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Introduction: A Brief Legislative History of the Civil Rights Act of 1991

*Roger Clegg**

This symposium will explore the issues surrounding the enactment and early enforcement of the Civil Rights Act of 1991.[1] The first article, by Glen D. Nager and Julia M. Broas, discusses the key enforcement issues that have already arisen under the Act. The next two articles discuss the two issues which principally earned the legislation the label "quota bill": C. Boyden Gray analyzes its treatment of so-called disparate impact claims, and Professor John O. McGinnis explores the ways the legislation seeks to limit challenges to racial preferences. The last two articles deal with less widely-known but still very important provisions of the statute. R. Gaull Silberman focuses on alternative dispute resolution, which is likely to become increasingly important in response to the greater litigation spawned by the Act's other provisions. Professor Nelson Lund discusses the coverage of the federal government—especially Congress—as an employer; his article is especially valuable for its "public choice" insights into the kind of civil rights legislation that was, and in the future is likely to be, enacted. The symposium's epilogue makes some broader observations about the future of civil rights issues in this country.

The purpose of this introduction is twofold: to offer a peek at what the other authors say in their respective chapters, and to weave that into a history of the legislation's enactment.

I. THE SUPREME COURT'S DECISIONS

The impetus for the Civil Rights Act of 1991 was a series of six decisions handed down by the Supreme Court in May and June of 1989.[2]

The decision that provoked the most legislative controversy was *Wards Cove Packing Co. v. Atonio*.[3] In 1971, the Court had ruled in *Griggs v. Duke Power*

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1. Pub. L. No. 102-166, 105 Stat. 1071-1100 (1991) (codified in scattered sections of 29 U.S.C. and 42 U.S.C.).

2. In January 1989, the Court announced its decision in City of Richmond v. J.A. Croson Co., 488 U.S. 469, 109 S. Ct. 706 (1989), striking down as unconstitutional a municipal ordinance that awarded city contracts on a racially preferential basis. This seventh decision was also unpopular with the civil rights groups. But because the decision was constitutional and not merely statutory, it was never included in the omnibus civil rights bill.

3. 490 U.S. 642, 109 S. Ct. 2115 (1989).

Co.[4] that if an employment practice has a disparate *impact* on members of minority groups and there is no proven "business necessity" for the practice, that suffices as a violation of Title VII of the Civil Rights Act of 1964[5] even if no discriminatory *intent* is alleged or proved. Clearly this doctrine raises a great danger of requiring employers to hire by quotas. If "disparate impact" can be shown casually by any statistical imbalance, and if "business necessity" can be shown only with great difficulty, an employer will be forced—either by litigation or by the fear of litigation—to ensure that his "numbers" come out "right." As Mr. Gray discusses in his article, this was precisely the way the federal civil rights bureaucracy proceeded to enforce *Griggs*, in particular through its Uniform Guidelines on Employee Selection Procedures.[6] Thus, by the time *United Steelworkers v. Weber*[7] was briefed a few years after *Griggs*, it was explicitly argued to the Court that reverse discrimination had to be allowed under Title VII because this was precisely what *Griggs* required.[8]

In *Wards Cove*, the 5-4 majority sought to relieve—or at least not further build—this quota pressure. The Court held that, for purposes of showing a disparate impact, the "proper basis for the initial inquiry" is "between the racial composition of the qualified persons in the labor market and the persons holding at-issue jobs" rather than between one part of the employer's work force and another.[9] This part of the Court's holding—which seems unassailable by any common sense standard—was never challenged in Congress, although it is worth noting that both the Ninth Circuit and four dissenting justices rejected it.

The Court went on to address three especially important additional issues in order to provide guidance to the lower courts on remand. All three of these issues were addressed in the ensuing legislation, as discussed at length in Mr. Gray's article.

First, "[a]s a general matter, a plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack."[10] In other words, the plaintiff cannot simply point to a racial imbalance and then require the employer to justify everything he does that may contribute to that imbalance. Second, with respect to business necessity, "the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer."[11] Thus, the employer need not show that the challenged term or condition—which, bear in mind, is not alleged to have been intentionally discriminatory, but only to have had a disparate impact—is absolutely essential to his business. Third, the Court

4. 401 U.S. 424, 91 S. Ct. 849 (1971).
5. 42 U.S.C. §§ 2000e et seq. (1988 & Supp. IV 1992).
6. 29 C.F.R. § 1607 (1993).
7. 443 U.S. 193, 99 S. Ct. 2721 (1979).
8. Br. for Pet'r, at 13-22, 49-50; Br. for the U.S. and EEOC, at 24-25.
9. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 650-51, 109 S. Ct. 2115, 2121 (1989).
10. *Id.* at 657, 109 S. Ct. at 2125.
11. *Id.* at 659, 109 S. Ct. at 2126 (citations omitted).

held that, while "the employer carries the burden of producing evidence of a business justification for his employment practice," nonetheless "[t]he burden of persuasion . . . remains with the disparate-impact plaintiff."[12]

A week after *Wards Cove*, the Court announced its decisions in *Lorance v. AT&T Technologies, Inc.*[13] and *Martin v. Wilks.*[14] *Lorance* held that the statute of limitations period for challenging an allegedly discriminatory and unfavorable change in an employee's contractual seniority rights—which were not discriminatory on their face or as currently applied—began when the new system was adopted, rather than when the employee was actually demoted pursuant to the seniority system.[15]

In *Wilks*, the Court held that white firefighters were entitled to bring an action against a city and county, challenging the legality of hiring and promotion quotas which had been adopted pursuant to an earlier consent decree entered after black firefighters had sued the local governments. The trial court had barred the suit, holding that the "impermissible collateral attack" doctrine immunizes parties to a consent decree from discrimination charges by nonparties to the decree for actions taken pursuant to it. A 5-4 majority of the Supreme Court, however, held that white firefighters could not be barred from challenging the deal struck at their expense between the local governments and the black firefighters. "This . . . is part of our 'deep-rooted historic tradition that everyone should have his own day in court.'"[16] The *Wilks* decision, and the part of the 1991 legislation that addressed it, are discussed in detail in Professor McGinnis's article.

A fourth controversial decision was *Patterson v. McLean Credit Union.*[17] It involved the proper construction of Section 1981 of Title 42, which then read:

> All persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . .

Thirteen years earlier, in *Runyon v. McCrary*,[18] the Court had held that Section 1981 prohibited one private party from refusing to contract with another because

12. *Id.*

13. 490 U.S. 900, 109 S. Ct. 2261 (1989).

14. 490 U.S. 755, 109 S. Ct. 2180 (1989).

15. The vote in *Lorance* was 5-3. Justice O'Connor did not participate, and Justice Stevens filed a separate concurrence in which he said he was joining the Court's opinion because it correctly applied prior opinions, although he believed those prior opinions were wrong. *Lorance*, 490 U.S. at 913, 109 S. Ct. at 2269.

16. *Wilks*, 490 U.S. at 762, 109 S. Ct. at 2185 (quoting 18 Charles Alan Wright et al., Federal Practice and Procedure § 4449, at 417 (1981)).

17. 491 U.S. 164, 109 S. Ct. 2363 (1989).

18. 427 U.S. 160, 196 S. Ct. 2586 (1976).

of race. The threshold issue in *Patterson* was whether *Runyon* should be reconsidered—i.e., whether Section 1981 prohibited wholly "private" discrimination at all. The Court decided it would not overturn *Runyon*.[19] This left open the specific question presented in *Patterson*, namely whether racial harassment violated Section 1981. In another 5-4 decision, the Court determined that it did not, since the statute did not apply to conduct which occurs after the formation of a contract and which does not interfere with the right to enforce established contractual obligations.

It is odd that *Price Waterhouse v. Hopkins*[20] would be the fifth decision prompting a legislative response, since at the time it was generally hailed as a victory by the civil rights groups.[21] In it, the Court set out the standards for deciding "mixed motive" cases. The plaintiff, a female accountant, alleged that she had been denied a partnership because of her sex, but the evidence developed at trial indicated that management had both discriminatory and nondiscriminatory reasons for its decision. The Supreme Court was splintered in the case and there was no majority opinion. Nonetheless, a majority of the Justices agreed that where direct evidence was presented that illegal discrimination was a substantial factor in an employment decision, the burden of proof would shift to the employer to prove that the same decision would have been reached even if this illegitimate criterion had played no part in the decision.

The final 1989 decision targeted by the civil rights groups was *Independent Federation of Flight Attendants v. Zipes*.[22] It was included in their omnibus bill, but was not addressed in the legislation that finally passed. The issue in *Zipes* was whether a nondefendant intervenor—here, the collective-bargaining agent for other flight attendants who might be hurt by the relief sought—could be required to pay the attorney fees of an opposing class of plaintiffs alleging sex discrimination. Title VII provides that a "court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee . . . ."[23] The Court had earlier held that this was best interpreted to require payment of fees as a matter of course by defendants to prevailing plaintiffs,[24] but to prevailing defendants by plaintiffs only if the lawsuit had been "frivolous, unreasonable, or without foundation."[25] The Court in *Zipes*—once more, by a 5-4 vote—held that the losing intervenors could be required to pay the prevailing party's attorney fees

19. *Patterson*, 491 U.S. at 171, 109 S. Ct. at 2369.

20. 490 U.S. 228, 109 S. Ct. 1775 (1989).

21. *Practitioners See Price Waterhouse Ruling As Major Weakening of Employer Position*, Daily Rep. for Executives (BNA), May 3, 1989; James H. Rubin, *Women's Rights Groups Hail Supreme Court Workplace Ruling*, Associated Press wire story, May 2, 1989; *see also* Editorial, *Promoting 'Femininity,'* N.Y. Times, May 6, 1989, at 26 (the liberal *Times*, which consistently followed the civil rights groups' lead during the legislative battle, called *Price Waterhouse* a "balanced, sensible judgment" that "made it easier for victims of employment discrimination to have their cases heard").

22. 491 U.S. 754, 109 S. Ct. 2732 (1989).

23. 42 U.S.C. § 2000e-5(k) (1988 & Supp. IV 1992).

24. Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 88 S. Ct. 964 (1968).

25. Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421, 98 S. Ct. 694, 700 (1978).

only if their position had been frivolous, unreasonable, or without foundation, since they "have not been found to have violated anyone's civil rights."[26]

II. OPENING MOVES

The reaction to the Supreme Court's decisions was predictable and typified the later debate: shrill condemnation by the civil rights groups, followed with a tentative defense by the Bush administration. After a few weeks, however, the public debate for the most part lapsed into a silence lasting over half a year. During this time, the groups drafted the bill they would introduce and lined up a long list of sponsors for it. The administration began preparing its response to that bill, based on the rumors of what it would entail.

The bill the groups decided to draft and which their allies in Congress introduced in early 1990 was enormously ambitious.[27] Not only did it address the four major statutory defeats before the Court in 1989 (*Wards Cove*, *Wilks*, *Patterson*, and *Lorance*), as well as one minor one (*Zipes*), it even addressed a case that the groups had claimed as a victory (*Price Waterhouse*), and several pre-1989 setbacks.[28] Most boldly of all, the bill sought to make damage awards available in Title VII lawsuits, when before only equitable relief (primarily injunctions and limited back pay) had been available. Not only was this a dramatic expansion per se, it also meant that now most Title VII cases would be tried to juries rather than decided by judges, since the Seventh Amendment guarantees the right to a jury trial in cases where damages in excess of $20.00 are claimed.

This decision—to ask for essentially *every* civil rights reform on their wish list—was the most important strategic call made by the civil rights groups during the whole debate, and it turned out to be the correct one. It might have backfired had the media or enough Senators and Representatives thrown up their arms in disgust at the groups' greed, but they did not. Instead, the groups' bill—and not the administration's much more limited version—was accepted as *the* bill on the table for purposes of the debate. Even the most tangential proposals remained in the bill until the very end, where some were used as bargaining chips—and the most dramatic, the wholesale expansion of Title VII to include damages and jury trials, actually became law.

When the announcement of this "Kennedy-Hawkins bill" was imminent, the administration had to decide whether simply to oppose the bill or to counter-propose a bill of its own. It decided on the latter course, for reasons of both politics and principle. Politically, many in the administration argued that it was

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26. *Zipes*, 491 U.S. at 762, 109 S. Ct. at 2737 (citing *Christiansburg Garment*, 434 U.S. at 418, 98 S. Ct. at 698).

27. S. 2104, 101st Cong., 2d Sess. (1990); H.R. 4000, 101st Cong., 2d Sess. (1990).

28. Marek v. Chesny, 473 U.S. 1, 105 S. Ct. 3012 (1985); Evans v. Jeff D., 475 U.S. 717, 106 S. Ct. 1531 (1986); Library of Congress v. Shaw, 478 U.S. 310, 106 S. Ct. 2957 (1986). *See also* Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 107 S. Ct. 2494 (1987).

essential for the administration's allies in Congress to be able to claim that, while they had voted against Kennedy-Hawkins, nonetheless they had voted for *a* civil rights bill, namely the President's. As a matter of principle, the administration thought it untenable to oppose legislation that would simply vindicate the position taken (unsuccessfully) by the Department of Justice itself before the Supreme Court in two targeted cases from the 1988-89 Term. The Court had interpreted Title VII more narrowly than the Department had argued as amicus in the *Lorance* case, and Section 1981 of Title 42 more narrowly than the Department had argued in the *Patterson* case. Thus, the administration proposed a short bill that would amend Title VII to overturn *Lorance*, and amend Section 1981 to overturn *Patterson* and ensure that racial harassment claims could be filed under that statute.[29] Little attention was paid to it.

The administration immediately found itself in a vulnerable position with respect to the sexual harassment issue. If it was willing to amend Section 1981 so that victims of racial and ethnic harassment could get that statute's unlimited compensatory and punitive damages, then why was it not also willing to support legislation making the same damage awards available to victims of *sexual* harassment? The answer was that such awards had *never* been available, and that no one had even proposed such an amendment until after the 1988-89 Term—in which the Supreme Court had said exactly nothing about sexual harassment. But this was a rhetorically limp response to those who claimed the administration was making women into "second class citizens."

The administration toyed with the idea of a free-standing bill on sexual harassment to solve this problem. Ultimately, however, the administration decided against this approach. After meeting with various civil rights leaders, President Bush announced that he wanted a civil rights bill, but one that met certain criteria: a provision for better harassment remedies, but also no quotas, no procedural unfairness, no lawyer's bonanza, and no special treatment for Congress (which had exempted itself from Title VII).[30]

III. FAILED NEGOTIATIONS AND A VETO

Soon after the President's speech, Jeffrey H. Blattner of Senator Kennedy's staff spoke with Assistant Attorney General John R. Dunne, who had just two months earlier been sworn in to lead the Justice Department's Civil Rights Division. A large meeting was set up in June 1990 between the relevant administration officials (mostly from the White House and the Department of Justice) and the various civil rights groups (who had agreed to be led by Mr. Blattner).

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29. 136 Cong. Rec. S1522 (daily ed. Feb. 22, 1990) (Sen. Hatch introduces the administration's bill, "Civil Rights Protections Act of 1990," S. 2166). *See* Michael Isikoff & Ann Devroy, *Civil Rights Bill Veto Threatened*, Washington Post, Apr. 5, 1990, at A25.

30. Remarks at a Meeting With the Commission on Civil Rights, 26 Weekly Comp. Pres. Doc. 778 (May 17, 1990).

It was a tense series of meetings. There were probably about fifteen people from the administration who sat along one side of a long table in the Civil Rights Division conference room, and as many people from the various civil rights groups who sat along the other side. Boyden Gray and John Dunne sat side-by-side in the center for the administration, facing Mr. Blattner. For many hours over several days the two sides stated and argued their positions. It was all very strained because for many on each side there were fundamental principles of transcendent importance at stake, and the other side was viewed as not only an adversary but an enemy. There was no real negotiation and certainly no agreement. Ultimately, the civil rights groups angrily walked out. The two sides were too far apart, and probably everyone who understood the stakes knew it.

Later that summer, Senator Kennedy had a series of meetings with then-White House chief-of-staff John Sununu. These meetings came closer to producing an agreement, at least on the *Wards Cove* issue, but ultimately failed, too.[31] Throughout the summer and into the fall the struggle continued. Senator Nancy Kassebaum introduced a bill that the administration supported,[32] but it was completely unacceptable to the civil rights groups and their allies in Congress. Congress passed the groups' bill instead,[33] the President vetoed it,[34] and the veto was sustained by a razor-thin one-vote margin in the Senate.[35]

IV. EARLY 1991: TRYING TO REDEFINE THE DEBATE

The first legislative item of 1991, H.R. 1, was introduced on January 3 that year.[36] Instead of a move toward consensus, however, this bill actually widened the distance between the administration and the original bill's supporters. The administration knew it wanted to oppose this bill, but with what?

The administration was aware that, so long as the civil rights groups' bill was the only one on the table, the bill's opponents were fighting an almost hopeless defensive battle. The groups would continue pressing the bill, year after year, until the—very tiny—additional political impetus that was needed to make

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31. *See* 46 Cong. Q. Almanac 466 (1990); Rowland Evans & Robert Novak, *'Sununu Blinked,'* Washington Post, July 18, 1990, at A23.

32. Kassebaum Amendment No. 2131 to S. 2104, 101st Cong., 2d Sess. (1990), *reprinted in* 136 Cong. Rec. S9786-87 (daily ed. July 16, 1990). A similar bill, also with administration backing, was introduced in the House that summer by Rep. John LaFalce. Amendment in the Nature of a Substitute to H.R. 4000, 101st Cong., 2d Sess. (1990).

33. 136 Cong. Rec. H9984-95 (daily ed. Oct. 17, 1990); *see* Tom Kenworthy, *House Approves Civil Rights Bill/Despite Changes, Veto Threat Stands*, Washington Post, Oct. 18, 1990, at A1.

34. Message to the Senate Returning Without Approval the Civil Rights Act of 1990, 26 Weekly Comp. Pres. Doc. 1632 (Oct. 22, 1990).

35. 136 Cong. Rec. S16,562-89, S16,620 (daily ed. Oct. 24, 1990); *see* Helen Dewar, *Senate Upholds Civil Rights Bill Veto, Dooming Measure for 1990*, Washington Post, Oct. 25, 1990, at A15.

36. H.R. 1, 102d Cong., 1st Sess. (1991), *reprinted in* 137 Cong. Rec. H53 (daily ed. Jan. 3, 1991).

the bill veto-proof appeared. The problem was, how could the groups' bill be removed from the table?

There were two possibilities: to discredit decisively the groups' bill, or to propose an administration alternative that succeeded in shifting the terms of the debate.

The former strategy was essentially what the administration had been following. And, indeed, it had been enormously successful (and accurate) in characterizing the proposed legislation as "a quota bill" and a "lawyer's bonanza."[37] Nonetheless, a large part of the bill's core constituency in both houses remained committed to it. Early in 1991, the administration also tried to paint the bill as unnecessary in all events. It released a detailed study that focused on the lower court decisions applying *Wards Cove*, *Wilks*, and *Price Waterhouse*, and argued that none of the three Supreme Court decisions was leading to unfair results.[38] But the administration did not expend much effort in publicizing the study, and it attracted little notice.

A similar pattern was followed in early 1991 with respect to an alternative approach to improving the civil rights laws. Once again, much effort was expended in formulation, but little in promotion.

There were, as a general matter, two sorts of alternative bills that the administration might offer. The first it had already proposed, namely a version of the groups' bill itself, with the most offensive provisions in it either scaled back to an acceptable level or deleted altogether. The bill the administration had itself proposed at the same time that the Kennedy-Hawkins bill was introduced—overturning *Lorance* and *Patterson* but doing nothing more—was the first and most limited such proposal; the bills introduced by Senator Kassebaum and Representative LaFalce, with the administration's support, were two others; and a bill proposed by the administration itself at the time of the veto was the latest and most elaborate.[39]

But the defects in this "dime-store me-tooism" were both political and philosophical. As a political matter, it meant that the administration and its supporters would inevitably be labeled as less in favor of "civil rights" than their opponents. That charge was, of course, readily answerable—by pointing out that the groups' quota bill was less consistent with the spirit of civil rights than the administration's alternative—but, again, that had not seemed to shake a near veto-proof majority in either house. The other political defect was that, over time, the alternative bill was ratcheted closer and closer to the quota bill—"ratcheted" because it was very difficult to take back any concession once made.

The philosophical defects were, to conservatives in the administration, even more troubling. To them, it was laughable to suppose that Title VII or Section

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37. *See, e.g., supra* note 30.

38. Memorandum from John R. Dunne, Assistant Attorney General, Civil Rights Division, to the Attorney General (Feb. 7, 1991).

39. *See* Message to the Congress Transmitting Proposed Civil Rights Legislation, 26 Weekly Comp. Pres. Doc. 1631 (Oct. 20, 1990).

1981 needed to be strengthened in *any* respect. To the contrary, even the pre-1989 *status quo ante* that the administration had said it was willing to codify had been built by the most appalling judicial activism. *Patterson*'s only defect was that it did not go far enough, since no principled reading of Section 1981 could justify its application to private employment contracts.[40] *Wards Cove* did not go far enough either, since the whole notion of a "disparate impact" cause of action was poisonous policy and ridiculous jurisprudence.[41] And *Wilks*, which allowed challenges to racially preferential plans by its victims, was surely no more than a necessary palliative, since the Court should have interpreted the plain language of Title VII to bar all racial preferences to begin with.[42] Take away the *Patterson*, *Wards Cove*, and *Wilks* provisions, of course, and not much of the civil rights bill was left.

Moreover, to conservatives the groups' bill fully captured everything that had gone wrong with the civil rights movement after the passage of its landmark legislation in the sixties. Not only did the civil rights lobby defend the patently unfair system of racial and gender preferences it had—with bureaucratic and judicial connivance—constructed, it was unable or unwilling to admit that systemic discrimination no longer had any appreciable relevance to the real problems confronting disadvantaged minorities. Thus, while the inner cities rotted, the civil rights establishment devoted its considerable lobbying and fund-raising resources to passing an absurd civil rights bill, encouraging its "constituency" to believe that discrimination was the principal source of woe, rather than individuals' failure to take responsibility for their own lives.

To conservatives, then, the alternative bill should not in its essentials be an "antidiscrimination" bill at all. Rather, it should "empower" the disadvantaged—of all races and ethnicities—to run their own schools, own their own homes, start their own businesses, and cut through the layers of bureaucratic red tape that might keep them from doing so. Not only would this give the administration's allies something positive to vote *for*, and not only would this underscore the intellectual bankruptcy of the civil rights groups, it was a major new part of their agenda that conservatives were hoping the administration would press anyway. The elements of that plan would include school choice, tougher anticrime measures, enterprise zones, home ownership incentives, and greater local control over government programs. On

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40. *See supra* text at notes 17-19; Runyon v. McCrary, 427 U.S. 160, 189-90, 96 S. Ct. 2586, 2603-04 (1976) (Stevens, J., concurring); *id.* at 186, 96 S. Ct. at 2602 (Powell, J., concurring); *id.* at 192-214, 96 S. Ct. at 2605-15 (White, J., dissenting). *See also* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 449-80, 88 S. Ct. 2186, 2208-23 (1968) (Harlan, J., dissenting).

41. *See supra* text at notes 4-8; Michael Gold, *Griggs' Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 Indus. Rel. L.J. 429 (1985).

42. *See supra* text at notes 7-8; United Steelworkers v. Weber, 443 U.S. 193, 219-55, 99 S. Ct. 2721, 2735-53 (1979) (Rehnquist, J., dissenting); *id.* at 216-19, 99 S. Ct. at 2734-35 (Burger, C.J., dissenting); Johnson v. Transportation Agency, 480 U.S. 616, 642-44, 107 S. Ct. 1442, 1457-58 (1987) (Stevens, J., concurring); *id.* at 647-48, 107 S. Ct. at 1460 (O'Connor, J., concurring in the judgment); *id.* at 657-77, 107 S. Ct. at 1465-75 (Scalia, J., dissenting). *See also id.* at 657, 107 S. Ct. at 1465 (White, J., dissenting).

February 27, 1991, President Bush announced such a plan, but that was essentially the last anyone heard of it.[43]

V. IMPASSE

In the spring, the Business Roundtable, led by AT&T chief executive Robert C. Allen, tried to reach an agreement with the civil rights groups. These efforts failed, too, with both the administration and other business leaders critical of the proposals being discussed.[44] Whatever its failures at promoting its own bill, the Bush administration was becoming quite successful at blocking unacceptable compromises by others. Indeed, *tactically* the Bush administration proved quite skilled in fighting the proposed legislation and justifying its refusal to accept it. But the reason it needed this skill was because of the difficult constraints it had placed on itself in its *strategic* concessions.

Thus, as we have seen, when the decisions first came down and the groups first attacked them, the administration did not swiftly and decisively defend those decisions and announce opposition to any attempt to overturn them. When the Kennedy-Hawkins bill was first proposed, the administration did not simply oppose it, but also proposed a bill of its own, overturning *Patterson* and *Lorance*. And, later that summer, the administration said that it was willing to accept legislation addressing *Wards Cove* and *Martin v. Wilks* and providing for enhanced monetary awards in Title VII cases.

Each decision seemed like a good idea at the time it was made. But collectively they forced the administration to draw and explain distinctions between the *Patterson-Lorance-Wards Cove-Wilks*-more-money bill it was willing to accept and the *Patterson-Lorance-Wards Cove-Wilks*-more-money bill it would not—distinctions that were quite valid, to be sure, but which would often appear to be pretextual and which guaranteed that any minor misstep would dash the administration's position on the quota rocks below.

In any event, ultimately Senator John Danforth was to succeed where others had failed and broker a compromise bill between the administration and the civil rights groups. The wisdom of this compromise, and indeed whether it was a compromise at all rather than a victory for one side or the other, will never be resolved.[45] But Senator Danforth met with both sides, hammered out a bill, and

43. Remarks at a Meeting of the American Society of Association Executives, 27 Weekly Comp. Pres. Doc. 221 (Feb. 27, 1991). President Bush had earlier referred to similar "empowerment" items on his agenda in his speech outlining his criteria for an acceptable civil rights bill, *supra* note 30.

44. Steven A. Holmes, *Talks on New Rights Bill Divide Large and Small Companies*, N.Y. Times, Apr. 19, 1991, at B6; Paul A. Gigot, *Big Business Shouldn't Sleep With the Enemy*, Wall St. J., Apr. 19, 1991, at A14.

45. In this symposium alone, for instance, Mr. Gray claims victory for the administration, at least on the *Wards Cove* issue; Professor Lund contends that the administration failed, albeit perhaps deliberately, to accomplish its stated goals; and Mr. Nager and Ms. Broas conclude that, so far, there are wins and losses for both sides, with the edge to the civil rights proponents, and the real losers their purported constituents.

then succeeded in selling it. For awhile, it was unclear whether either side—and, in particular, the administration—would buy. But ultimately, in the fall of 1991, an agreement was reached. How this came about is itself an unresolved mystery,[46] but at least part of the answer may lie in a separate but parallel drama that unfolded at the same time.

VI. BREAKTHROUGH

On the Friday and weekend of October 11-13, 1991, the nation sat riveted before its television sets, watching the Clarence Thomas-Anita Hill hearings. That event is beyond the scope of this introduction, but it was related to the proceedings of the civil rights bill in several key respects. First, the ideological fault lines were identical. Clarence Thomas was an anti-quota conservative, and this—greatly aggravated by the fact that he was black—earned him the wrath of the civil rights lobby. Second, what became the underlying issue of the hearings—sexual harassment—was of course an issue in the bill as well. And third, the conservatives won and the civil rights lobby lost—and in no small measure because of the efforts of Senator John Danforth, Thomas's former boss and his principal defender in the Senate.

Almost immediately after the hearings, the civil rights groups and the administration reached agreement on a civil rights bill. The temptation to see a connection between the two is irresistible. Is it valid, or is it a classic case of *post hoc, ergo propter hoc*?

The temptation is strongest to see the connection as explaining some final concession by the administration. President Bush was being the magnanimous patrician in the wake of his victory, the explanation goes, and the WASP President was never one with an instinct for the jugular on this issue anyway, and only too eager to wash his hands of the groups' blood after the unseemliness of the Thomas-Hill fight. For good measure, this theory also points to the ascendancy of David Duke's candidacy for governor of Louisiana at the same time: President Bush simply could not abide another race-charged national battle. Besides, he owed Senator Danforth after the Thomas confirmation. So he told his lawyers to cut the best deal they could and be done with it.

This is not an implausible scenario, and it has added credibility since even conservatives might have rationalized cutting a deal at that time. The administration had been able to hold on for another year, but 1992—an election year—loomed. It was easy to envision a handful of Senators and Representatives, just enough to make the bill veto-proof, getting sufficiently skittish over the next few months to sue for peace. Again, given the self-imposed constraints of the administration, time was not on the side of the bill's opponents. And a bill passed

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46. For one account, written by Senate staffers who worked for the adoption of the Danforth compromise, see Peter M. Leibold et al., *Civil Rights Act of 1991: Race to the Finish—Civil Rights, Quotas, and Disparate Impact in 1991*, 45 Rutgers L. Rev. 1043 (1993).

over the President's veto would be significantly worse—substantively and politically—than one he negotiated.

There is, however, an alternative scenario, namely that it was the *civil rights groups* who felt under the most pressure to strike the best deal they could after the Thomas-Hill hearings. Remember that these hearings were an unmitigated disaster for them. Clarence Thomas was their worst nightmare, a black conservative on the Supreme Court, and overwhelmingly the American people had believed him and not their desperate hope to stop his confirmation, Anita Hill. And their relations with their most important ally, Senator Danforth, were greatly strained after the hearings.[47] If he insisted on further concessions, and if the groups were unwilling to make them and this resulted in the loss of his (and other moderate Republicans') support, then the administration really might be able to block the bill indefinitely.

And it was not quite true that the groups could bide their time forever. The "quota bill" was turning into a public relations debacle. An internal survey by the Leadership Conference on Civil Rights showed that Americans largely viewed the groups as special pleaders for preferential treatment for minorities, rather than principled defenders of fairness; the results of survey, to the groups' embarrassment, were leaked.[48] And what if, as they had hoped to do, the administration and its allies at some point succeeded in attaching a dramatically scaled-back version of the bill as a rider to some piece of popular legislation, forcing an up-or-down vote? The passage of such a bill might end decisively any hopes for the more sweeping changes the groups' bill contemplated. So the groups faced considerable pressure to strike a deal, too.

The two scenarios are not, of course, mutually exclusive. The political calculus for both sides was altered after the Thomas-Hill hearings. Moreover, President Bush should be taken at his word on this crucial point: he really did want a civil rights bill all along.[49] The hearings were not needed to change that.

VII. CONCLUSION

On the eve of the signing ceremony for the bill, conservatives in the administration pressed for an anti-quota parting shot. They drafted a directive that the President would sign along with the bill, which would have required a review of all federal employment programs that included racial, ethnic, religious, or sexual

47. When the Leadership Conference on Civil Rights announced its opposition to the Clarence Thomas nomination, Senator Danforth stated, "I do not think the support of the people of this country for Clarence Thomas will be swayed by the action of a group of self-anointed professional activists." Ruth Marcus, *Civil Rights Coalition Finds Thomas Too 'Radical' for Court*, Washington Post, Aug. 8, 1991, at A13.

48. Thomas B. Edsall, *Rights Drive Said to Lose Underpinnings/Focus Groups Indicate Middle Class Sees Movement as Too Narrow*, Washington Post, Mar. 9, 1991, at A6; William J. Bennett, *A New Civil Rights Agenda*, Wall St. J., Apr. 1, 1991, at B12.

49. On this point, see Nelson Lund's article in this symposium, *Congressional Self-Exemption from the Employment Discrimination Laws*, 54 La. L. Rev. 1559 (1994).

preferences, and the termination of those programs inconsistent with the new law or with the principle of discouraging quotas and unfair preferences. Ultimately, however, the idea was rejected.[50] The bill was signed, with only a general declaration in the signing statement that "[i]t is extremely important that the statute be properly interpreted—by executive branch officials, by the courts, and by America's employers—so that no incentives to engage in such illegal conduct [i.e., 'adopt[ing] quotas or unfair preferences'] are created."[51]

To the inevitable questions, "Who won? Who lost?," the answer to both is, even more than usual with compromises, "Both sides."

The civil rights groups passed a bill that, from their perspective, was certainly a dramatic improvement on the law as it stood after the Supreme Court's decisions in 1989. But it was nowhere near the wish list they had proposed. More importantly, the debate over the bill together with the Thomas-Hill hearings made abundantly clear that the civil rights groups had greatly diminished political capital and essentially no moral authority left. For these lobbyists, there is no higher price.

President Bush, on the other hand, got a civil rights bill he could live with. The trouble was, he set his sights too low. Had the administration been earlier, more vigorous, and more principled in its opposition, it might have been able to defeat passage of any so-called civil rights bill. Put another way: measured against the benchmark of the original Kennedy-Hawkins bill, and given its self-imposed restraints, the administration acquitted itself well; but measured against the benchmark of where the law should have been and where it in fact ended up when President Bush signed the bill in November 1991, the outcome was disastrous.

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50. *See* Ann Devroy & Sharon LaFraniere, *U.S. Moves to End Hiring Practices/Affirmative Action Policies Targeted*, Washington Post, Nov. 21, 1991, at A1; Ann Devroy, *President Signs Civil Rights Bill/White House Disavows Proposed Directive to End Affirmative Action*, Washington Post, Nov. 22, 1991, at A1.

51. Statement on Signing the Civil Rights Act of 1991, at 27 Weekly Comp. Pres. Doc. 1701, 1702 (Nov. 21, 1991). The signing statement also adopted as "authoritative interpretive guidance" the analysis of the bill introduced by Senator Robert Dole into the *Congressional Record*. *Id.* (citing 137 Cong. Rec. S15,472-78 (daily ed. Oct. 30, 1991); *id.* S15,953 (daily ed. Nov. 5, 1991)).