

# Law Quadrangle (formerly Law Quad Notes)

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Volume 32 | Number 3

Article 7

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Spring 1988

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Sallyanne Payton  
*University of Michigan Law School*

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### Recommended Citation

Sallyanne Payton, *Civil Rights and Republican Principles: a Reply to the Graham "Incoherence" Thesis*, 32 *Law Quadrangle (formerly Law Quad Notes)* - (1988).

Available at: <https://repository.law.umich.edu/lqnotes/vol32/iss3/7>

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# Civil Rights and Republican Principles: a Reply to the Graham "Incoherence" Thesis

*Professor Sallyanne Payton began her academic career at Michigan in 1976. She formerly served on the White House Domestic Council staff and was chief counsel to the Urban Mass Transportation Administration in the U.S. Department of Transportation.*

SALLYANNE PAYTON

I am grateful for an opportunity to respond to Professor Graham's very stimulating and informative paper. Professor Graham's central insight, as I understand it, is that the Nixon administration's civil rights policy was characterized by theoretical inconsistency and some political opportunism. The "policy" included a federal commitment to enforcing affirmative action, at the same time that it included the encouragement of a constitutional amendment against busing. It included



Phyllis Dantis

both a vigorous effort to help Southern school districts dismantle their dual schools systems and opposition to legislation that would have vested cease-and-desist enforcement powers in the EEOC. The Nixon administration created the Office of Minority Business Enterprise while attempting to weaken the Voting Rights Act. There was the Philadelphia Plan, but at the same time President Nixon made two attempts to place a Southern conservative on the Supreme Court of the United States. On balance, the record cannot be characterized as "liberal," but neither can it be thought of as "conservative," certainly not in the sense in which the nation has experienced a purer conservatism under the Reagan administration. Professor Graham argues that the Nixon record is, taken as a whole, "incoherent," and that what Nixon administration officials lacked was "an enunciation of Republican principles to guide their policies."

By way of introduction, I should say that I am a lawyer, and now a law professor. I came from private practice to John Ehrlichman's domestic council staff in April 1971, and served as staff assistant to the president for two years, after which I moved to the Department of Transportation. I was not at the time and have never been a civil rights professional, and civil rights policy was never in my portfolio. However, as one of the two Blacks on the White House staff at the time (Bob Brown being the other) I did have both the opportunity and, I thought, the obligation to understand what was going on in civil rights, and I participated in the women's movement as one of the Republican women so involved. It is as an interested inside bystander rather than as a participant, therefore, that I respond to Mr. Graham's paper.

Mr. Graham has discovered the eternal truth that events that seem from afar to be planned systematically frequently appear from a closer distance to be random. The latter impression may be as misleading as the former, however, because the pattern of action that one actually observes, and the principles that have guided the actors' selection of alternatives, may be based in unspoken assumptions and implicit world views. A coherent pattern can emerge from discrete actions even though the actors appear to be unaware of the pattern they are creating. I do not propose to argue with Professor Graham's data, only to suggest another way of describing the pattern.

Professor Graham's thesis seems to have been stimulated by his surprise that the Nixon civil rights policy was not as wholly unsatisfactory as he expected to find it. He suggests that what surprised him about the information that he reviewed was the "incoherence" of the Nixon administration's civil rights policy. He thereby suggests both that coherence is possible and that incoherence is a deficiency, the implication being that coherent policy, had it existed, would have yielded better results. There is a backhanded compliment here: the implicit premise is that the Nixon administration's Republican principles were so successful in other domestic areas that if they had been applied to civil rights, or if the administration had tried to develop Republican principles for civil rights, the results would have been

more satisfactory, from Professor Graham's point of view, than the actual course of incoherent events. I am doubtful on that very point. I suspect that civil rights was in the early 1970s, and still is in the late 1980s, the great unmanageable item on the American political agenda, the great policy failure that poisons the nation.

Indeed, to call the problem one of "civil rights" is to confuse the issue. The problem, indeed, is how to name the problem. By the time the Nixon administration domestic policy team began to turn its attention to civil rights policy it had already become clear that "civil rights" in the classic legal sense of the term was only a fragment of the issues over which the "civil rights" struggle was being waged.

The deprivation of "civil rights" has been accompanied by and has been emblematic of a broad spectrum of deprivations visited historically upon Black America: slavery, segregation, discrimination, and now nearly complete social isolation, which have left an aggregate legacy of depression that is proving extremely difficult to counteract.

By the time the Nixon administration took office, there was a political consensus that racial distinctions ought to be eliminated from American law, a process that was occurring partly through judicial order in the wake of *Brown v. Board of Education* and partly through voluntary action on the part of legislatures and executive branches throughout the federal system. In addition, the Congress had in the Civil Rights Act of 1964 decided that discrimination against Blacks and other minorities in private employment ought to be eliminated as well.

It was apparent, however, that something more needed to be done, something that Professor Graham thinks ought to have been done pursuant to Republican principles. Just in order to get a sense of the difficulty of that undertaking, let us return to the intellectual scenes of what Mr. Graham identifies as the great policy triumphs of the Nixon administration. If we look closely, we will see that they were all based on an appreciation of structure and principle. In foreign affairs, Mr. Nixon had a clear understanding of the structure of the conflict between the United States and the Soviet Union, a conflict aptly dubbed by observers a "chess game." The

*This paper was originally presented at the Hofstra University "Conference on the Nixon Presidency," Nov. 23, 1987.*

game is structured by geography and the determinants of domination such as access to resources, ability to deny the enemy access to resources, control of the governments of other countries, and so forth. The game can be taught. Likewise in domestic policy the achievement of the Nixon-style New Federalism, with block grants, revenue sharing, regional planning, and the like, was based on the principles of efficiency in the collection and expenditure of resources: centralized collection and decentralized administration, with the appropriate scale of the decentralized unit depending on the task to be performed. There are a small number of mutually consistent principles that were at the base of most of the Nixon administration's initiatives in restructuring domestic government. For Republican reformers, in general, good governmental structure and process are good government, and there are things that government ought to do.

**W**hat is the structure of the larger problem of overcoming the legacy of slavery and segregation? To dismantle *de jure* segregation and restore political participation rights in the South would be part of any agenda, because the legal subordination of an entire race was indisputably contrary to every articulate principle of American government. Once white supremacy had been rejected as a principle, formal legal equality must follow, again in principle. This principle yields frequently to the contemplation of the electoral calculus, but the principle is clear, in principle. President Johnson had gone a long way toward making the laws of the nation reflect these principles. The Civil Rights Act and the Voting Rights Act had the effect of taking down the "white only" signs all over America, the markers of the official racial caste boundary.

By the time Mr. Nixon took office those signs were down, though the memories of them were still fresh, and the nation had discovered that it had larger problems that had been obscured by the obvious one. The "white only" sign might come down from the door, but it was still in the mind. And race was class, the latter being a much more powerful marker of persons than is simple pigmentation. The problem of class became obvious in the 1970s and revealed that the integration strategy that had fueled so much of the civil rights movement was unrealistic. Races can be integrated more easily than classes, and it is extremely difficult to force integration across both race and class lines. The recent suburban flight of middle-class Blacks is simply one more demonstration of the point. Something must be done, however, about the plight of the poor, which even in 1970 was clearly worsening.

In the midst of this, it would not have required much perspicacity to have known that one did not know what to do. The behavior of the Nixon administration is largely consistent with this simple insight. Some of the actions that had been designed under the old schema were helpful and needed only to be intensified, such as increasing the enforcement of anti-discrimination policy and helping the moderates in the South to retain control of school desegregation. Accordingly, discrimination that had moved underground was attacked with the new weapon of "affirmative action," which is essentially a management tool designed to flush out unconscious and surreptitious discrimination, and school desegregation was supported. But at the same time the pathologies of the ghetto could be seen to worsen, and that was where the heart of the problem was. No one knew what to do about the ghetto.

Meanwhile, the environment in which any thinking had to occur was not conducive to sustained contemplation. America was undergoing general cultural upheaval, of which the change in the pattern of relations between the races was a central, even emblematic, part. From the vantage point of 1987 it may be difficult to remember the general din of the early 1970s. Recall Black power, busing, the arguments over the proper role of whites in the civil rights movement, the welfare rights movement, and other manifestations of the times. Meanwhile, white America was in the throes of the counterculture and the anti-war movements. The children of the white upper middle class were in the streets protesting the war in Vietnam, when they were not listening to rock music, experimenting with alternative living arrangements, and definitely not just saying no. Kent State happened in the spring of 1971.

Now if the Nixon administration had attempted to formulate "coherent" civil rights policy in accordance with Republican principles in this environment, to whom might it have turned for advice? The Southern whites who thought they knew the problem best and to whom the nation had traditionally turned for insight were the problem itself; for the first time the Blacks who were experiencing and thinking about the problem were being heard, but they had had no recent reason to admire or adopt Republican principles. Mr. Nixon, however, was a Republican, and there was a limit to his ability to continue to do things that made him look like a Democrat, or a secret Democrat. In fact, it is worth observing that the rightward shift of the Republican party in the late 1970s was stimulated greatly by conservatives' observation of the centrist tendencies of the Nixon administration.

In any event, the late 1960s and early 1970s were not the times in which cool masters of government structure such as Fred Malek and Larry Lynn could have put together a Republican design for civil rights policy. Race being an issue *sui generis* in American life, civil rights enforcement was not regarded as an aspect of ordinary administration. Civil rights enforcement is a moral imperative in the form of government. The civil rights laws are intended to eradicate discrimination, not to regulate it. Mr. Graham is astute in pointing out

that the Nixon administration never developed a coherent theory of the use of regulatory power in civil rights enforcement.<sup>1</sup> Where I differ with Professor Graham is in thinking that this was just as well, in light of the fact that the moral underpinnings of the civil rights laws are so different from the moral underpinnings of, say, the Interstate Commerce Act.

Professor Graham seems to be saying, however, that the Nixon administration was also incoherent *within* civil rights policy, and he makes a convincing case. The reasons for this incoherence are not so difficult to discern. Mr. Nixon was elected on a tide of reaction. There was a good deal of space to the political right of him that he might have occupied, but did not, although he did make noises soothing to conservatives who needed to believe that people who agreed with them were back in control. Mr. Nixon himself was not, however, a man of the Right; nor was he a Southern agrarian segregationist; nor was he a man whose sense of his own merit rested on his skin privilege or his control of private property. He was, if it does not seem old-fashioned to say it, a real conservative, the kind of conservative who sees inevitable change and tries to create structures to contain new energies and to accommodate them in ways that augment rather than undermine the civil order. Mr. Nixon and his principal men were centrists. They had come not to dismantle government but to rationalize it, to restore a balance between national and state power after the unbalancing actions of the Kennedy and Johnson years. Insofar as they could deal at all with civil rights policy, their inclination was to consolidate the gains of the civil rights movement and to legitimize them by institutionalizing them.

I suggest, therefore, that we start from the premise that the people in the upper ranges of the Nixon administration were at heart centrists who were interested principally in the design of government, and that they had a sense that something had to be done for civil rights but were confused as to what was best under all the circumstances, which included their interest in the re-election of their leader. I suggest that we look at Mr. Graham's data not to denounce what it reveals as "incoherent" but to think about what it may actually reveal. My assumption here is that an intelligent person tries to optimize subject to constraints; my further observation is that the Nixon administration officials operating in the domestic arena were intelligent and thoughtful, were conventionally competent professionals, and shared a core set of values and assumptions about what kind of government was likely in the long run to conduce to the happiness of the nation. Those values and assumptions were the ones that had worked, by and large, to bring white America to a state of material success unequalled in the history of the world. The problem of race, as it looked from this perspective in the late 60s and early 70s, was how to get Black America into the system, and to make the system work for Black America. The Nixon administration was conservative in this important respect: administration officials did not see the failure of the system to accommodate Blacks as a fundamental flaw in the system but as a problem for this particular moment

in history, which it was important not to stretch out unnecessarily. Hence their endorsement of affirmative action, which can be understood as an effort to speed up the integration process, to reduce the Black community's frustration and to skip a generation in terms of making opportunities available and making certain that minorities took advantage of them. The solution lay, Nixon officials thought, in getting more Black people to behave like whites — to get into business, go to school, become homeowners, and so on. What worked for whites ought to work for Blacks, if the Blacks were willing to do what the whites had done and if the whites could be persuaded to treat the Blacks the same way they treated whites. This was the world in 1971.

**H**owever, civil rights enforcement was not the priority of the Nixon administration. What was most important was to deal with government structure, as Mr. Graham points out, and the structure was to be dealt with by the application to late twentieth-century government classic Republican principles, on the understanding that the existence of a substantial federal government was a fact to be accommodated. That is to say, the Nixon administration's ideas about government acknowledged the existence, utility and vast potential power of the federal government and sought to direct that power into activities that a powerful national government was uniquely suited to carry out, such as civil rights enforcement and environmental protection; conversely, the effort was to prevent the federal government from competing with state and local governments to provide services that could better be provided at the state and local level. All this was in accordance with classic Republican principles of government, which the Nixon administration was trying to update to accommodate the historical fact of the increasing influence of the federal government.

The principles themselves are familiar, but it may be helpful to review them as a prelude to the rest of this discussion. First is the principle of limited government, the idea that private ordering through the private and voluntary sectors is in general preferable to the use of government power. The second is federalism, the idea that politically responsible local governments are the primary organs of government and the indispensable locus of genuine popular self-government. If government must be used, state and local governments are systematically to be preferred to federal action. The third principle is the separation of powers, which is a technique of distributing the powers of government

among the branches in order to reduce the threat posed by the concentration of all government powers in the same individuals. Programs that are consistent with these principles may be good; programs that are inconsistent with them are surely bad in the absence of extraordinary justification. We might add here a fourth principle, which is that the laws and government structure ought to reflect in general the preferences of the majority.

**T**he civil rights problem posed a dilemma for believers in these principles: it was fairly clear that the only civil rights policies that promised to be effective were in tension with the principles, and the policies that might be indisputably consistent with the principles were likely to be ineffective. The reason is that the principles assume as a matter of fact that individuals are better served when decision-making is lodged in the private sector or in small government "close to the people." While those assumptions may be dubious for most Americans, they are flatly contrary to fact for most Black Americans. The private sector is the setting for private racial discrimination; and state and local governments were the enforcers of official segregation. Moreover, the whites held the majorities in the legislatures so it was to the courts, not the legislatures, that Black Americans had to turn for justice. In order to build effective civil rights enforcement programs it was necessary to discard the assumptions on which much American government rested. In fact, civil rights enforcement threatened to provide a setting in which the strength of the principles might be broken forever: since discrimination was pervasive, so was the potential reach of federal judicial and regulatory authority, and it was reasonable for traditionalists to fear that regulatory programs and judicial doctrines designed to bring about effective civil rights enforcement might become models for other types of regulation and judicial intervention that did not start from such moral imperatives. This was not an idle fear: the vocabulary of "rights" expanded drastically during the 1960s and 1970s, and any of a number of movements claimed to be as important as civil rights or claimed that their beneficiaries were as oppressed as were Black people.

If vigorous, conspicuous civil rights enforcement can always be expected to raise the anxieties if not the hackles of persons of Republican temperament and principles, it is wholly unrealistic to expect a Republican president to be a crusader for civil rights even where the moral issues are clear. By the time Mr. Nixon took office, ambiguities had already set in. The pure "civil rights" issue, conceptually the easiest for Republicans, had in the main already been dealt with legislatively during the Johnson administration. Iron-

ically, Mr. Nixon inherited not only the hard issues, but the issues that were hardest specifically for Republicans. What were those issues? By the late 60s and early 70s it was becoming clear that the demoralization of the Black family had a great deal to do with the fact that simply removing the racial caste barriers in American society would not bring about a great surge toward material success on the part of many Blacks. This fact was understandably embarrassing to the Black community, and there was a good deal of heated discussion about who was to blame, but the fact could not be avoided. Indeed, over time the situation has grown more pronounced.

Republican principles assume that the basic social unit is the family, the individual members of which strive for personal advancement. The theory of racial uplift through the personal mobility of individuals, however, is based squarely in the assumption that the unit to be uplifted is an intact nuclear family with an employed or employable male head of household and an obedient and supportive female at home who runs the household and takes care of the children. All of the Republican assumptions about the appropriate division of function between the public and private sectors, about the amount of time the adults in a family can devote to making money, about labor mobility, about political participation, and a host of other matters, assume (implicitly, for the most part) a male head of household. The entire liberal democratic idea of promoting equality by promoting opportunity was designed to allow men to achieve equality with one another; the core of civil rights policy has been to allow Black men to achieve the same economic and political status as white men. On this there has been bipartisan consensus. Democrats have differed from Republicans chiefly in being more comfortable with maintaining a large population of women and children on welfare. The subtext of much policy toward the Black community, however, has been to place Black males in a position to direct their families and contribute their resources to them in the same way that white males are presumed to contribute.

The flaw in this approach has been that the nuclear family structure within the white community itself has been coming under pressure. In the 60s and 70s it was obvious to anyone willing to look that the problems of the Black community were not to be solved by cultivating patriarchy. But what else was there? The answer to that problem was not clear in the early 70s and is not clear now. What is clear is that a family unit cannot subsist on the income realistically available to an unskilled woman worker with children whose opportunities are limited by the gender segregation of the workplace. One can attack the problem directly, or one can tell the woman to find (or keep) a man and get his money. The thinking of much of the civil rights community has run along the latter lines, which are, ironically, consistent with Republican principles that contemplate the dependence of females and children on adult males. Even in the late 80s conferences on "civil rights" rarely devote much time to discussing the status of women, though the female-headed household is now a prevalent form of family organization in the Black community.

If one wants to deal with the structural problem that confronts Black America, one must deal with the status of Black women and through that window with the problem of Black children, which is where the future lies. I cannot fault Mr. Nixon for not having taken the lead on this issue, because the women's movement had just gotten underway and thinking about the status of women was embryonic. What Mr. Nixon did in fact, being unable to deal with one basic structural problem, was by no means deplorable, as Mr. Graham points out. The picture that emerges from Mr. Graham's paper is of an administration actually trying to achieve some progress, subject to political constraints and in light of its determination not to miss its opportunities to make the GOP the majority party at the presidential level. There was, predictably, a great deal of symbolic political activity directed at wooing the most discontented whites. But Mr. Nixon was no counterrevolutionary. Nor was Mr. Ehrlichman, nor Mr. Schultz. There is no villain in this piece.

What Graham actually accuses Mr. Nixon of is "incoherence" rather than villainy. The evidence for this is that Mr. Nixon said very little, never developed an articulate program, allowed the various members of his administration to go off on projects of their own (e.g., Schultz and the Philadelphia Plan), and mainly demanded that they not get him in trouble, that is, that they should design action so that if there was to be a reaction it would be directed at another branch of government, preferably the courts. Meanwhile, in low visibility areas such as budgets Mr. Nixon beefed up civil rights agency enforcement resources and helped the moderate South maintain control during desegregation. And he tried to give some encouragement to the fledgling class of Black entrepreneurs.

This is not a bad record for a Republican elected on a wave of reaction. Indeed, some conservatives have never forgiven Mr. Nixon for having been so sensible. It is possible to argue that the energy for the expansion of rights was coming from Democrats, not Republicans, and that Mr. Nixon did everything he could to keep the volume down and to retard the pace of change. But he could have kept the volume a good deal lower, and he could have been much less supportive of the ultimate direction of change. What the Nixon administration actually tried to do was to moderate change, to create sound government structures to contain the energy that was flowing, uncontrollably, into government. The administration did not, and this is important, try to stamp out the energy itself. Working for the administration was frequently frustrating for those of us who were part of the energy, but it is hard to fault the Nixon administration for being what it was elected to be, which was a moderate Republican administration. Indeed, Mr. Nixon did some things that placed him ahead of his time, such as the Indian policy put together by Ehrlichman and Bobbie Kilberg. And in the area where policy

was most out of view of the right wing, that being District of Columbia affairs, the president, Mr. Ehrlichman and Mr. Krogh were consistently supportive of the Black officials of the District of Columbia government, poured very impressive amounts of resources into the jurisdiction, and worked to place the District on a sound fiscal basis and to achieve home rule. I can say on the basis of my own experience in managing District of Columbia affairs that these centrist Republican reformers were a pleasure to work for and with.

In reviewing the entire record of an administration, it is important to keep in mind that measures that are not taken as part of an advertised "civil rights" policy may have a tremendous effect, for good or ill, on Black Americans. Early in his administration Mr. Nixon proposed the Family Assistance Plan, which would have placed basic cash incomes in the hands of poor and working poor families with children, many of them female heads of families. The plan would have had a radical effect on the economic and political structure of the South. It would have provided a real subsistence floor for millions of Black children in rural areas. It would have been a first step toward treating the female-headed family as a structure, not an aberration or pathology, and therefore would have dealt with it straightforwardly as a problem of wage structure and work incentives. The FAP died as the result of a coalition of conservatives who understood its implications and of liberals who did not perceive its beneficiaries, who would mainly have been poor women and their children, as their constituency. It is only now that comprehensive welfare reform is back on the political agenda, and I fear that it is not yet widely understood that the status of Black women will ultimately determine the future of Black people in America. I cannot fault Richard Nixon and his conventional Republican reformers for having failed in 1971 to appreciate truths that are only beginning to be perceived.

Let it sound as though I am arguing that the Nixon administration did fine on civil rights, all things considered, let me make it clear that my empathy for the intellectual problems of engineering a civil rights policy for a Republican administration does not obscure my dismay at the moral damage done to the civil rights effort during the Nixon years. At the same time that his executives were doing their sensible best to create a sound approach to civil rights, the political message that was going forth from the White House was one of Southern strategy and conservative Southern appointments to the Supreme Court, of nods and winks. The Johnson administration had put the moral weight of the presidency behind the law, and behind the civil rights movement. The Nixon administration continued and extended much of the good concrete work. But there was the moral counterweight, and I am not prepared to argue that the loss of the moral presence of the presidency on the side of those seeking to break down the racial caste system was not in the end the most long-lasting legacy of the Nixon administration. Perhaps the most balanced statement that can be made is that the time for informed judgment has not yet come.