The likely explanation for the surface variations in practices of the EEOC and the IRS is that the two agencies serve different constituencies. The EEOC, as Graham demonstrates, sees itself as a civil rights advocate. As such, it is predisposed to expand its statutory mandate to serve this higher objective. The IRS, in contrast, does not serve this constituency and hence is unlikely to place civil rights concerns ahead of its interest in effective administration. In fact, by denying reform efforts initiated by political factions, the IRS insulates itself from interest group politics and hence improves its ability to reign over the Tax Code. The potentially conflicting objectives of the IRS and the EEOC support Graham's assertion that White House centralization of civil rights enforcement is a difficult task.<sup>102</sup> Civil rights enforcement cuts across all federal agencies. Not surprisingly, each agency will value civil rights objectives in light of its other priorities. Consequently, centralization in civil rights enforcement demands that the White House play an extremely aggressive role — making civil rights a priority at the expense of other policy objectives. *The Civil Rights Era* barely hints at this critical attribute of civil rights enforcement.

The private school tax exemption issue also lends important support to Graham's assertion that from 1960-1972 the judiciary emerged

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of *Private Education by the Internal Revenue Service*, in PUBLIC VALUES, PRIVATE SCHOOLS, *supra* note 95, at 133.

99. U.S. COMM. ON CIV. RIGHTS, SOUTHERN SCHOOL DESEGREGATION, 1966-67, at 99-100 (1967).

100. See Rabkin *supra* note 98, at 139.

101. For a summary of statutory and constitutional arguments on this matter, see Galvin & Devins, *A Tax Policy Analysis of Bob Jones University v. United States*, 36 VAND. L. REV. 1353, 1368 (1983).

102. Furthermore, like the EEOC, the OCR was aligned with the civil rights community and hence took an aggressive approach in interpreting its Title VI authority. Unlike Title VII enforcement, however, public opposition to expansive school desegregation orders ultimately led to the curtailment of OCR power. See *supra* text accompanying notes 90-93.

as a key player in the administrative state. Unlike judicial enforcement of Title VII, which assisted the EEOC in its efforts to liberalize Title VII, the courts played the lead role in reversing the IRS' extension of tax breaks to discriminatory schools.<sup>103</sup> In 1969, rather than seek legislative reversal of the IRS policy through statutory amendment, the Lawyers Committee for Civil Rights filed suit, raising statutory and constitutional objections to the IRS policy. This strategy paid off. After a preliminary injunction was issued against the Service, the government — reportedly after high level discussions in the White House<sup>104</sup> — reversed its position and announced that it could “no longer legally justify allowing tax-exempt status to private schools which practice racial discrimination . . . .”<sup>105</sup>

This concession, too, seems surprising. After all, the preservation of the status quo at the IRS was implicit in Nixon's Southern Strategy opposing school desegregation remedies. Yet, after denouncing the new IRS policy, southerners began to see the “logic” of the Nixon IRS action. Following a meeting with IRS Commissioner Randolph Thrower, Mississippi Republican Party Chairman Clark Reed perceived the IRS announcement as merely symbolic; he announced that “[i]f Thrower sticks to his word and is sincere in taking action only to offset more extreme court action, no private school . . . I know of . . . will be without tax exempt status for a single day.”<sup>106</sup>

This episode reveals, in starker form than anything discussed by Graham, the potential reach of judicial authority in the shaping of civil rights administration. That the courts should, as Skelly Wright put it, fill in the voids where “the elected branches of government should have acted and failed”<sup>107</sup> portends a type of judicial oversight of agency decisionmaking that may well exceed traditional legislative oversight. The private school tax exemption affair is proof positive of this new judicial role.

Although Graham pays limited attention to Nixon's Southern Strategy, neither the OCR nor the IRS emerges as an actor in *The Civil Rights Era*. Their experiences, however, are revealing both as separate tales of civil rights enforcement and as part of a larger mosaic of federal civil rights enforcement. Indeed, with respect to Graham's

103. See generally McCoy & Devins, *Standing and Adverseness in Challenges of Tax Exemptions for Discriminatory Private Schools*, 52 *FORDHAM L. REV.* 441 (1984) (chronicling court's disregard of standing, adverseness, and mootness in federal tax exemption litigation).

104. Indeed, the White House went out of its way to signal President Nixon's personal involvement in the decision. See D. WHITMAN, *RONALD REAGAN AND TAX-EXEMPTIONS FOR RACIST SCHOOLS* (1984) (Kennedy School of Government Study).

105. IRS News Release, July 10, 1970, reprinted in 1970 *Stan. Fed. Tax Rep.* (CCH) ¶ 6790.

106. Reed, *Both Sides in South Mistrust Nixon Action on School Integration*, *N.Y. Times*, July 16, 1970, at A22, col. 1.

107. Rabkin, *supra* note 4, at 34. Wright limits this activism to the “area of equal rights for disadvantaged minorities.” *Id.*



larger concerns of assessing both White House centralization efforts and the advent of the judiciary as a key player in the administrative state, race and education issues seem at least as important to *The Civil Rights Era* as housing, the equal rights amendment, and quite possibly voting rights.

*Minority Business Enterprise.* *The Civil Rights Era* is strangely mute on various Nixon initiatives to encourage minority business enterprise through explicit race preferences.<sup>108</sup> These programs demonstrate that Executive Order 11,246 was not a fluke. The Nixon administration, rather than seek political advantage through endorsement of a single affirmative action plan, was solidly in the corner of race preferences. This commitment to race preferences reinforces Graham's assertion that group rights concerns had by 1972 trumped equality of opportunity concerns — an assertion, incidentally, that grounds Graham's explanation as to why 1960-1972 is an appropriate period to study. Indeed, since numerical proofs of discrimination utilized in Title VII and voting can be characterized as measurements of *purposeful* discrimination,<sup>109</sup> and since Executive Order 11,246 — according to Graham's account — seems a political anomaly, some discussion of minority business enterprises seems necessary to make airtight Graham's group rights claim.

In 1953, Congress created the Small Business Administration (SBA), an agency which by contracting — under its section 8(a) authority — with government agencies to set aside work for SBA-designated small businesses<sup>110</sup> ensured the award of government contracts to small businesses. At that time, the focus of SBA section 8(a) efforts was race-neutral economic development. With Congress' enactment in 1967 of legislation designed to assist economically disadvantaged small business,<sup>111</sup> the SBA set-aside program began to change focus. In June 1969, the SBA had created an Office of Business Development to “deal with the complex problems involved in effectively using the authority of section 8(a).”<sup>112</sup> In November 1970, SBA regulations

108. Graham's discussion is limited to a brief two-page discussion of the Office of Minority Business Enterprises. Pp. 314-16.

109. Proponents of numerical proofs of discrimination claim that the inadequacy of the intent standard as an accurate gauge of discrimination necessitates the use of numerical measures. See, e.g., Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935 (1989).

110. 15 U.S.C. § 637a (1982). My discussion of the Small Business Administration draws heavily from P. Lyons, *The Small Business Administration's Section 8(a) Set-Aside Program* (unpublished manuscript) (copy on file with author). See also Levinson, *A Study of Preferential Treatment: The Evolution of Minority Business Enterprise Assistance Programs*, 49 GEO. WASH. L. REV. 61 (1980).

111. Small Bus. Act Amends. of 1967, Pub. L. No. 90-104, 81 Stat. 268 (1967).

112. *Small Business and Labor Surplus Area Set-Asides and 8(a) Subcontracts: Hearing Before the Subcomm. on Government Procurement of the Senate Select Comm. on Small Business*, 91st Cong., 2d Sess. 6 (1970) (statement of Edward N. Odell, Acting Deputy Director, Office of

specified program eligibility to firms owned by "socially or economically disadvantaged persons," that is, a category of owners of firms that "includes, but is not restricted to, Black Americans, American Indians, Spanish Americans, Oriental Americans, Eskimos and Aleuts."<sup>113</sup> Although these criteria technically did not prohibit nonminority participation in the 8(a) program, a 1978 SBA report indicated that ninety-six percent of 8(a) participants were minority-owned firms.<sup>114</sup>

This minority specification was rooted in a rather creative reading of the 1967 statute. The SBA assumed that, by referring to "low income" individuals in the statute, Congress' concern was not simply economic disadvantage but also social disadvantage. In addition, the SBA assumed, as SBA head Thomas Kleppe put it, that "'minority' is a shorthand for the phrase 'socially or economically disadvantaged.'"<sup>115</sup>

This feat of statutory construction, which certainly matches EEOC interpretations of Title VII in audacity, was encouraged by the White House. Between March 1969 and October 1971, President Nixon issued three executive orders to "help establish and promote minority business." The creation of the Office of Minority Business Enterprise<sup>116</sup> within the Department of Commerce and the call for increased representation of "Minority Business Enterprises" within federal departments and agencies<sup>117</sup> were the byproduct of these executive orders. Moreover, in 1971, a President's Advisory Council Report advocated that minorities be provided "a substantially increased stake in the American economy,"<sup>118</sup> for "[t]he unique historical experience of . . . disadvantaged minorities . . . cannot be ignored in shaping a national effort to produce substantial new entrepreneurial activity."<sup>119</sup> The Nixon administration then, as Phil Lyons puts it, was "determined to act on its conviction that some groups in our soci-

Business Development, Small Business Administration, Washington, D.C., accompanied by Clifford J. Hawley, District Director, Small Business Administration, Albuquerque, New Mexico).

113. 13 C.F.R. § 124-8.1(c) (1971).

114. § 8(A) REVIEW BOARD, SMALL BUSINESS ADMINISTRATION, REPORT AND RECOMMENDATIONS ON THE SECTION 8(A) PROGRAM FOR A. VERNON WEAVER, ADMINISTRATOR, SBA 23 (1978); see also Levinson, *supra* note 110, at 66.

115. *Government Minority Small Business Programs: Hearings Before the Subcomm. on Minority Small Business Enterprise of the House Select Comm. on Small Business*, 92d Cong., 1st Sess. 5 (1971) [hereinafter *Small Business Hearings*] (testimony of Thomas S. Kleppe, Administrator, Small Business Administration, accompanied by John A. Knebel, General Counsel, and Arthur McZier, Assistant Administrator for Minority Enterprise).

116. Exec. Order No. 11,458, 34 Fed. Reg. 4937 (1969); see also Exec. Order No. 11,625, 3 C.F.R. 616 (1971) (authorizing OMBE to provide financial assistance to organizations "so that they may render technical and management assistance to minority business enterprises").

117. Exec. Order No. 11,518, 3 C.F.R. 907 (1970).

118. PRESIDENT'S ADVISORY COUNCIL ON MINORITY BUSINESS ENTERPRISE, MINORITY ENTERPRISE AND EXPANDED OWNERSHIP: BLUEPRINT FOR THE 70s 5 (1971).

119. *Id.* at 10.

ety, due to no fault of their own, had not enjoyed economic progress in comparison to other groups."<sup>120</sup>

In 1971, efforts to curtail the SBA program were launched in Congress and the courts. Senate and House oversight committees both heard that the minority designation was without statutory authorization.<sup>121</sup> Yet, perhaps because committee members were sympathetic to the SBA section 8(a) program,<sup>122</sup> little real pressure was placed on the SBA and, in 1978, Congress codified the section 8(a) program.<sup>123</sup> In court, a constitutional reverse discrimination challenge ultimately failed because of plaintiffs' lack of standing.<sup>124</sup>

The SBA section 8(a) program and minority business enterprise executive orders are revealing on several fronts. First, the Nixon administration's commitment to these programs demonstrates the prevalence of the group rights approach in the early 1970s. Although the Nixon administration's full throttle commitment to increasing both minority enterprise and minority employment suggests — contrary to Graham — that Nixon's support of civil rights was more real than superficial,<sup>125</sup> Graham's thesis regarding the dominance of group rights concerns ultimately would benefit from a more forceful presentation of the solidification of affirmative action largesse in the Nixon era. Second, the explicit designation of groups other than blacks as program beneficiaries is a development of extraordinary significance. Politically, broadening the base of the beneficiaries proved critical to the near deferential approach of oversight committees to the section 8(a) program. Yet over time, this legitimation of a racial spoils system led to vigorous battles between in and out groups over their fair share of this government pie.<sup>126</sup> This ancillary phenomenon exemplifies the shift to group rights, for these battles made mockeries of both the

120. P. Lyons, *supra* note 110, at 27.

121. See *Small Business Hearings*, *supra* note 115, at 35 (Rep. Robinson's criticism of the minority designation); SENATE SUBCOMM. ON FEDERAL SPENDING PRACTICES AND OPEN GOVERNMENT OF THE COMMITTEE ON GOVERNMENTAL AFFAIRS, REPORT BASED ON HEARINGS AND INQUIRIES CONDUCTED ON THE SBA INVOLVING ABUSES IN THE 8(A) PROGRAM 4 (Comm. Print 1978) (" 'Social or economic disadvantage' is a phrase initiated by SBA's Office of General Counsel to step around the constitutional questions raised by the 8(a) program.")

122. Cf. P. Lyons, *supra* note 110, at 30-33 (discussing committee members' advocacy of minority interests).

123. Pub. L. 95-507, 92 Stat. 1757-73 (1978). For further discussion, see Levinson, *supra* note 110, at 84-94.

124. Ray Baillie Trash Hauling, Inc. v. Kleppe, 477 F.2d 696, 709-10 (5th Cir. 1973), cert. denied, 415 U.S. 914 (1974). At the district court level, however, plaintiffs prevailed on the merits. 334 F. Supp. 194 (1971).

125. See also H. BELZ, *supra* note 48, at 35 (Nixon pressed employment equality in Eisenhower administration), at 38-39 (Philadelphia Plan support rooted in belief in minority economic development), at 94-95 (SBA 8(a) program).

126. Compare 44 Fed. Reg. 42,832 (1979) (granting presumptive disadvantaged status to Asian-Pacific Americans) with 45 Fed. Reg. 25,563 (1980) (denying presumptive status to Hasidic Jews).

ethos of individualism (which views as morally offensive the treatment of individuals as members of a group) and of remedial principles (which would draw sharp lines between blacks and other minority groups based on differing degrees of discrimination suffered at the hands of government). Third, an agency's ability to use its authorizing statute as a creative license is well-illustrated in SBA interpretations of its section 8(a) authority. This story reinforces Graham's central lesson about the EEOC. Fourth, although not as dramatic or significant as Executive Order 11,246, presidential executive order power is also illustrated here. Fifth and finally, the role of the courts and legislative oversight committees is again revealed here. That the challenges sought to limit group rights decisionmaking and that the challenges failed also point to the solidification of the group rights approach.

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Minority business enterprise, race and education, and employment testing strengthen Graham's central contentions about the ascendancy of group rights and the ability of agencies to transform legislative priorities. These issues also are instructive in stating the complex interchange that takes place between the agency, interest groups, the White House, and Congress. *The Civil Rights Era*, with its "full policy cycle" emphasis, would have been well served by the inclusion of these topics.

### III. REAGAN CIVIL RIGHTS AND THE IMPOSSIBILITY OF WHITE HOUSE CENTRALIZATION

The explicit and implicit conclusions of *The Civil Rights Era* suggest an enfeebled presidency. Graham gives several reasons for this. First, the "full policy cycle" reveals that career bureaucrats, not political appointees, ultimately hold the key in the running of government agencies (p. 7). Second, triangular power relationships that form among an agency, its legislative oversight committee, and its constituent interests effectively foreclose active White House involvement in the running of government (p. 470). Third, to the extent that agencies disregard constituent interests, the judiciary will likely impose these constituent desires on agencies (p. 470). Fourth, agency power is at its apex immediately after the enactment of legislation. During this period, agency statutory interpretations — validated by court opinions — shape the meaning of legislation into a form acceptable to the agency.<sup>127</sup> Correlatively, although Graham does not make this point, agencies are circumscribed in their ability to "recreate" their legislative mandate once court opinions cement agency constructions. In other words, a White House that inherits a preexisting enforcement scheme has rather limited options.

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127. See *supra* text accompanying notes 42-53.

Graham's proof of these propositions is wanting. Furthermore, some of these propositions are suspect. While it is indisputable that careerist attorneys in both the Justice Department and the EEOC helped shape agency policy, there is no reason to suspect that these policy directions were not in accord with the desires of political appointees. In fact, the Nixon and Johnson administrations' support of sweeping civil rights initiatives suggests just the opposite. Moreover, even if careerists unilaterally shaped policy in the Nixon and Johnson years, that does not mean that a president ideologically opposed to this careerist vision could not retool the agency to suit his priorities. For example, President Reagan sought to undertake such a retooling in several government agencies.

Graham's failure to discuss relationships between oversight committees and either agencies or interest groups is also problematic because it makes his assertion about "iron triangles" pure speculation. Moreover, the mere potential that such triangular relationships may form does not mean that that potential will be realized. During the Reagan years, for example, relationships between agencies, on the one hand, and oversight committees<sup>128</sup> and interest groups<sup>129</sup>, on the other hand, were often testy. Finally, although the courts often impose constituent views on agencies, courts — at least during the Reagan years — sometimes prefer the White House's view.<sup>130</sup>

These criticisms of Graham's proof do not mean that Graham's ultimate conclusions about the difficulties of White House centralization are in error. Early agency interpretations are extraordinarily influential, careerists do remain after a president's term is complete, courts do order agencies to comply with constituent interests claims, and oversight committees do exert tremendous power over agencies. In addition to the vast array of federal programs and agencies in need of coordination, these phenomena stand as roadblocks to White House centralization efforts. These roadblocks, however, do not foreclose White House influences; instead, they deny presidential supremacy and force the administration to supplement traditional policymaking-through-rulemaking with such back door policymaking devices as appointments, agency reorganization and policy prioritization.<sup>131</sup> Although such policymaking devices are necessarily transitory (for subsequent administrations can exercise the powers of appointment,

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128. See *infra* notes 160, 162, 174-79, 187 and accompanying text.

129. See *infra* note 141 and accompanying text.

130. Compare Schwartz, *The 1986 and 1987 Affirmative Action Cases: It's All Over but the Shouting*, 86 Mich. L. Rev. 524 (1987) (Reagan Department of Justice attack on affirmative action soundly defeated by Supreme Court) with Devins, *Affirmative Action After Reagan*, 68 Texas L. Rev. 353, 378 (1989) ("[V]iewed as a mosaic, the cases leave unanswered many questions about the scope of permissible affirmative action.").

131. See *infra* notes 180-94 and accompanying text.

policy prioritization, and reorganization to displace their predecessor's objectives), they play quite a large role in civil rights enforcement.

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 and section 8(a), were strengthened<sup>132</sup> and numerous race- and gender-conscious initiatives were launched throughout federal departments and agencies.<sup>133</sup> Reagan 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 individuals in favor of others, thereby rendering such regulations and decisions inherently discriminatory."<sup>134</sup>

The manner in which Reagan sought to effect change is also significant. In addition to the appointment of like-minded individuals,<sup>135</sup> Reagan intended to reestablish the White House as the locus of federal power. Almost immediately after assuming office, Reagan formed a Task Force on Regulatory Relief.<sup>136</sup> The byproduct of this task force was the creation of an entity within the White House, the Office of Information and Regulatory Affairs (OIRA), to screen all agency rulemaking.<sup>137</sup> The Reagan White House then appeared ready, will-

132. See P. Lyons, *supra* note 110, at 46-52 (discussing 8(a) program under Carter); Clark, *Affirmative Action May Fall Victim to Reagan's Regulatory Reform Drive*, NATL. J., July 11, 1981, at 1248, 1250.

133. See generally Finn, "Affirmative Action" Under Reagan, COMMENTARY, Apr. 1982, at 17, 18-20. Carter initiatives included efforts to demand adequate minority student representation in tax-exempt private schools, 43 Fed. Reg. 37,296 (1978); the granting of preferences to minority broadcasters, Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C. 2d 979 (1978); the establishment of a minority business enterprise set aside for Department of Transportation highway programs, Department of Transportation Order No. 4000.7A, 43 Fed. Reg. 20, 883 (1978); and the EEOC's 1978 Uniform Guidelines, 43 Fed. Reg. 38,295 (1978) and 43 Fed. Reg. 38,312 (1978).

134. 1980 Republican Platform, reprinted in 36 CONG. Q. ALMANAC 50-B, 62-B (1980). Compare 1980 Democratic Platform, reprinted in 36 Cong. Q. Almanac 91-B, 105-B ("[A]n effective affirmative action program is an essential component of our commitment to expanding civil rights protections."). Reagan, moreover, did not change his rhetoric once in office.

135. The Reagan administration made commitment to an antiregulatory agenda, rather than substantive expertise in the relevant program, the critical prerequisite to presidential nomination. See G. EADS & M. FIX, RELIEF OR REFORM?: REAGAN'S REGULATORY DILEMMA 140-46 (1984). The consequence of this strategy was that Congress failed to support regulatory reform efforts requiring the granting of discretion in program heads. *Id.* at 146-48.

136. White House Report, Program for Economic Recovery, 17 WEEKLY COMP. PRES. DOC. 138, 151 (Feb. 18, 1981).

137. Exec. Order No. 12,291, 3 C.F.R. 12 (1982). For competing perspectives on this executive order, compare Rosenberg, *Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking under Executive Order 12,291*, 80 MICH. L. REV. 193 (1981) (executive order unconstitutionally subverts Congress' legislative primacy) with Demuth & Ginsberg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075 (1986) (defending executive order). Interestingly, Congress threatened to cut off federal funding of OIRA due to the overpoliticization of the review process. See Havermann, *'Defunding' O.M.B.'s Rule Reviewers*,

ing, and able to tackle the Carter legacy of expansive race-conscious programs and regulations.

Once in office, however, the Reagan Administration's pursuit of its equal opportunity platform proved far from clear. This lack of clarity evidences real limits in White House centralization efforts. 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."<sup>138</sup> Chester E. Finn, Jr., put the matter more succinctly when he observed that "[t]he most ideological administration in recent history seems not to have its ideas sorted out"; instead Reagan civil rights policy depended "more than it should on what day it is, who is in charge of a particular decision, what constituency is raising the loudest ruckus, and which agency is responsible for formulating the alternatives and executing the decision."<sup>139</sup>

Criticism did not come only from the right. Indeed, the Reagan administration has been savaged by the left. Norman Amaker concludes that the Reagan civil rights record "reflects an energizing, consistent philosophical view . . . . That view is one that eschews any attention to the historical roots of race and sex discrimination . . . [but focuses instead] on the present intent of alleged discriminatory conduct."<sup>140</sup> Correlatively, during the Reagan years, the civil rights community issued numerous reports condemning the administration. The liberal attacks targeted Reagan's opposition to voting rights reform and the Civil Rights Restoration Act; Reagan's attempts to grant tax breaks to discriminatory private schools and to reconstitute the Civil Rights Commission in his own image; appointees to the Federal Communications Commission, Department of Education, and EEOC who questioned the Carter legacy; and — most important — the granting of *carte blanche* authority to the Department of Justice to launch a frontal assault on numerical measures of equality.<sup>141</sup>

The Reagan administration's mixed record, while inviting criticism

Wash. Post, July 18, 1986, at A17, col. 1. After this threat, OIRA agreed to modify its review procedures.

138. Rabkin, *Reagan's Secret Quotas*, NEW REPUBLIC, Aug. 5, 1985, at 15, 17. Specifically, Rabkin pointed to Department of Labor enforcement of Executive Order 11,246, the Department of Education's use of numerical proofs of discrimination, the EEOC's demand that federal agencies maintain affirmative action hiring plans, and minority business enterprise programs in the Small Business Administration as well as the Department of Commerce.

139. Finn, *supra* note 133, at 28.

140. N. AMAKER, *supra* note 10, at 161.

141. See generally LEADERSHIP CONFERENCE ON CIVIL RIGHTS, WITHOUT JUSTICE 75 (1982); WASHINGTON COUNCIL OF LAWYERS, REAGAN CIVIL RIGHTS: THE FIRST TWENTY MONTHS 5-6 (1982); Finn, *supra* note 133, at 17.

from both sides, seems inevitable. First, federal civil rights enforcement sweeps throughout the executive branch; hence, effective White House coordination is almost impossible. Unless a president makes civil rights 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. Third, reliance on such secondary devices limits a president's civil rights legacy. Successor administrations can easily reset priorities and reorganize agencies. The Reagan experience supports each of these propositions and hence reveals the inherent limits of White House centralization. The balance of this section will consider these three matters in turn, portraying Graham's central assertions about the difficulty of White House centralization, the import of early agency interpretations, and the power of other players — courts, oversight committees, and interest groups — as truisms of the modern presidency.

*The Improbability of Centralization.* Every government agency, department, and commission is in the business of civil rights enforcement. Title VI requirements are enforced by all government agencies distributing federal largess;<sup>142</sup> EEOC regulations call for sensitivity by all government agencies to numerical equality objectives in their own hiring.<sup>143</sup> Moreover, freestanding civil rights enforcement projects exist within the EEOC, SBA, FCC, Civil Rights Commission (CRC), the Legal Services Corporation (LSC), and the Departments of Treasury, Labor, Education, Commerce, Transportation, and Justice.<sup>144</sup> 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

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142. Civil Rights Act of 1964 § 602, 42 U.S.C. § 2000d-1 (1982).

143. "EEOC had cited § 717(B)(1) of Title VII and Executive Order 11,748 as requiring Federal agency equal employment opportunity plans, including affirmative action goals, to be reviewed and evaluated by EEOC." 1987 CRC REPORT, *supra* note 6, at n. 313 (citing Clarence Thomas, speech before NASA Equal Opportunity Council Meeting, Hampton, Va. 10-11 (May 26, 1983)).

144. With the exception of the Legal Service Corporation, these programs are discussed throughout this review. For a discussion of Legal Services in the Reagan era, see Wallace, *Out of Control: Congress and the Legal Service Corporation*, in *THE FETTERED PRESIDENCY* 169 (L. Crowitz & J. Rabkin eds. 1989).



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. The most visible strategy — commonly associated with the Department of Justice 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* . . . .”<sup>145</sup> It was also confrontational, calling for immediate and massive judicial, regulatory, and legislative reform.<sup>146</sup>

The willingness of Justice to launch a frontal assault on numerical proofs of discrimination and nonvictim relief is unique, however. The preferred strategy of other civil rights enforcement agencies<sup>147</sup> — EEOC, OFCC, and OCR — 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 Justice Department’s moral imperative — focused their attentions on other regulatory initiatives. Reagan FCC appointees, for example, were willing to hold their opposition to minority race preferences in check in order to advance their deregulatory agenda. Finally, at least with respect to minority business enterprise programs housed in the Small Business Administration 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.<sup>148</sup>

These varied strategies ensured a certain degree of disunity in Rea-

145. *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 131, 137 (1981) (citation omitted) (statement of William Bradford Reynolds); see also 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).*

146. This vision shares common ground with ideological attacks on social regulation launched at the Equal Protection Agency, the Occupational Safety and Health Administration, and the National Highway Traffic Safety Administration. G. EADS & M. FIX, *supra* note 135, at 256-57. Specifically, appointees were chosen for ideological opposition to the Carter administration’s regulatory agenda, not substantive expertise with the programs they were to administer; appointees viewed the agency’s permanent career professionals as the enemy; and appointees were willing to place commitment to an ideological vision ahead of marginal change premised upon the propriety of scaling down current programs. *Id.* at 142-43.

147. See *infra* notes 180-94 and accompanying text.

148. See Pear, *Administration Challenges Plan by Rights Panel*, N.Y. Times, Apr. 11, 1986, at A1, col. 2.

gan civil rights policies. Ironically, this disunity can be explained, in part, by efforts towards White House centralization. Most significant, "movement conservatives" at Justice and the White House saw themselves in the midst of a holy war that required uniform adherence to the Justice creed.<sup>149</sup> 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!"<sup>150</sup> 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 Department of Justice. 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.<sup>151</sup> 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.<sup>152</sup> In explaining the administration's position, a "hearing room full of civil-rights activists erupted into laughter" when Attorney General Smith remarked that "the President doesn't have a discriminatory bone in his body."<sup>153</sup> Third, in 1983, President Reagan (unsuccessfully) sought to remove Mary Frances Berry and two of her colleagues from the allegedly "independent, bipartisan" U.S. Commission on Civil Rights.<sup>154</sup> 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."<sup>155</sup> Although he had good reason to be fed up with the Commission's partisan attacks on his administration,<sup>156</sup> 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."<sup>157</sup>

The costs of these three blunders to White House centralization

149. See *supra* text accompanying notes 145-46.

150. Bell, *Education Policy Development in the Reagan Administration*, PHI DELTA KAPPAN, Mar. 1986, at 487, 491 [hereinafter Bell, *Education Policy*]; see also T. BELL, THE THIRTEENTH MAN 99-113 (1988).

151. I.R.S. News Release, Jan. 8, 1982.

152. Voting Rights Act Amendments of 1982 § 2, 42 U.S.C. § 1973b (1982).

153. Finn, *supra* note 133, at 27.

154. See *President Fires Three Members of U.S. Commission on Civil Rights*, Daily Lab. Rep. (BNA), at A-1 (Oct. 25, 1983). See generally *Nomination Hearings*, *supra* note 12.

155. See Weisman, *Reagan Defends 3 Nominations to Rights Panel*, N.Y. Times News Serv., Aug. 1, 1983, reprinted in *Nomination Hearings*, *supra* note 12, at 501.

156. See Letter from U.S. Commission on Civil Rights to the Vice President, 1 (Feb. 12, 1982) ("The U.S. Commission on Civil Rights views with increasing alarm efforts to end Federal leadership in promoting equal educational opportunity."); Finn, *supra* note 133, at 24-25.

157. *Nomination Hearings*, *supra* note 12, at 219 (statement of Sen. Edward Kennedy).

were enormous. 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 comes at a high cost. Consequently, although kamikaze pilots at the Department of Justice were allowed to continue their mission, neither the White House nor other agencies would assist them in it.<sup>158</sup>

External pressures, principally in the form of legislative oversight, also stood in the way of White House centralization. The EEOC's experience was typical. Despite stated objections to both affirmative action remedies and the 1978 Uniform Guidelines,<sup>159</sup> the EEOC never formally modified preexisting Carter EEOC regulations. Repeated oversight hearings,<sup>160</sup> Government Accounting Office investigations (and threats thereof),<sup>161</sup> committee reports,<sup>162</sup> confirmation hearings,<sup>163</sup> and the power of the purse all moderated the agency's behavior.<sup>164</sup> For example, EEOC chair Clarence Thomas explicitly

158. This apparent discord is best explained by Reagan's noninterventionist approach to managing department heads. See Bell, *Education Policy*, *supra* note 150, at 490. Ironically, 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 . . ." G. EADS & M. FIX, *supra* note 135, at 193-94. This more modest approach would have been less subject to political attack and, consequently, might have withstood oversight committee and constituency group pressure.

159. See *Equal Employment Opportunity Commission 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) (statement of Clarence Thomas, Chairman, Equal Employment Opportunity Commission) ("[N]umerically based remedies which focus on sex, race or ethnic considerations have the potential to undermine the ultimate goals of nondiscrimination embodied in Title VII."); see also *Hearings*, *supra* note 7, at 354 (statement of C. Thomas).

160. During the Reagan years, Congress held many oversight hearings each year. See generally 1987 CRC REPORT, *supra* note 6, at 9-44. Moreover, there were numerous informal contacts between the oversight committees and the EEOC.

161. See GAO, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION NEEDS TO IMPROVE ITS ADMINISTRATIVE ACTIVITIES (1981); GAO, INQUIRY INTO ALLEGED OPERATING AND MANAGEMENT PROBLEMS IN EEOC'S OFFICE OF REVIEW AND APPEALS (1982); Letter from Rep. Augustus Hawkins to Comptroller General Charles Bowsher (July 15, 1985) (requesting GAO investigation).

162. See, e.g., REPORT, *supra* note 7.

163. 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. (1986) [hereinafter *Thomas Hearings*]; *Nomination of Jeffrey Ira Zuckerman, of Virginia, to be General Counsel of the Equal Employment Opportunity Commission: Hearings Before the Senate Comm. on Labor and Human Resources*, 99th Cong., 1st Sess. (1986).

164. Congress' power of the purse is best revealed in the EEOC's annual budget submission and the corresponding oversight hearings which accompany that submission. See generally 1987 CRC REPORT, *supra* note 6, at 9-44.

endorsed the use of goals and timetables, despite his personal objections, at Senate reconfirmation hearings.<sup>165</sup> Indeed, on several occasions, the EEOC locked horns with the Department of Justice on the numerical equality issue.<sup>166</sup> Moreover, despite the White House's suggestion that the 1978 guidelines were inefficient, the EEOC left the guidelines alone,<sup>167</sup> apparently because the political costs of revision were too high.<sup>168</sup>

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 regulation,<sup>169</sup> 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 (pp. 44, 64), Kennedy (pp. 181-84, 192), and Carter<sup>170</sup> administration efforts at interagency coordination. However, some of the problems the Reagan administration faced were unique unto it. An overly ideological group of "movement conservatives," Reagan's reliance on delegating authority to like-minded individuals to accomplish centralization objectives,<sup>171</sup> and the simple fact that the Reagan administration was swimming against the political current<sup>172</sup> were cir-

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165. See *Thomas Hearings*, *supra* note 163, at 44.

166. These disputes concerned Justice'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. See 1987 CRC REPORT, *supra* note 6, at 40-42; see also Letter from Clarence Thomas to Attorney General Smith reprinted in *Hearing before Subcommittee on Constitutional and Civil Rights, House Judiciary Committee*, May 6, 1983.

167. See Barringer, *Job Bias Debate is Reopened*, Wash. Post, Aug. 14, 1981, at A27, col. 2; 1987 CRC REPORT, *supra* note 6, at 24.

168. OIRA's influence was more profound in deterring the EEOC from adopting expansive age discrimination regulations. After the EEOC in 1984 decided to apply the Age Discrimination in Employment Act to apprenticeship training programs, OIRA returned the rule to the agency "expressing concern that prohibiting apprenticeship programs [from] imposing age limits might prevent employers from recovering the cost of training." *Selected Statements Delivered January 28, 1988 to the House Select Committee on Aging*, Daily Lab. Rep. (BNA), No. 19, at E-1 (Jan. 28, 1988) (testimony of Clarence Thomas). In 1987, the EEOC formally concurred with OIRA on this matter. See *id.*

169. See generally 1987 CRC REPORT, *supra* note 6, at 40-42, 61, 71, 93-4, 100.

170. See U.S. COMM. ON CIV. RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT — 1977, TO ELIMINATE EMPLOYMENT DISCRIMINATION: A SEQUEL 331 (1977) (federal agencies disagreed with each other "as to the meaning of discrimination and how discrimination, once identified, should be remedied."); J. CALIFANO, *supra* note 31, at 240-41 (describing conflicts within Carter administration strategy in *Bakke* litigation); L. FISHER, CONSTITUTIONAL DIALOGUES 27 n.68 (1988) (describing conflicts between White House and Department of Justice); Kneeland, *Sears Sues U.S. over Job Bias Laws*, N.Y. Times, Jan. 25, 1979, at A1, col. 1 (Sears charged the federal government with promulgating conflicting requirements in federal employment law.).

171. *But see supra* note 158 and accompanying text.

172. Indeed, even business — presumably saddled with the burdens of affirmative action — opposed Reagan initiatives here. Cf. H. BELZ, *supra* note 48, at 196-200; Seligman, *Affirmative*

cumstances 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, contrary to Graham's suggestion, does not mean that the White House is without substantial power in this area.

*Administrative Discretion 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.

Enforcement agencies seeking to repeal existing programs are likely to confront a potent legislative attack. FCC efforts to rescind the granting of preferences to minority broadcasters were greeted by the enactment of single-year funding restrictions forbidding such reconsideration.<sup>173</sup> 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 congressional oversight of a magnitude Washington insiders say is unprecedented."<sup>174</sup> Congress has used its power of the purse in other ways to correct agencies which disregard their past and, with it, legislative preferences. Such was the fate suffered by the Reagan appointee driven U.S. Commission on Civil Rights. Unwilling to play ball with Congress, the Commission — in addition to being subjected to an extensive GAO audit<sup>175</sup> — had its appropriations severely reduced and was directed by Congress to pursue specified research priorities and to allocate its appropriations internally according to a restrictive legislative formula.<sup>176</sup> Finally, Congress used its confirmation power to pun-

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*Action is Here to Stay*, FORTUNE, Apr. 19, 1982, at 143, 162. The primary cost of swimming against the political current, however, is the cost of doing battle with civil rights interest groups. For those who oppose numerical proofs of discrimination and affirmative action programs, the power of civil rights is analogous to powerful special interests throughout government. The difference in civil rights is that, unlike farm supports, trade tariffs, etc., policymaking implicates fundamental moral and economic concerns. This is a difference that matters. At the same time, the focus of concern should not be the efforts of special interests (for democratic free market politics dictates that special interests will advance their claims); instead, the focus should be on the ability of elected government to distinguish civil rights concerns from other types of concerns.

173. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act, 1988, Pub. L. No. 100-202, 101-Stat. 1329, 1329-31-32; Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1989, Pub. L. No. 100-459, 102 Stat. 2186, 2216-17; Department of Commerce, Justice, and State, the Judiciary, and Related Agencies, 1990, Pub. L. No. 101-162, 103 Stat. 988, 1020.

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

175. See Brock, *Politicizing the Government's Watchdog*, Wall St. J., July 16, 1986, § 1, at 22, col. 3.

176. See Kurtz, *Hill Slashes Funding for Rights Panel*, Wash. Post, Oct. 19, 1986, at A12, col. 4. See generally Comment, *supra* note 12, 492-95 (1987).

ish individuals within the administration who spearheaded confrontational operations. William Bradford Reynolds' appointment to the Associate Attorney General position at the Department of Justice was turned down,<sup>177</sup> as were the nominations of Jeffrey Zuckerman (to EEOC general counsel)<sup>178</sup> and John Agresto (to Archivist).<sup>179</sup> Interestingly, each of these exercises of congressional power was indirect. Congress never enacted substantive legislative amendments to correct administrative exegesis; rather, it relied on temporal measures such as single-year appropriations and the confirmation of single administration appointments.

Enforcement agencies fare much better when the chosen weapons for change are reorganization, policy prioritization, and the simplification of existing regulations. These changes neither require congressional support nor do they force an agency to call attention to changes in existing policy.

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."<sup>180</sup> During the Reagan years, however, reorganizations also enabled political appointees to maintain greater control over their operations. For example, the EEOC created an Office of Legal Counsel charged with inter-agency coordination and the drafting of regulations.<sup>181</sup> The Civil Rights Commission also traveled this road by creating an Office of Program and Policy Review to play the lead role in the drafting of Commission reports. Since political appointees fill these new offices with a cadre of trustworthy individuals, these offices — especially at the Civil Rights Commission — were used as workhorses of the new regime.<sup>182</sup>

Policy prioritization enables agencies to displace problematic programs in favor of preferred programs. The EEOC proved the agency most adept at policy prioritization during the Reagan years. In Sep-

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177. See Dickinson, *Running Scared in Pennsylvania: Sen. Specter Aims to Survive in Democratic Territory*, Wash. Post, July 6, 1985, at A4, col. 1; Kurtz, *Reynolds' Nomination Voted Down*, Wash. Post, June 28, 1985, at A1, col. 2; Duke, *Senate Panel Rejects Reagan Nominee for Associate Attorney General Post*, Wall St. J., June 28, 1985, § 1, at 3, col. 2.

178. Thornton, *Senate Rejects EEOC Nomination: Comments on Discrimination Were Issue*, Wash. Post, May 21, 1986, at A23.

179. Werner, *Senate Panel Derails Nomination for Archives*, N.Y. Times, Oct. 3, 1986, at D-16, col. 4.

180. G. EADS & M. FIX, *supra* note 135, at 156.

181. See 1987 CRC REPORT, *supra* note 6, at 18-19.

182. Correlatively, when budget cuts forced the dismissal of agency employees, the ax disproportionately fell on "old line" pre-Reagan staffers. See, e.g., LEADERSHIP CONFERENCE ON CIVIL RIGHTS, STATEMENT ON THE CLOSING OF THE CIVIL RIGHTS COMMISSION'S REGIONAL OFFICES (1986) (news release on file with Harvard Civil Rights-Civil Liberties Law Review), cited in Comment, *supra* note 12, at 494 n.258.

tember 1984, the agency announced it would place greater emphasis on litigation to secure redress for identified victims of employment discrimination.<sup>183</sup> The agency's emphasis on individual make-whole relief meant that fewer resources were available to pursue class action cases — whose remedies often included goals, timetables, and quotas.<sup>184</sup> Yet pursuit of this individualized approach left existing regulations and directives used in class action litigation unaffected.<sup>185</sup> Furthermore, class action litigation was not eliminated, just reduced (from sixty-seven percent, in fiscal year 1980, to thirty-five percent, in fiscal year 1986, of all nonsubpoena cases).<sup>186</sup> Consequently, while members of Congress disapproved of this approach,<sup>187</sup> the EEOC's shift from one legitimate policy objective to another did not raise legislative ire to the retaliation point.

The EEOC also proved adept at policymaking through inaction, that is, through 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,<sup>188</sup> declined to extend Title VII to professional certification and licensing,<sup>189</sup> and refused to adopt regulations extending the Age Discrimination in Employment Act to apprenticeship programs.<sup>190</sup> These refusals did not alter the status quo ante and hence were not readily subject to legislative attack.

Policymaking through the simplification of existing procedures is yet another device that enables agencies to attack regulatory excesses without challenging the bottom line. Take the case of the Reagan OFCC.<sup>191</sup> Although not challenging the Executive Order program, the OFCC modified the program through internal directives, orders,

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183. EEOC Commissioners' Memorandum, Statement of Enforcement Policy, Sept. 11, 1984 reprinted in REPORT, *supra* note 7, at 104-07.

184. Williams, *A Question of Fairness*, ATLANTIC MONTHLY, Feb. 1987, at 70, 80.

185. See 1987 CRC REPORT, *supra* note 6, at 24.

186. See *id.* at 38. One explanation for declining class action filings is that employers, after years of experience with Title VII demands, are less likely to commit class wrongs over time. Yet, in stark contrast to this "simple economics" argument, the Carter EEOC sought to shift resources from individual cases to "the equally vital task of identifying and attacking employment systems that illegally operated to exclude whole classes of people from jobs or promotions." Leach, *Title VII of the Civil Rights Act and the EEOC: An Agency in the Midst of Change*, 29 MERCER L. REV. 661, 669 (1978).

187. See Letter from Rep. Augustus Hawkins, *supra* note 161.

188. EEOC Decision No. 85-80 (1985 EEOC Lexis 19) (June 17, 1985; reissued with corrections July 12, 1985) (comparable worth decision). By contrast, the Carter administration seemed ready to endorse comparable worth. In 1979, Carter EEOC chair Eleanor Holmes Norton depicted comparable worth as the most important issue of the 1980s. See Krucoff, *Money: The Question of Men, Women and "Comparable Worth"*, Wash. Post, Nov. 13, 1979, at B5, col. 1.

189. EEOC Decision No. 87-2, 2 Empl. Prac. Guide (CCH) (Empl. Prac. Dec.) ¶ 6869 (Aug. 31, 1987).

190. See *supra* note 168.

191. See text accompanying notes 60-61.

and notices.<sup>192</sup> OFCC, moreover, told its regional managers “not to require or to accept affirmative action plans with goals exceeding availability unless there were identifiable victims of discrimination. . . .”<sup>193</sup> Ironically, the OFCC ultimately reverted to much of its Carter era enforcement strategy as a result of congressional pressures fueled by the failed efforts of William Bradford Reynolds and others to have President Reagan rescind Executive Order 11,246.<sup>194</sup>

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 and Civil Rights Commission seem doomed to failure. Consequently, after the enactment of legislation and promulgation of initial agency regulations and interpretation, 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 for a president to establish a civil rights legacy.

*Reagan’s Legacy.* Aside from judicial appointments, Reagan’s attempts at centralizing civil rights enforcement will likely have little lasting effect. The Reagan administration spent some significant political capital in opposing voting rights legislation, vetoing the Civil Rights Restoration Act, supporting tax breaks for discriminatory private schools, and enabling the Justice Department to launch a frontal assault on preferential hiring. In paying the bill for these unpopular policies, moreover, the Reagan administration received very little in return. Internal discord and external pressures ultimately left the Reagan civil rights agenda in disrepair. The Reagan experience then cautions against serious White House centralization efforts that vary significantly from constituency and legislative expectations.

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192. See H. BELZ, *supra* note 48, at 194; see also 1987 CRC REPORT, *supra* note 6, at 82-83.

193. *Id.* at 82 (referring to OFCCP Memorandum for Area Office Directors). OFCC also eased pressure on national corporations by permitting the adoption of standardized affirmative action plans. See H. BELZ, *supra* note 48, at 194.

194. See, e.g., Statement of Deputy Under Secretary of Labor Meisinger on OFCCP Enforcement Before House Labor Subcommittee on Employment Opportunities, *reprinted in* Daily Lab. Report (BNA), at E-1 (June 5, 1987); see also Letter from Larry Rogers to Susan Prado (July 7, 1987), *reprinted in* 1987 CRC REPORT, *supra* note 6, at 135. The “liberalization” of the OFCCP can be attributed, in part, to congressional pressure. See, e.g., Statements Before the House Labor Subcommittee on Employment Opportunities at Oversight Hearing on Office of Federal Contract Compliance Programs, Daily Lab. Rep. (BNA), at F-1 (June 4, 1987) (statement of Rep. Augustus Hawkins).



George Bush's strategy is proof positive of this lesson. Rather than follow "in the tradition of Ronald Reagan," as the 1988 Republican platform puts it,<sup>195</sup> the Bush administration is clearly unwilling to stay the course in civil rights. Critical appointments at the Department of Education, Federal Communications Commission, Equal Employment Opportunity Commission, and Civil Rights Commission suggest dramatic differences between Bush's approach to civil rights and Reagan's.<sup>196</sup> Moreover, although he vetoed the Civil Rights Act of 1990, Bush's support of the Americans with Disabilities Act and minority scholarship programs further highlights differences between the two administrations.

The Reagan experience offers a telling supplement to *The Civil Rights Era*. With legislative programs in place and hence little opportunity to exert the type of raw power available during an agency's nascent development, White House policymaking operates within a culture of settled expectations. Consequently, the White House must face the external pressures of oversight committees and constituency interests. Centralization, moreover, is complicated by the internal pressures associated with the extraordinary sweep of modern civil rights enforcement. During the Reagan years, competing policy agendas from within the administration seriously curtailed centralization efforts. Yet, contrary to Graham's assertions, the problem of centralization was not one of bureaucrats run amok. Career bureaucrats did not derail the Reagan administration, for White House appointees generally seemed unsympathetic to the careerist's perspective.<sup>197</sup> Instead, the lesson of "full policy cycle" implementation is that internal and external pressures limit the scope of White House centralization. For example, marginal administrative adjustments such as reorganization, resource prioritization, and regulatory simplification appear more successful than direct conflict. In fact, policy blunders associated with the confrontational approach cost the administration dearly. The Bush administration, for example, responded to these Reagan initiatives by distancing itself so much from its Republican predecessor that Reagan's civil rights legacy amounts to very little indeed. In the end, the Reagan administration would have been better served by marginal administrative adjustments such as reorganization, resource prioritization, and regulatory simplification than direct conflict.

The Reagan years, however, do not speak to the futility of White House centralization. Iron triangles, contrary to Graham's depiction,

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195. 1988 Republican Party Platform reprinted in CONG. Q. 2369, 2399 (Aug. 20, 1988).

196. See Devins, *The Civil Rights Commission's Backslide*, Wall St. J., Oct. 19, 1990, § 1, at 14, col. 4. Contrary to the title of my opinion piece (written by editorial page writers with a point of view of their own), I do not necessarily perceive that differences between the Bush and Reagan administrations represent changes for the worse.

197. See *Deregulation HQ*, REGULATION, Mar./Apr. 1981, at 22-23 (interview of Murray L. Weidenbaum and James C. Miller III by Antonin Scalia and Anne Brunsdale, editors).

are impediments, not obstructions. The success of the Reagan EEOC is testament to this. Yet, when the political context dictates, the White House must be willing to play the game of subtle bureaucratic maneuvering, and this game promises only a modest payoff. Hence it is in accord with Graham's central contention about the limits of White House power.

#### IV. CONCLUSION: ALL IS WELL IN MUDVILLE

Proponents of a strong executive are likely to find disheartening the combined lessons of *The Civil Rights Era* and the Reagan experience. Agencies appear inherently resistant to administration directives; legislative and interest group pressures exacerbate these difficulties; and court opinions appear a disruptive wild card. Furthermore, secondary policymaking devices that work within existing regulatory regimes often serve as the principal mechanism for executive influence. Interestingly, proponents of an imperial Congress, too, are likely to be disturbed by both Graham's account and the Reagan years. The White House appears coequal in the enactment of legislation,<sup>198</sup> and agencies (frequently controlled by the executive) play the lead role in both the interpretation and implementation of legislation. Indeed, Congress must resort to a host of oversight techniques — ranging from hearings to explicit budgetary constraints — to protect its lawmaking role. Weakness in executive and legislative power, however, does not mean that agencies reign supreme. Presidential power to appoint, submit budgets, approve reorganizations, and monitor rulemaking severely limit agency power. Congress' oversight techniques as well as its ability to modify substantive law also undermine agency control. Furthermore, legislative and executive priorities may be at odds, thus making it impossible for an agency to please both

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198. The Civil Rights Act of 1990 is proof positive of the president's instrumental role in the shaping of legislation. When proposed, the Act, among other things, demanded that an employer demonstrate that her employment practices are "essential to effective job performance" whenever a group of employment practices "results in a disparate impact . . ." S. 2104, 101st Cong., 2d Sess., 136 Cong. Rec. S1019 (daily ed. Feb. 7, 1990) (emphasis added). After President Bush threatened to veto the measure, bill sponsors made significant concessions. Under the compromise measure, the complaining party, where practicable, had to identify "which specific [employment] practice or practices contributed to the disparate impact . . ." H.R. Rep. No. 755, 101st Cong., 2d Sess. 3 (1990) (Conference Report) (emphasis added). Moreover, to defend selection practices, the employer need only show that "the practice or group of practices . . . bear a significant relationship to successful performance of the job" to sustain her burden of proof. *Id.* at 2. Despite these compromise efforts, President Bush vetoed the bill, and the veto was sustained. See Dewar, *Senate Upholds Civil Rights Bill Veto, Dooming Measure for 1990*, Wash. Post, Oct. 25, 1990, at A15, col. 1. The success of the Bush veto suggests that the president, not congressional sponsors, may well be in the driver's seat in defining the terms of this debate. See Kenworthy and Lee, *Civil Rights Compromise is Readied; House Democrats' Proposal Includes Controversial Cap*, Wash. Post, May 17, 1991, at A1. This conclusion is bolstered by the House of Representative's June 5, 1991, failure to approve the Civil Rights Act of 1991 by a veto-proof majority. See Kenworthy, *House Approves Civil Rights Bill; 273-158 Vote Would Not Override Veto*, Wash. Post, June 6, 1991, at A1, col. 5.

constituencies. Consequently, contrary to Graham's assertions, bureaucracies do not reign supreme.<sup>199</sup>

The end result is that the power to make and implement the law is diffuse rather than centralized in one branch of government or another. Moreover, as Terry Moe recognizes, "[t]he [increasing] layering of presidential bureaucracy upon congressional bureaucracy . . . will likely become a still more consequential — and organizationally disruptive — feature of American government . . . ."<sup>200</sup> This state of affairs, however, is precisely how modern government should work — the legislative and the executive branches are neither supreme nor without power; agencies serve as conciliators responding to competing executive and legislative pressures.

The enactment and enforcement of civil rights laws then provides a model of the workings of modern government. While bemoaning the ultimate impotency of executive power, Hugh Davis Graham's *The Civil Rights Era* reveals that the executive possesses great power (if not control) — especially in the law enactment phase. The Reagan experience likewise reveals that the executive can play an important — albeit transitory — role in the implementation of the law. While the Reagan White House may have poorly managed its power delegation, the administration's failure here is largely the failure of politics and not the failure of the presidency.

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199. The judiciary, while an important player, is more a wild card than a lead actor and, hence, I think it would be inappropriate to speak of judicial supremacy in the same way that I refer to legislative, executive, and administration supremacy. Granted, in some instances, disappointed constituent interests advance their policy objectives through the courts. See generally J. RABKIN, *supra* note 92. Indeed, on occasion, the courts — through the enforcement of injunctive relief — effectively transform government agencies into agencies of constituent interests. See *id.* at 147-81 (discussing "capture" of OCR through *Adams* lawsuit). Yet, these occurrences are rare and likely not to occur in the future. See Williams, *Fingers in the Pie* (Book Review), 68 TEXAS L. REV. 1303 (1990) (reviewing J. Rabkin, *Judicial Compulsions*). Instead, it is far more likely that courts will defer to agency statutory interpretations and hence defeat these interest group efforts. See, e.g., *Chevron U.S.A. v. National Resources Defense Council*, 467 U.S. 837 (1984) (agency interpretations are entitled to great deference, including the filling in of gaps left by Congress); cf. J. RABKIN *supra* note 92, at 81 (noting that the Supreme Court's *Chevron* ruling "took it for granted that judges must hold executive operatives to those standards which they can discern as being intended by the enacting Congress"). At this level, the judiciary will function much as it did in *The Civil Rights Era*, that is, enabling the EEOC and other agencies to control the meaning of legislation. Indeed, since legislative delegations are often broad, agency interpretations — as Graham suggests — serve as an important policymaking tool. This is the lesson of *Rust v. Sullivan*, 111 S. Ct. 1759 (1991), a recent Supreme Court decision approving the Reagan administration's policy-driven interpretation of a 1970 family planning statute to forbid federally funded family planning centers from mentioning abortion. See also Bryner, *Congress, Courts, and Agencies: Equal Employment and the Limits of Policy Implementation*, 96 POL. SCI. Q. 411 (1981).

200. Moe, *The Politics of Bureaucratic Structure*, in *CAN THE GOVERNMENT GOVERN* 267, 328 (J. Chubb & P. Peterson eds. 1989). Moe further recognizes that "compromise" and "uncertainty" in American government makes both winning and losing groups impose "protective structures they know are impediments to effective performance." *Id.* at 327. Finally, "because presidents are constitutionally empowered and politically induced to control executive agencies, they cannot be stopped from acting to impose structures of their own that may be quite incompatible with those prescribed by Congress." *Id.*

*The Civil Rights Era*, despite its many strengths, could benefit from a tighter, more analytically focused presentation. The book is too much like a travelogue and too little like a proof. Too much responsibility is placed on the reader to tie together Graham's assertions of agency power, White House centralization, and the rise of group rights. Graham's argument also would benefit from both a fuller treatment of existing topics (EEOC testing, early agency support of numerical proofs) and the inclusion of other relevant topics (race and education, minority business enterprise). Graham also goes too far in using the "imperial presidency" as his normative benchmark. That there is room for improvement, however, does not mean that the book does not succeed admirably. It does, *but* there is clearly room for improvement.

*The Civil Rights Era* (and the Reagan experience) reveals the limits of White House centralization in civil rights. Graham's interpretation of these limitations as reflective of a tragic weakening of the presidency is subject to debate. In my view, limits on White House centralization are a necessary feature of the administrative state. While I disagree with Graham on this matter, I am mightily glad to have been able to base my judgment on a reading of *The Civil Rights Era's* lucid chronicling of the 1960-1972 period.