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## Exploring the Limits of Executive Civil Rights Policymaking

Stephen Plass

*St. Thomas University*, [splass@stu.edu](mailto:splass@stu.edu)

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## EXPLORING THE LIMITS OF EXECUTIVE CIVIL RIGHTS POLICYMAKING

STEPHEN PLASS\*

Racial equality for blacks remains a minefield issue for American presidents. Any position a president takes is bound to alienate someone. As a result, even a well-meaning president such as Bill Clinton has had to tread very carefully when addressing this topic.<sup>1</sup> Popular attitudes shaped by the powerful continue to dictate the extent to which presidents are able to confront continuing racial discrimination and its legacy of inequality in American life.<sup>2</sup> Although many laws ordaining racial equality have been written, discrimination remains a normal part of life in America. This reality makes the President's role in this area almost as difficult and compelling as it was over a century ago.

The Clinton presidency demonstrated that even a president who is inclined to make equal treatment a priority first must consider the needs of a non-black electorate, congressional opponents, and conservative judges.<sup>3</sup> Presidents walk a tightrope when they expend resources on old and new barriers to equality because they face searching scrutiny from an electorate and judiciary that question the propriety, if not the constitutionality, of such an agenda.<sup>4</sup> Absent a popular mandate that is unlikely, race-specific policies intended to ensure equal treatment are invariably viewed as "affirmative action," or an unnecessary government hand-out to blacks. Presidents sympathetic to minority concerns continue to have a difficult time responding to perceptions

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\* Professor of Law, St. Thomas University School of Law, Miami Gardens, Florida.

1. *See infra* text accompanying note 173.

2. This, of course, is unsurprising since the president is the product of an electorate, a small portion of which is comprised of blacks. The constitutional grant of executive authority and powers inherent in the office of president give the president a range of options on matters of national and international importance, but presidents are careful to not make policy that alienates significant voting blocks. *See generally* Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132 (1999).

3. *See infra* text accompanying note 174.

4. The current division between blacks and whites over affirmative action is a prime example of a civil rights dilemma that presidents face. For a discussion, with responses to the typical arguments made against affirmative action, see Richard Delgado, *1998 Hugo L. Black Lecture: Ten Arguments Against Affirmative Action—How Valid?*, 50 ALA. L. REV. 135 (1998). For a good discussion of how deep-rooted the psychology of discrimination is and a persuasive defense of affirmative action, see David Benjamin Oppenheimer, *Understanding Affirmative Action*, 23 HASTINGS CONST. L.Q. 921 (1996). *But see* Robert Woodson, *Affirmative Action Is No Civil Right*, 19 HARV. J.L. & PUB. POL'Y 773 (1996) (arguing that affirmative action has done little to help blacks in need).

of inferiority and discriminatory conduct that promote a racially stratified society.<sup>5</sup> And the players in the battle for equality remain at odds, with each side trying to capture political support that can be a foundation for real change.<sup>6</sup>

This article evaluates official executive acts and their impact on black life since the civil rights revolution of the 1960s. It scrutinizes executive support for and opposition to black civil rights through treaties, constitutional provisions, statutes, executive orders and proclamations, and other official conduct. The article evaluates whether activism by the chief executive can help set the mood of the nation either in the direction of racial cooperation or division. Conversely, it considers whether a national mood of tolerance must first exist before a president who supports racial equality can act.

Part I begins with an evaluation of the modest initiatives of President Dwight Eisenhower as a response to growing black discontent and despair. It shows how the President's narrow commitment to civil rights resulted in lost opportunities for change that were created by the Supreme Court's rejection of the "separate but equal" doctrine.<sup>7</sup>

Part II shows how Presidents Kennedy and Johnson were prodded into action by civil rights activism and the violence levied against civil rights supporters. It documents the significant legal accomplishments of these presidents through the enactment of legal rules prohibiting discrimination in major facets of American life. These 1960s' regulations remain the foundation for equal treatment and serve as the core battleground for future presidents whose views on civil rights may be narrower or broader than the regulations.

Part III looks at the interpretation and enforcement actions of the presidents that followed Johnson. This part begins to define the parameters of the

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5. The problems encountered by President Clinton's "conversations on race initiative" is a good example of how difficult it is to get Americans together in an effort to confront racism. The initiative was attacked by some who argued that

[it] provided an ineffective but benign way for Clinton to play the role of therapist in chief. Rather than attempting the more controversial and expensive effort of putting forth substantive policies to deal with the continuing impact of racial exclusion and discrimination, the initiative allowed Clinton a low-cost way to create the impression of concern and action.

Philip Klinker, *Bill Clinton and the Politics of New Liberalism*, in *WITHOUT JUSTICE FOR ALL* 11, 27 (Adolph Reed Jr. ed., 1999).

6. For example, some politicians have tried to recapture opportunities lost to whites as a result of preferential programs that set aside opportunities to minorities only. Legislative proposals to end such affirmative action programs include the Civil Rights Act of 1997, H.R. 1909, 105th Cong. § 2 (1997); Equal Opportunity Act of 1995, S. 1085, 104th Cong. § 2 (1995); Act to End Unfair Preferential Treatment, S. 497, 104th Cong. § 2 (1995); and Civil Rights Restoration Act of 1995, S. 318, 104th Cong. § 2 (1995).

7. See generally *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

battleground for Democratic and Republican presidents. It shows the programs for equality that Presidents Nixon, Ford, and Carter pursued and the helpful or harmful effects they have had in achieving equal treatment.

Part IV details the accomplishments of Republican presidents in limiting the achievement of civil rights. This part shows how the Reagan presidency and several Bush administrations delayed and deferred opportunities for equal treatment. By appointing conservative judges and like-minded federal officials, these presidents secured narrow interpretations and limited enforcement of civil rights laws. This forced civil rights groups to expend their resources on countering these “raids on civil rights,” rather than fighting widespread discriminatory practices, old and new.

Part V shows that without popular support or consent from Congress and the judiciary, even a well-meaning president such as Bill Clinton can do little with executive orders and proclamations. This part shows that the broad vision of equality articulated by Clinton is desirable but could never be effectively pursued in a society that is comfortable with racial inequality. Clinton’s equality initiatives faced many critics and had difficulty gaining traction. But his appointments and other symbolic gestures were critical demonstrations of black qualifications and worth. This part concludes that an emphasis on equality—without prodding by civil rights demonstrations—should be an essential component of executive policymaking.

### *1. The First Modern Civil Rights Initiatives*

A casual observer of American life quickly learns that our society thrives on differences. Unfortunately, the things that make blacks different generally fall in the negative category. Natives and aliens alike recognize the generally inferior nature of black schools, housing, employment, political influence, and economic participation. This disadvantaged reality combines with glamorized stereotypes and the realities of vulgar music and gangster-like behavior to force a conclusion that the race should not be respected and may be treated with contempt.

Before the *de jure* civil rights revolution of the 1960s, blacks had few opportunities to demonstrate their value. Without the basic civil right of equal employment, blacks could barely eke out a living. Limited educational opportunities foreclosed class and financial mobility for parents and generations of children after them. Exclusion from the political realm foreclosed opportunities for networking and wealth-building.

This system of apartheid was theoretically tackled and formally dismantled with civil rights laws, and the presidents who fostered and enforced these laws played prominent roles in advancing civil rights. By the 1950s when President

Dwight Eisenhower took office, chief executives had gradually moved from their position on the sidelines. Instead of passively watching as civil rights laws were scrapped by Congress, they promoted laws that could dismantle the slavery-like system constructed in many states after emancipation. With growing signs of protest and compelling evidence that black equality was far from realized—a century after emancipation—the chief executives were finally prodded into action. But the first civil rights initiatives were largely symbolic. During the Eisenhower presidency, fighting Communism and the Cold War remained priorities, but the civil rights movement was also taking shape.

The Supreme Court's equality mandate in *Brown v. Board of Education*<sup>8</sup> gave President Eisenhower strong ammunition to pursue civil rights legislation, but the President did not take advantage of it.<sup>9</sup> Civil rights were not an Eisenhower priority, and when he finally acted, his proposals were weak responses to the problems blacks faced when attempting to exercise their civil rights. Once the Supreme Court rejected the separate but equal doctrine, the President failed to voice his support for the decision or encourage compliance with desegregation mandates.<sup>10</sup> The President's silence in the face of desegregation and voter registration violence only seemed to facilitate a worsening of race relations.<sup>11</sup>

Eventually, in 1956, President Eisenhower acted and told Congress that blacks were being denied the right to vote by intimidation and violence.<sup>12</sup> And in January of 1957 he addressed the nation and Congress, proposing extremely modest civil rights measures such as the creation of a Civil Rights Commission and the creation of a civil rights division in the Department of Justice.<sup>13</sup> The President's proposals also provided for injunctive relief when federal civil

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8. *See id.* (rejecting state laws that relegated blacks to a separate and inferior life).

9. Some argue that Eisenhower did not support the *Brown* decision, and reluctantly enforced the decision's equality mandates. *See* Christo Lassiter, *The New Race Cases and the Politics of Public Policy*, 12 J. L. & POL. 411, 413 (1996).

10. For three years Eisenhower failed to express approval of the *Brown* decision or demand compliance with its mandates. *See* C. VAN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 113 (1974). The President stayed silent despite rumors that he deplored *Brown's* holding and felt that integration should move more slowly. *Id.* at 168. As a result, resistance to desegregation stiffened and few schools were desegregated during the Eisenhower administration. *Id.* at 167-68.

11. *See* EARL OFARI HUTCHINSON, *BETRAYED* 78 (1996).

12. President Dwight D. Eisenhower, Annual Message to the Congress on the State of the Union, PUB. PAPERS 1 (Jan. 5, 1956).

13. *See* President Dwight D. Eisenhower, Annual Message to the Congress on the State of the Union, PUB. PAPERS 17 (Jan. 10, 1957).

rights were violated<sup>14</sup> and for federal enforcement of voting rights.<sup>15</sup> The net product of the President's efforts was the Civil Rights Act of 1957<sup>16</sup>—an ineffective measure that brought little change.

With the 1957 legislation failing to impact the oppressive practices that triggered it, the President proposed new civil rights legislation in 1959.<sup>17</sup> This proposal was aimed primarily at stemming violence triggered by desegregation decrees and securing equal voting rights for blacks. In 1959, the Civil Rights Commission issued a report to the President outlining the problem of state-sponsored voting discrimination and recommending federally appointed “voting registrars.”<sup>18</sup> But President Eisenhower remained committed to a modest civil rights program and he rejected the “voting registrar” proposal in favor of a “voting referee” system that made it particularly difficult to secure black voting rights.<sup>19</sup> After congressional opponents gutted the bill,<sup>20</sup> the President signed a second piece of civil rights legislation, the Civil Rights Act of 1960.<sup>21</sup>

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14. *Id.*

15. *Id.*

16. Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (codified as amended in scattered sections of 18, 20 & 42 U.S.C.).

17. *See* President Dwight D. Eisenhower, Special Message to the Congress on Civil Rights, PUB. PAPERS 164 (Feb. 5, 1959). As examples, the President noted that “[t]here have been instances where extremists have attempted by mob violence and other concerted threats of violence to obstruct the accomplishment of the objectives in school decrees.” *Id.* at 165. Further, Eisenhower noted that “recent incidents of bombings of schools and places of worship” required federal involvement to supplement the efforts of state and local authorities. *Id.* He went on to state: “State or local authorities, in some instances, have refused to permit the inspection of their election records in the course of investigations,” *id.* at 166, and that “[a]ccess to registration records is essential to determine whether the denial of the franchise was in furtherance of a pattern of racial discrimination.” *Id.*

18. U.S. COMM’N ON CIVIL RIGHTS, REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS 140 (1959).

19. *See* Jocelyn C. Frye et al., Comment, *The Rise and Fall of the United States Commission on Civil Rights*, 22 HARV. C.R.-C.L. L. REV. 449, 461 (1987) (stating the Eisenhower Administration pushed the voting referee plan). The voting referee system required the filing of a case under the 1957 Civil Rights Act as a predicate to court appointment of referees. The voting registrar system was simpler and more efficient because it was an administrative process based on the recommendation of the Civil Rights Commission. *See* FOSTER RHEA DULLES, THE CIVIL RIGHTS COMMISSION: 1957-1965, at 96-98 (1968).

20. *See generally* DANIEL M. BERMAN, A BILL BECOMES A LAW: THE CIVIL RIGHTS ACT OF 1960 (1962).

21. Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86 (codified as amended in scattered sections of 18, 20 & 42 U.S.C.).

The Civil Rights Acts of 1957 and 1960 were regarded as greater victories for opponents of civil rights than substantive progress for blacks.<sup>22</sup> Southern Congressmen effectively weakened these measures,<sup>23</sup> apparently recognizing that the President was not fully committed to strong equal rights laws. The weakness and ineffectiveness of the 1957 measure has caused some to question whether it even deserves a civil rights title.<sup>24</sup> And the 1960 legislation was so weak that Thurgood Marshall remarked that it was not worth the paper it was written on.<sup>25</sup> But things soon changed as blacks and other supporters of civil rights increasingly challenged the policies and practices of segregation after President Eisenhower left office.

## *II. The De Jure Civil Rights Revolution*

President John F. Kennedy took office when civil rights protests were widespread enough that they could not be ignored. And although President Kennedy has been criticized for having a narrow civil rights vision,<sup>26</sup> he paved the way for a civil rights revolution. The President pledged his opposition to racial oppression, although civil rights were not his top priority.<sup>27</sup> President Kennedy, like Presidents Eisenhower and Truman, was caught up in the

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22. See Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 137-38 (1994) (describing the 1957 legislation as substantively hollow and unenforced); see also DULLES, *supra* note 19, at 97 (“The Southerners not only beat back every effort of the northern liberals to put sharper teeth into the [1960] bill, but succeeded in winning passage of several of their weakening amendments.”).

23. See MILTON R. KONVITZ, *A CENTURY OF CIVIL RIGHTS* 83-85 (1961).

24. See BERNARD SCHWARTZ, *STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS PART II* 839 (1970). Schwartz notes that:

As finally passed, the 1957 statute scarcely deserves the title of Civil Rights Act. Supporters of the bill could only refer to the congressional bromide that government is founded on compromise. Opponents, on the other hand, were rightly jubilant, for they well knew that they had shorn what had started as a mild measure of what little substance it had. Well might Senator Richard Russell [Dem., Ga.], a leader of the southern bloc, declare, at the end of the debate, that the limited scope of the new law was “the sweetest victory of my 25 years as a senator.”

*Id.* (alteration in original).

25. *Id.* at 938; see also BERMAN, *supra* note 20, at 135.

26. See KENNETH O'REILLY, *NIXON'S PIANO* 236 (1995). Kennedy was described as a civil rights minimalist whose policy was to “[c]ultivate the handful of people who could deliver the black vote, make an occasional symbolic gesture, [and] never risk any political capital on behalf of anyone’s civil rights.” *Id.*

27. See HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA* 32 (1990). In Kennedy’s first sixteen messages to Congress setting out his legislative priorities, civil rights were neglected. See *id.*

Communist threat;<sup>28</sup> but, by 1963, civil rights was a burning domestic issue. Black passivity had shifted to non-violent activism. Television cameras brought the violence against black protesters to the nation's living rooms. In addition to acts of violence against non-violent protesters for civil rights, the nation saw, among other things, segregationists use violence and force to prevent blacks from obtaining equal access to schools.<sup>29</sup>

With white supremacist and segregationist violence rampant, President Kennedy could not delay acting on his declared commitment to civil rights. On June 11, 1963, the President addressed the nation:

The Negro baby born in America today, regardless of the section of the Nation in which he is born, has about one-half as much chance of completing a high school as a white baby born in the same place on the same day . . . one-third as much chance of becoming a professional man, twice as much chance of becoming unemployed, about one-seventh as much chance of earning \$10,000 a year, a life expectancy which is 7 years shorter, and the prospects of earning only half as much.<sup>30</sup>

President Kennedy noted that we don't ask for whites-only when we select soldiers and send them off to war. Further, he noted that blacks should be able to attend public schools without the backing of federal troops, and blacks should receive service in public facilities without having to resort to public demonstrations. President Kennedy added that blacks should be able to register and vote without threats of reprisal or fears of violence.

The President sent several civil rights proposals to Congress that in retrospect may not be regarded as far-reaching. He proposed prohibiting discrimination in employment, public accommodations, voting, education, and federally-funded programs.<sup>31</sup> While he acted on his declared support for civil

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28. Kennedy had great plans to attack poverty, fight communism, and negotiate arms control treaties. *See generally* ARTHUR M. SCHELSINGER, JR., *ROBERT KENNEDY AND HIS TIMES* (1978).

29. In Mississippi, even Governor Ross Barnett joined hands with segregationists to deny blacks equal access to education. *See* Bradley W. Joondeph, *Missouri v. Jenkins and the De Facto Abandonment of Court-Enforced Segregation*, 71 WASH. L. REV. 597, 604-05 n.33 (1996); *see also* Klarman, *supra* note 22, at 121-22 (reporting the successful reelection strategy of Birmingham City Commissioner Bull Connor of promoting Klan violence against blacks and other civil rights activists).

30. *See* President John F. Kennedy, Radio and Television Report to the American People on Civil Rights, PUB. PAPERS 468, 468-69 (June 11, 1963).

31. *See* President John F. Kennedy, Annual Message to the Congress on the State of the Union, PUB. PAPERS 11 (Jan. 14, 1963); President John F. Kennedy, Special Message to the Congress on Civil Rights, PUB. PAPERS 221 (Feb. 28, 1963); President John F. Kennedy, Special



rights laws, he nonetheless made mild legislative proposals.<sup>32</sup> While President Kennedy would not live to see the outcome of his initiatives, he did plant the seeds for major civil rights legislation.

Before he was killed, President Kennedy acted on his declared interest in seeing fair employment practices become a reality. He issued Executive Order 10,925<sup>33</sup> which prohibited discriminatory hiring by federal contractors, thereby helping set the stage for a national policy against employment discrimination. Executive Order 10,925 also made reference to affirmative action that later became an influential part of federal remedial civil rights efforts. President Kennedy also issued Executive Order 11,063<sup>34</sup> that set out a national policy of non-discrimination in federally-assisted housing. This measure remained an important part of the long struggle for equal housing until Congress passed an open-housing law in 1968 that President Johnson signed.<sup>35</sup>

The assassination of President Kennedy sparked the nation and his successor, President Lyndon Johnson, against forces of racial oppression in much the same way the drive to expand slavery sparked President Lincoln and the Union to fight for slavery's destruction. Like President Lincoln, President Johnson animated his office to push civil rights legislation whenever possible. Amid plans for a Great Society,<sup>36</sup> fighting communism,<sup>37</sup> and the Vietnam War,<sup>38</sup> civil rights for blacks featured prominently on President Johnson's agenda.

Armed with President Kennedy's civil rights program, President Johnson became an outspoken supporter of civil rights for blacks. In his civil rights message to Congress, he declared:

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Message to the Congress on Civil Rights and Job Opportunities, PUB. PAPERS 483 (June 19, 1963).

32. See HUTCHINSON, *supra* note 11, at 12, 27; see also CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* 27 (1985) (stating that Kennedy was doubtful about the chances of passage for stronger legislation).

33. Exec. Order No. 10,925, 3 C.F.R. 86 (1961 Supp.), *amended by* Exec. Order No. 11,114, 3 C.F.R. 185 (1963 Supp.).

34. Exec. Order No. 11,063, 3 C.F.R. 261 (1962 Supp.).

35. Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified as amended in various sections of 18, 25 & 42 U.S.C.).

36. See MERLE MILLER, *LYNDON: AN ORAL BIOGRAPHY* (1980). Johnson's Great Society programs included educational assistance, conservation, Medicare assistance, urban renewal, and a fight against poverty and crime, among other things. See President Lyndon B. Johnson, Annual Message to the Congress on the State of the Union, 1 PUB. PAPERS 1, 4-9 (Jan. 4, 1965) (outlining Johnson's vision of the Great Society).

37. See *id.* at 472.

38. *Id.*

First, no memorial oration or eulogy could more eloquently honor President Kennedy's memory than the earliest passage of the civil rights bill for which he fought so long. We have talked long enough in this country about equal rights. We have talked for one hundred years or more. It is time now to write the next chapter, and to write it in the books of law.<sup>39</sup>

This declaration indicated President Johnson's transformation from civil rights antagonist as senator<sup>40</sup> to civil rights leader as President. By making civil rights a top priority and exerting pressure on Congress, President Johnson successfully guided President Kennedy's proposals through Congress and subsequently signed the Civil Rights Act of 1964.<sup>41</sup> The 1964 legislation contains important provisions aimed at the many practices that precluded blacks from participating equally in American society. For example, the 1964 Act prohibits racial discrimination in public accommodations,<sup>42</sup> prohibits discrimination by any program receiving federal funding,<sup>43</sup> and bans employment discrimination.<sup>44</sup>

Successful passage of the 1964 Act represented a major legal victory for blacks who were still effectively excluded from the most desirable employment opportunities and public facilities. It was the first time since 1877 that Congress produced positive legislation in the area of equal public accommodations. The more modest public accommodations law passed in 1875 had been rejected as unconstitutional and beyond the scope of the Fourteenth Amendment soon after it was enacted,<sup>45</sup> and Congress did not respond to this determination. Congress sought to avoid the constitutionality problem in 1964 by grounding public accommodations and other civil rights laws in the Commerce Clause, and the Supreme Court subsequently endorsed this approach.<sup>46</sup>

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39. President Lyndon B. Johnson, Address Before a Joint Session of the Congress, 1 PUB. PAPERS 8, 9 (Nov. 27, 1963).

40. While serving as a United States Senator, Lyndon Johnson voted against all civil rights legislation. See HUTCHINSON, *supra* note 11, at 96, 117.

41. See Phyllis Craig-Taylor, *To Be Free: Liberty, Citizenship, Property, and Race*, 14 HARV. BLACKLETTER L.J. 45, 64 (1998).

42. See Civil Rights Act of 1964, Pub. L. No. 88-352, § 206, 78 Stat. 241, 245 (codified as amended at 42 U.S.C. §§ 2000a to 2000a-5 (2000)).

43. See *id.* § 601, 78 Stat. at 252 (codified as amended at 42 U.S.C. § 2000d to 2000d-7).

44. See *id.* § 701, 78 Stat. at 253-55 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17).

45. See Civil Rights Cases, 109 U.S. 3, 25 (1883).

46. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

President Johnson also spoke out in Congress about the denial of the right to vote. He noted that “[e]very device of which human ingenuity is capable has been used to deny this right. . . . It is wrong—deadly wrong . . . . Their cause must be our cause too. Because it is not just Negroes, but really it is all of us, who must overcome the crippling legacy of bigotry and injustice.”<sup>47</sup> Within days of addressing Congress on this issue, the President sent his voting rights bill to Congress.

The need for more federal participation in the voting rights area was crucial because prior legislative efforts had failed to stop practices designed to contain the black electorate. Although civil rights legislation in 1957 and 1960 sought to vindicate the black vote, they were ineffective in achieving this goal.<sup>48</sup> Prior to the 1950s, the only federal initiative in this area was the Force Act of 1871, which Democrats repealed in 1894 after taking control of Congress. The 1965 legislation was aimed at the massive problem of voting discrimination that individual lawsuits had failed to stem.<sup>49</sup>

Although modeled after the Force Act of 1871, the 1965 legislation was much more expansive. It provided for greater federal policing and enforcement of the right to vote, in addition to abolishing literacy tests, poll taxes, and other racially exclusionary policies.<sup>50</sup> President Johnson’s support for such sweeping voting rights protection stands in stark contrast to the weaker efforts of his predecessors in the White House.

Despite passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965, many of the guarantees provided by the Thirteenth and Fourteenth Amendments remained unprotected and unrealized. The use of force and other coercive tactics designed to prevent blacks from enjoying political equality led to the introduction of mild legislation prohibiting such activities. President Johnson intervened in 1968 with a special message to Congress in which he called for more comprehensive civil rights legislation that included fair housing provisions.<sup>51</sup> The President’s support, coupled with pressures stemming from the assassination of Martin Luther King Jr., secured passage of the Civil Rights Act of 1968.<sup>52</sup>

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47. President Lyndon B. Johnson, Special Message to the Congress: The American Promise, 1 PUB. PAPERS 281, 282-84 (Mar. 15, 1965).

48. See THEODORE EISENBURG, CIVIL RIGHTS LEGISLATION 743 (1981).

49. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 U.S.C.). The Act provides: “No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied . . . .” *Id.* § 2, 79 Stat. at 437.

50. *Id.* §§ 4, 10, 79 Stat. at 438, 442 (codified as amended at 42 U.S.C. §§ 1973b, 1973h).

51. President Lyndon B. Johnson, Special Message to the Congress on Civil Rights, 1 PUB. PAPERS 55, 61 (Jan. 24, 1968).

52. See HUTCHINSON, *supra* note 11, at 138, 142.

President Johnson's involvement in promoting civil rights legislation was very important in 1968. After the Voting Rights Act was passed in 1965, there was dwindling congressional interest in civil rights laws.<sup>53</sup> This congressional mood reflected that of the nation because by 1966, many whites felt that Congress was doing too much for blacks.<sup>54</sup> President Johnson's willingness to advocate for laws protecting blacks' exercise of rights guaranteed to all citizens seems courageous under the circumstances. His support for equal housing rights, albeit with small limitations,<sup>55</sup> also advanced the civil rights cause.

In addition to his legislative initiatives, President Johnson issued Executive Order 11,246<sup>56</sup> that requires those who contract with the federal government to hire minorities and treat them fairly. Besides its equal employment goals, Executive Order 11,246 was used to promote employment affirmative action by refusing to award contracts to federal contractors with poor minority representation.<sup>57</sup> Through the Office of Federal Contract Compliance,<sup>58</sup>

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53. See GRAHAM, *supra* note 27, at 202-03.

54. See *id.* at 5 ("The perceived effect of competing individual and group claims to jobs and contracts, to appointments and promotions, to higher education and professional schools, when combined with the logic and force of rising federal efforts to rectify the 'underutilization' of minorities, ultimately raised the cry of 'reverse discrimination.'").

55. Lyndon Johnson's fair housing proposal was a gradual measure intended to bar discriminatory housing sales and rental practices. See Johnson, *supra* note 51, at 61-62. The fair housing measures Congress passed in the Fair Housing Act of 1968 were also limited because they excluded certain housing sales and rentals. See Fair Housing Act of 1968, Pub. L. No. 90-284, § 803, 82 Stat. 73, 82 (codified as amended at 42 U.S.C. § 3603). After all the legislative wrangling to pass fair housing laws, the Supreme Court ruled in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), that all housing discrimination was already prohibited by the century-old Civil Rights Act of 1866.

56. Exec. Order No. 11,246, 3 C.F.R. 167 (1965 Supp.). Executive Order 11,246 superseded Executive Order 10,925. Exec. Order No. 10,925, 3 C.F.R. 86 (1961 Supp.), amended by Exec. Order No. 11,114, 3 C.F.R. 185 (1963 Supp.). These previous executive orders had similar fair employment provisions with enforcement authority in the President's Committee on Equal Employment Opportunity, which was created by Executive Order 10,925. 3 C.F.R. 86 (1961 Supp.). Executive Order 11,246 also abolished this committee and placed enforcement authority in the Department of Labor. 3 C.F.R. 167 (1965 Supp.).

57. *Id.* Executive Order 11,246 was also used to attack hiring hall discrimination, for example, by imposing hiring quotas on the building trades unions in Philadelphia. See William B. Gould, *The Seattle Building Trades Order: The First Comprehensive Relief Against Employment Discrimination in the Construction Industry*, 26 STAN. L. REV. 773, 778 & n.22 (1974) (describing Executive Order 11,246 and the Philadelphia Plan's attempt to end discrimination in the construction industry).

58. This office was created by Executive Order 11,246. See 3 C.F.R. 167 (1965 Supp.).

President Johnson attempted to ensure that employment equality provided by law became a reality for blacks.

### *III. Interpreting and Enforcing Civil Rights Laws*

President Johnson was succeeded by Richard Nixon who faced many challenges in his presidency. These included bringing the Vietnam War to a close<sup>59</sup> and improving relations with communist China and Russia.<sup>60</sup> The President also had domestic economic concerns<sup>61</sup> that were priorities. President Nixon's vision of civil rights, however, was not the same as President Johnson's. And with many civil rights laws already enacted, President Nixon's office faced more issues related to the interpretation and enforcement of those laws.

For example, President Nixon questioned whether the Voting Rights Act was too "regional"<sup>62</sup> and advocated repeal of the pre-clearance provisions of this statute.<sup>63</sup> But the President was not successful in urging repeal of the Act's important requirement that problematic jurisdictions pre-clear electoral changes that would adversely affect minority voters. The President also believed that the country's welfare system needed overhauling.<sup>64</sup> To that end, he proposed welfare reform legislation that stirred some controversy about its potentially harmful effects on blacks and women.<sup>65</sup> Ironically, welfare reform

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59. See MELVIN SMALL, *THE PRESIDENCY OF RICHARD NIXON* 92 (1999).

60. See RICHARD NIXON, *RN: THE MEMOIRS OF RICHARD NIXON* 544-48 (1978).

61. See SMALL, *supra* note 59, at 203.

62. See O'REILLY, *supra* note 26, at 296; see also GRAHAM, *supra* note 27, at 346.

63. See, e.g., Scott Gluck, *Congressional Reaction to Judicial Construction of Section 5 of the Voting Rights Act of 1965*, 29 COLUM. J.L. & SOC. PROBS. 337, 366 (1996) ("Despite the overwhelming evidence of continuing discrimination in the South and the ongoing need to protect Blacks from invidious attempts to dilute the Black vote, Section 5 would have been deleted under the proposal advanced by the Nixon Administration."). In lieu of pre-clearance, Nixon proposed empowering the Attorney General to police discriminatory voting schemes through legal challenges. See Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 203, 84 Stat. 314, 317; see also Laughlin McDonald, *The Quiet Revolution in Minority Voting Rights*, 42 VAND. L. REV. 1249 (1989).

64. See President Richard Nixon, Special Message to the Congress on Welfare Reform, PUB. PAPERS 500 (Mar. 27, 1972).

65. Some critics of Nixon's welfare reform proposal felt that his approach of guaranteeing a minimum income for the poor was an attempt to appease white segregationists. See JILL QUADAGNO, *THE COLOR OF WELFARE* 123 (1994). The National Welfare Rights Organization, whose membership primarily consisted of black welfare mothers, also opposed the legislation. See William H. Simon, *Rights and Redistribution in the Welfare System*, 38 STAN. L. REV. 1431, 1501 (1986). Noted economist Arthur Burns was also a critic of Nixon's welfare plan, concluding that it was an income maintenance plan rather than a welfare system and that it would not improve family structure or stability. See DANIEL P. MOYNIHAN, *THE POLITICS OF*

was accomplished much later by Bill Clinton, a Democrat, who received heavy support from blacks at the polls.

Compared to his predecessor, President Nixon cannot be described as a champion of black civil rights. He did, however, demonstrate a limited commitment to black economic development.<sup>66</sup> By 1968, the Small Business Administration determined that it could set aside contracting opportunities for businesses owned and controlled by minorities.<sup>67</sup> The President supported such set-asides, stating: “The opportunity for full participation in our free enterprise system by socially and economically disadvantaged persons is essential if we are to obtain social and economic justice for such persons and improve the functioning of our national economy.”<sup>68</sup> By executive orders, President Nixon promoted black capitalism through federal minority business enterprise programs.

By Executive Order 11,458,<sup>69</sup> the President created the Office of Minority Business Enterprise (OMBE) in the Commerce Department. Through Executive Order 11,518,<sup>70</sup> the President called for greater representation of minority businesses contracting with federal agencies. And Executive Order 11,625<sup>71</sup> expanded OMBE’s authority to provide financial help to organizations that rendered technical and management assistance to minority businesses. These executive initiatives were important steps in the drive to include black businesses in the lucrative arena of federal contracting.

Outside of promoting black entrepreneurship, President Nixon generally

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GUARANTEED INCOME 179-85 (1973). Curiously, however, prominent black organizations such as the NAACP and The Leadership Conference on Civil Rights did not oppose Nixon’s initiative. *Id.* at 339.

66. During his campaign for the presidency, Nixon promised to promote “black capitalism” and to increase the number of black businesses. *See* GRAHAM, *supra* note 27, at 135. As president, Nixon followed through on his promise by issuing several executive orders which helped to promote the development and growth of minority business enterprises. *See infra* notes 68-71 and accompanying text.

67. *See* TERRY EASTLAND, *ENDING AFFIRMATIVE ACTION 50* (1996) (“The [Small Business Administration] did not distinguish among small businesses on the ground of race or ethnicity until 1968, when it decided to interpret its statutory authority to set aside contracts for small businesses owned by ‘socially or economically disadvantaged’ individuals.”); *see also* Neal Devins, *The Civil Rights Hydra*, 89 MICH. L. REV. 1723, 1746-47 (1991) (reviewing GRAHAM, *supra* note 27) (stating SBA’s construction of the Small Business Act to set aside contracts for minorities was audacious and encouraged by the executive branch).

68. Exec. Order No. 11,625, 3 C.F.R. 213, 213 (1972).

69. Exec. Order No. 11,458, 34 Fed. Reg. 4937 (Mar. 7, 1969), *superseded* by Exec. Order No. 11,625, 3 C.F.R. 213.

70. Exec. Order No. 11,518, 3 C.F.R. 108 (1970).

71. Exec. Order No. 11,625, 3 C.F.R. 213 (1972), *revoked in part* by Exec. Order No. 12,007, 3 C.F.R. 139 (1978).

focused on the interests of the majority<sup>72</sup> and was sensitive to the South<sup>73</sup> when defining his position on racial equality. The partisan politics of civil rights enforcement continued through President Nixon's term and his impeachment.

When President Gerald Ford succeeded President Nixon, he inherited a depressed economy, chronic energy shortages, inflation, and continuing concerns about relations with Russia and China.<sup>74</sup> In the area of civil rights, President Ford supported an extension of the Voting Rights Act,<sup>75</sup> but stubborn practices of racial segregation forced him to take a position on school desegregation. As the nation continued its struggle to end the problems of separate and unequal education, the President proposed the School Desegregation Standards and Assistance Act of 1976.<sup>76</sup> This bill was designed to restrict the role of the judiciary in desegregating schools.<sup>77</sup> Specifically, the President opposed busing and desired firm limitations of the judiciary's use of busing as a remedial device.<sup>78</sup>

His public denouncement of busing was widely regarded as a step backward for the cause of equal education opportunities.<sup>79</sup> Civil rights leaders warned the President that his position on busing would likely lead to defiance and violence,<sup>80</sup> but President Ford forged ahead with his anti-busing measure. His position on this subject is credited with helping to breed opposition to busing and crystallize it as a national issue.<sup>81</sup> President Ford's growing popularity

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72. See HUTCHINSON, *supra* note 11, at 144; see also GRAHAM, *supra* note 27.

73. Nixon's "southern strategy" was to engage in foot-dragging or oppose civil rights initiatives. See Matthew M. Hoffman, *The Illegitimate President: Minority Vote Dilution and the Electoral College*, 105 YALE L.J. 935, 959 (1996).

74. See GERALD R. FORD, *A TIME TO HEAL: THE AUTOBIOGRAPHY OF GERALD R. FORD* (1979).

75. See President Gerald R. Ford, Letter to the Senate Minority Leader Urging Extension of the Voting Rights Act of 1965, 2 PUB. PAPERS 1016 (July 23, 1975); see also President Gerald R. Ford, Remarks upon Signing a Bill Extending the Voting Rights Act of 1965, 2 PUB. PAPERS 1118 (Aug. 6, 1975).

76. 122 CONG. REC. 20,281-87 (1976).

77. See President Gerald R. Ford, Special Messages to the Congress Transmitting Proposed School Busing Legislation, 2 PUB. PAPERS 1909 (June 24, 1976); see also GARY ORFIELD, *MUST WE BUS?* 276 (1978).

78. See President Gerald R. Ford, The President's News Conference of October 9, 1974, 2 PUB. PAPERS 245 (Oct. 9, 1974).

79. See Sandra Salmans et al., *Busing: Ford's New Route*, NEWSWEEK, May 31, 1976, at 26.

80. See Robin D. Barnes, *Black America and School Choice: Charting a New Course*, 106 YALE L.J. 2375, 2382 (1997) (citing Salmans et al., *supra* note 79, at 26); see also Jerome McCristal Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L.J. 39, 81 n.127 (citing William Chapman & William Claiborne, *Ford Decries Boston School Busing Order*, WASH. POST, Oct. 10, 1974, at A1).

81. See ORFIELD, *supra* note 77, at 276; Drew S. Days, III, *School Desegregation Law in*

with Southern Republicans because of his anti-busing stance gave the civil rights community pause,<sup>82</sup> especially since the President was not otherwise an activist in the civil rights area.

President Ford's successor, Jimmy Carter, believed in racial equality,<sup>83</sup> and his beliefs led him to use the authority and power of his office to make racial equality a reality. With core civil rights laws already enacted, President Carter pitched in by using the president's enforcement and appointment powers. Through executive orders, President Carter pursued a policy of civil rights enforcement. For example, he promoted and furthered federal compliance with equal employment laws through Executive Order 12,067.<sup>84</sup> He also advanced compliance with President Lyndon Johnson's initiative that banned discrimination by federal contractors by issuing Executive Order 12,086.<sup>85</sup> The President also promoted nondiscrimination in federal programs or programs receiving federal funds by issuing Executive Order 12,250.<sup>86</sup>

In addition to his civil rights enforcement efforts, President Carter supported affirmative action initiatives that sought to undo some of the disparities and inequalities created by slavery and segregation. For example, he advocated greater representation for minority students at tax-exempt private schools.<sup>87</sup> He also supported preferences for minority broadcasters<sup>88</sup> and contract set-

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*the 1980's: Why Isn't Anybody Laughing?*, 95 YALE L.J. 1737, 1738-39 (1986) (reviewing PAUL R. DIMOND, *BEYOND BUSING: INSIDE THE CHALLENGE TO URBAN SEGREGATION* (1985)); *Ford's Plan to Limit Court-Ordered Busing*, U.S. NEWS & WORLD REP., July 5, 1976, at 18.

82. See Philip Shabecoff, *Curbs on Busing Specified by Ford*, N.Y. TIMES, June 25, 1976, at A1.

83. President Carter believed "that in a pluralist democracy the diversity among the ruled should be reflected in similar diversity among the rulers." Elliot E. Slotnick, *Lowering the Bench or Raising it Higher?: Affirmative Action and Judicial Selection During the Carter Administration*, 1 YALE L. & POL'Y REV. 270, 275 (1983); see also ALAN NEFF, *THE UNITED STATES DISTRICT JUDGE NOMINATING COMMISSIONS: THEIR MEMBERS, PROCEDURES, AND CANDIDATES* 150 (1981).

84. Exec. Order No. 12,067, 3 C.F.R. 206 (1979).

85. Exec. Order No. 12,086, 3 C.F.R. 230 (1979).

86. Exec. Order No. 12,250, 3 C.F.R. 298 (1981).

87. See Proposed Revenue Procedure on Private Tax-Exempt Schools, 43 Fed. Reg. 37,296-98 (proposed Aug. 22, 1978); see also Thomas McCoy & Neal Devins, *Standing and Awareness in Challenges of Tax Exemptions for Discriminatory Private Schools*, 52 FORDHAM L. REV. 441 (1984).

88. See Exec. Order No. 12,046, 3 C.F.R. 158 (1979); see also Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979 (1978); Neal Devins, *Congress, the FCC, and the Search for the Public Trustee*, LAW & CONTEMP. PROBS., Autumn 1993, at 145, 171 ("[The Carter Administration] successfully lobbied the FCC both to provide tax breaks to broadcasters who sold their stations to minority owners and to allow broadcasters, whose qualifications had been called into question and otherwise could not sell their stations, to sell their license at 'distress sale' prices to FCC-approved minority enterprises.").



asides for minority businesses.<sup>89</sup> President Carter followed through with his support for affirmative action by defending challenges to such programs before the Supreme Court.<sup>90</sup> He also made significant appointments of blacks to government jobs in the midst of dealing with national issues of inflation, high unemployment, energy shortages, and environmental protection.<sup>91</sup>

#### IV. Holding on to Civil Rights Achievements

By the time Ronald Reagan took office in 1981, the nation's attitude toward civil rights had changed. In fact, his election was in part a reflection of such changed attitudes. Affirmative action programs had created opportunities for blacks that led to their physical presence in many sectors of American life. Increasingly, whites complained that opportunities and preferences for blacks and other minorities were unfair, if not unconstitutional. President Reagan embraced the contention that the federal government was going too far with preferences and challenged the constitutionality of many remedial devices that assisted blacks.<sup>92</sup> As a result, the affirmative action programs created and expanded by some presidents during the 1960s and 1970s came under constant attack.<sup>93</sup> President Reagan changed the chief executive's civil rights focus

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89. See *Minority Business Enterprise*, 43 Fed. Reg. 20,883 (May 15, 1978) (internal order of the Department of Transportation stating its commitment toward helping minority-owned businesses).

90. The Carter Administration voiced its support for affirmative action in cases such as *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193 (1979); and *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). See Carl E. Brody, Jr., *A Historical Review of Affirmative Action and the Interpretation of Its Legislative Intent by the Supreme Court*, 29 AKRON L. REV. 291 (1996).

91. See JIMMY CARTER, *KEEPING FAITH: MEMOIRS OF A PRESIDENT* (1983). On the international front, Carter was very instrumental in trying to bring peace to the Middle East through the Camp David accords, in addition to improving relations with China and championing human rights generally. *Id.*

92. See Sondra Hemeryck et al., Comment, *Reconstruction, Deconstruction and Legislative Response: The 1988 Supreme Court Term and the Civil Rights Act of 1990*, 25 HARV. C.R.-C.L. L. REV. 475, 501-02 (1990) ("Reagan decried the attention paid by the federal government to 'special interest' groups, such as blacks, and set forth a 'formalistic, color-blind view' of civil rights which opposed affirmative action and other remedies based on race or class." (footnote omitted)).

93. President Reagan's view of civil rights enforcement varied from that of many of his predecessors. Specifically, the Reagan Administration argued against the use of race or sex for remedial purposes, and narrowed enforcement focus to intentional civil rights violations. See Drew S. Days, III, *The Courts' Response to the Reagan Civil Rights Agenda*, 42 VAND. L. REV. 1003, 1008-09 (1989); see also Lani Guinier, Comment, *Keeping the Faith: Black Voters in the Post-Reagan Era*, 24 HARV. C.R.-C.L. L. REV. 393, 396 (1989) (stating that Reagan advocated repeal of affirmative action programs and pursued only those racial discrimination cases with identifiable victims). Reagan even attacked race and gender-based benefits that prior

from correcting the vestiges of black oppression to defining the harmful effects of redemption on whites.<sup>94</sup> In addition to attempting to dismantle the affirmative action programs implemented by his predecessors, President Reagan supported narrow interpretations of civil rights laws.<sup>95</sup> Although he signed important civil rights legislation, prior to doing so he often attempted to weaken these initiatives.<sup>96</sup>

The long-standing problem of discriminatory voting practices was thrust upon President Reagan when the Voting Rights Act of 1965 was scheduled to expire in 1982. In response to proposed legislation aimed at strengthening voting rights for blacks, the President was resistant. He opposed certain provisions of the 1982 amendments<sup>97</sup> and otherwise engaged in foot-dragging.<sup>98</sup>

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presidents had obtained through consent decrees. See Penda D. Hair, Tribute, *Justice Blackmun and Racial Justice*, 104 YALE L.J. 7, 9 (1994).

94. See John O. Calmore, *Exploring Michael Omi's "Messy" Real World of Race: An Essay for "Naked People Longing to Swim Free"*, 15 LAW & INEQ. 25, 47-48 (1997) (stating the Reagan Administration legitimized the reverse discrimination claims of white males and facilitated the displacement of black victimization by focusing on white rights); see also Ted Gest et al., *Justice Under Reagan*, U.S. NEWS & WORLD REP., Oct. 14, 1985, at 58 (stating that Reagan's Justice Department supported white males who challenged affirmative action programs). Reagan also opposed the use of race or sex for remedial purposes. See Days, *supra* note 93, at 1008-09.

95. Ronald Reagan viewed remedial civil rights legislation and programs as undemocratic quotas. See Neal Devins, *Reagan Redux: Civil Rights Under Bush*, 68 NOTRE DAME L. REV. 955, 973 (1993) [hereinafter Devins, *Reagan Redux*]. In many respects, George H.W. Bush lived up to his campaign promise to follow in Reagan's footsteps by opposing preferential schemes that benefitted blacks and women. See Neal Devins, *Adarand Constructors, Inc. v. Peña and the Continuing Irrelevance of Supreme Court Affirmative Action Decisions*, 37 WM. & MARY L. REV. 673, 680, 690-91 (1996).

96. For example, Reagan signed an extension of the Voting Rights Act into law only after his attempts at diluting the legislation failed. See President Ronald Reagan, Remarks on Signing the Voting Rights Act Amendments of 1982, 1 PUB. PAPERS 822 (June 29, 1982). For a discussion of Reagan's attitude and actions toward the Voting Rights Act, see Drew S. Days, III, *Turning Back the Clock: The Reagan Administration and Civil Rights*, 19 HARV. C.R.-C.L. L. REV. 309, 330 (1984); James Forman, Jr., *Victory by Surrender: The Voting Rights Amendments of 1982 and the Civil Rights Act of 1991*, 10 YALE L. & POL'Y REV. 133, 135 (1992).

97. See President Ronald Reagan, Statement About Extension of the Voting Rights Act, PUB. PAPERS 1018 (Nov. 6, 1981). For example, Reagan opposed an impact standard for determining voting rights violations, and instead advocated the use of motive-based (intent) inquiry which historically has been fatal for victims of civil rights violations. *Id.*

98. See James Nathan Miller, *Ronald Reagan and the Techniques of Deception*, ATL. MONTHLY, Feb. 1984, at 62; Susan Tiffit, *In Trouble with Blacks: Reagan and the Black Community*, TIME, June 6, 1983, at 28; Lena Williams, *Cuomo Assails White House on Its Record on Civil Rights*, N.Y. TIMES, July 8, 1987, at A20.

The President's response was particularly pernicious when one considers the historical roots of the Voting Rights Act and its amendments. Blacks had progressed from property and chattel status with no human or political rights, to freed men and citizens with the legal right to vote. Once the right to vote was granted, schemes were designed to thwart black electoral participation. Large segments of the nation were so determined to limit black political participation that federal machinery had to be constructed to help protect the rights of black voters.

The exclusionary and sometimes violent electoral practices engaged in by both private and governmental bodies necessitated the passage of the Enforcement Act of 1870.<sup>99</sup> At that time, exclusionary voting qualifications requirements were taken for granted. Blacks not only faced rules of exclusion, but discriminatory application of those rules and violence that further diluted their voting rights. In addition to prohibiting violence and intimidation, the Enforcement Act had a modest goal of requiring the officials implementing voting qualifications to do so on a non-discriminatory basis.<sup>100</sup>

But the Enforcement Act was not enough to address the extensive practices of black electoral exclusion. The Enforcement Act was therefore supplemented a year later with the Force Act of 1871.<sup>101</sup> The Force Act provided a federal machinery to supervise congressional elections,<sup>102</sup> and served, almost a century later, as a model for the Voting Rights Act of 1965.

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99. Enforcement Act of 1870, ch. 114, 16 Stat. 140 (codified as amended at 18 U.S.C. § 241 (2000)).

100. *Id.* § 2. Section 2 states:

That if by or under the authority of the constitution or laws of any State, or the laws of any Territory, any act is or shall be required to be done as a prerequisite or qualification for voting, and by such constitution or laws persons or officers are or shall be charged with the performance of duties in furnishing to citizens an opportunity to perform such prerequisite, or to become qualified to vote, it shall be the duty of every such person and officer to give to all citizens of the United States the same and equal opportunity to perform such prerequisite, and to become qualified to vote without distinction of race, color, or previous condition of servitude; and if any such person or officer shall refuse or knowingly omit to give full effect to this section, he shall, for every such offence, forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered by an action on the case, with full costs, and such allowance for counsel fees as the court shall deem just, and shall also, for every such offence, be deemed guilty of a misdemeanor, and shall on conviction thereof, be fined not less than five hundred dollars, or be imprisoned not less than one month and not more than one year, or both, at the discretion of the court.

*Id.*

101. Force Act of 1871, ch. 99, 16 Stat. 433 (repealed 1894).

102. *See generally id.*

The Voting Rights Act was a necessary measure because many schemes were devised over time to preclude black electoral participation. Discriminatory voting practices consistently evaded any limitation encountered from federal laws.<sup>103</sup> And the law as prescribed by Congress or determined by the Supreme Court did not deter the discriminators.

When Democrats controlled Congress and the White House in 1892, they dismantled the modest prophylactic measures Congress had structured by repealing the Enforcement Act of 1870 and the Force Act of 1871.<sup>104</sup> The repeal was particularly brazen because the Supreme Court had ruled that both statutes were constitutional.<sup>105</sup> The Repeal Act of 1894 therefore reopened the field of voting rights abuse to private, state, and local government actors.

Congress and the Chief Executive did not seriously confront voting rights abuses again until the 1950s when the modern civil rights era began. And the early flurry of civil rights laws were no match for exclusionary practices that had become entrenched and sophisticated. Continuing racial barriers to black voting led President Johnson to call for a voting rights law in 1965.<sup>106</sup> The result was the Voting Rights Act of 1965, which was modeled after the Force Act of 1871 but was much more far-reaching. The Act abolished literacy tests and poll taxes, and focused on the systemic problem of racial electoral exclusion.

With a century of practice, states and local governments had perfected schemes that ensured the exclusion of blacks in the political process. And practices had been continually modified to overcome legal prohibitions. This continuing adaptation forced changes to the modern-era voting rights laws intended to prevent voting discrimination.<sup>107</sup> Because many states, counties, and municipalities had routinely modified their electoral procedures to achieve discriminatory results, the 1965 Voting Rights Act required governmental entities with a discriminatory history to get pre-clearance before changing their

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103. As a result, the Voting Rights Act of 1965 provides: “No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.” Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 (codified as amended at 42 U.S.C. § 1973 (2000)).

104. See Repeal Act of 1894, ch. 25, 28 Stat. 36.

105. In *Ex parte Yarbrough*, 110 U.S. 651 (1884), the Court upheld the Enforcement Act of 1870, and in *Ex parte Siebold*, 100 U.S. 371 (1880), the Court upheld the Force Act of 1871.

106. See Johnson, *supra* note 47, at 283.

107. See generally Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

procedures in the future.<sup>108</sup> If the Justice Department regards any change as discriminatory, it may veto the change.<sup>109</sup>

In responding to the voting rights amendments in 1982, President Reagan focused heavily on the interests of states, not the interests of black voters.<sup>110</sup> Instead of supporting the Act, the President called for a study—although one had already been completed.<sup>111</sup> The President worried about the burdens the Act placed on some jurisdictions<sup>112</sup> and the demise of at-large election schemes, although this device is often used to ensure black exclusion.<sup>113</sup>

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108. The Voting Rights Act of 1965 provides:

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure.

*Id.* § 5, 79 Stat. at 439.

109. *See id.*

110. President Reagan advocated his support for provisions in the law that would allow some states to avoid the Act's requirements. *See Reagan, supra* note 97, at 1018. The President stated:

As a matter of fairness, I believe that States and localities which have respected the right to vote and have fully complied with the act should be afforded an opportunity to 'bail-out' from the special provisions of the act. Toward that end, I will support amendments which incorporate reasonable 'bail-out' provisions for States and other political subdivisions.

*Id.* at 1018.

111. *See* President Ronald Reagan, Letter to the Attorney General Directing an Assessment of the Voting Rights Act, PUB. PAPERS 513 (June 15, 1981).

112. *See id.*

113. *See* Laughlin McDonald, *The Voting Rights Act and Vote Dilution*, 19 GA. L. REV. 459, 461 (1985) (reviewing CHANDLER DAVIDSON, *MINORITY VOTE DILUTION* (1984)); *see also* Days, *supra* note 96, at 336.

Moreover, he advocated an intent proof requirement<sup>114</sup> over an impact test,<sup>115</sup> even though intent standards have generally been fatally prejudicial to discrimination victims.<sup>116</sup> The President finally signed the 1982 provision but only after exhausting available opportunities to dilute and delay this critical voting rights measure.

President Reagan went further and vetoed the Civil Rights Restoration Act of 1987.<sup>117</sup> The President contended that states' rights and individual and religious freedoms required this response.<sup>118</sup> But Congress passed the Restoration Act over his objections.<sup>119</sup> The Restoration Act was triggered by a restrictive Supreme Court decision that limited anti-discrimination sanctions to the discriminatory program receiving federal funding as opposed to the entire institution.<sup>120</sup> The restoration bill was intended to restore prior law that denied funding to the entire institution.<sup>121</sup>

Airing his objections, President Reagan stated that the legislation "dramatically expands the scope of Federal jurisdiction over State and local governments and the private sector . . . . It diminishes the freedom of the private citizen to order his or her life and unnecessarily imposes the heavy burden of compliance with extensive Federal regulations and paperwork on many elements of American society."<sup>122</sup> President Reagan felt that the drive for civil rights had gone too far by unfairly burdening white America in order to promote the interests of minority groups.

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114. See Reagan, *supra* note 97, at 1018.

115. *Id.*

116. See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 321 (1987); Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787, 830 (1993); David O. Barrett, Note, *The Remedial Use of Race-Based Redistricting After Shaw v. Reno*, 70 IND. L.J. 255, 262 (1994); Andrew L. Shapiro, Note, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537, 550 (1993).

117. President Ronald Reagan, Message to the Senate Returning Without Approval the Civil Rights Restoration Act of 1987 and Transmitting Alternative Legislation, 1 PUB. PAPERS 345 (Mar. 16, 1988).

118. See *id.* at 345-46.

119. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified as amended in scattered sections of 20, 29 & 42 U.S.C.).

120. See *Grove City College v. Bell*, 465 U.S. 555 (1984), *superseded by statute*, Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28, *as recognized in Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 466 n.3 (1999).

121. S. REP. NO. 100-64, at 4 (1987), as reprinted in 1988 U.S.C.C.A.N. 3, 6.

122. President Ronald Reagan, Letter to Congressional Leaders on the Proposed Civil Rights Restoration Act of 1987, 1 PUB. PAPERS 280, 281 (Mar. 1, 1988).

Convinced that minority preferential schemes were harmful, President Reagan had a strong interest in terminating President Johnson's Executive Order 11,246 that required contractors receiving federal funds to hire minorities and not discriminate against them.<sup>123</sup> Lack of support from Congress, the Supreme Court, and the business community, however, forced the President to abandon this goal.<sup>124</sup> President Reagan also felt that employment preferences were illegal and argued for an interpretation of Title VII of the 1964 Civil Rights Act that barred such programs.<sup>125</sup>

With the help of changing public sentiment about affirmative action, President Reagan changed the debate and executive focus toward working for its demise. Using his appointments power, the President selected judges and other governmental officials who believed that affirmative action discriminates against whites and is otherwise ineffective at combating racial problems.<sup>126</sup> Although affirmative action survived the Reagan presidency, the President laid the foundation for rolling back such programs. His appointees on the Supreme Court have been instrumental in constricting the scope of preferences along with growing public intolerance for such schemes.<sup>127</sup>

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123. See Exec. Order No. 11,246, 3 C.F.R. 167 (1965 Supp.); Government Contractors; Affirmative Action Requirements, 47 Fed. Reg. 17,770 (proposed Apr. 23, 1982) (to be codified at 41 C.F.R. pt. 60) (explaining the effects of Executive Order 11,246); see also Neal Devins, *Affirmative Action After Reagan*, 68 TEX. L. REV. 353, 354-56 (1989); Reginald C. Govan, *Honorable Compromises and the Moral High Ground: The Conflict Between the Rhetoric and the Content of the Civil Rights Act of 1991*, 46 RUTGERS L. REV. 1, 13-14 (1993); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1246 n.382 (1995).

124. See Devins, *supra* note 123, at 13.

125. For example, the President often intervened in employment cases to challenge consent decrees, arguing that goals and quotas were never permissible under Title VII. See DONALD G. NIEMAN, *PROMISES TO KEEP* 220 (1991); see also William A. Wines, *Title VII Interpretation and Enforcement in the Reagan Years (1980-89): The Winding Road to the Civil Rights Act of 1991*, 77 MARQ. L. REV. 645, 716 (1994) (stating that Reagan stifled Title VII enforcement by tightening purse strings).

126. President Reagan nominated a record number of conservative judges in addition to two extremely conservative Supreme Court justices—Sandra Day O'Connor and Antonin Scalia. See NORMAN C. AMAKER, *CIVIL RIGHTS AND THE REAGAN ADMINISTRATION* 161 (1988). The President appointed William Bradford Reynolds as Assistant Attorney General for Civil Rights, and Reynolds was critical of race-based remedies. See WILLIAM E. PEMBERTON, *EXIT WITH HONOR: THE LIFE AND PRESIDENCY OF RONALD REAGAN* 139 (1998). Another appointee, Clarence Pendleton, who chaired the Civil Rights Commission, felt that affirmative action was bankrupt public policy. See ROBERT R. DETLEFSEN, *CIVIL RIGHTS UNDER REAGAN* 146 (1991).

127. Justices Scalia and O'Connor, both Reagan appointees, have been outspoken critics of affirmative action. See *Adarand Constructors v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring) (stating that the "government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the

President Reagan was succeeded by George H.W. Bush, whose presidency was occupied with issues related to war in the Persian Gulf and the overthrow of Manuel Noriega in Panama.<sup>128</sup> But civil rights remained a hot issue during the Bush administration, in part because the Supreme Court made it that way. In 1988 and 1989, the Court did an extensive review of employment discrimination laws by deciding a number of cases.<sup>129</sup> In these decisions the Court, among other things, narrowly interpreted employment discrimination laws making it extremely difficult for discrimination victims to prove their cases.<sup>130</sup> The Court essentially tipped the balance in favor of employers and departed from many historic precedents that sought to equalize the playing field.

Civil rights groups responded by introducing legislation to overturn the Court's decisions. These legislative initiatives coalesced into the Civil Rights Act of 1990<sup>131</sup> that passed both Houses of Congress and was sent for President Bush's signature.<sup>132</sup> The President vetoed the measure, calling it a quota bill.<sup>133</sup> The quota allegation was a powerful and destructive one because it

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opposite direction"); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 505 (1989) (writing for majority, O'Connor rejected ability of municipality to enact "racial preferences" in order to remedy effects of past discrimination).

128. See BOB WOODWARD, *THE COMMANDERS* (1991).

129. See generally *Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754 (1989), *superseded by statute*, Civil Rights Act of 1991, § 102, 42 U.S.C. § 1981 (2000), *as recognized in* *Fernando v. Hotel Nikko Saipan, Inc.*, Civ. No. 91-0013, 1992 WL 350312, at \*1 (D. N. Mar. I. Mar. 7, 1992); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), *superseded by statute*, Civil Rights Act of 1991, § 101, 42 U.S.C. § 1981, *as recognized in* *Landgraf v. USI Film Prods.*, 511 U.S. 244, 251 (1994); *Lorance v. AT & T Techs.*, 490 U.S. 900 (1989), *superseded by statute*, Civil Rights Act of 1991, § 112, 42 U.S.C. § 2000e-5, *as recognized in* *Landgraf*, 511 U.S. at 251; *Martin v. Wilks*, 490 U.S. 755 (1989), *superseded by statute*, Civil Rights Act of 1991, § 108, 42 U.S.C. § 2000e-2, *as recognized in* *Landgraf*, 511 U.S. at 251; *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), *superseded by statute*, Civil Rights Act of 1991, § 105, 42 U.S.C. § 2000e-2, *as recognized in* *Raytheon Co. v. Hernandez*, 540 U.S. 44, 53 (2003); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991, § 107, 42 U.S.C. § 2000e-2, *as recognized in* *Landgraf*, 511 U.S. at 251.

130. For example, in *Wards Cove Packing Co.*, 490 U.S. 642, the Court ruled that plaintiffs in disparate impact cases must prove causation, and must also identify the wrongful practice being challenged. And in *Lorance*, 490 U.S. 900, the Court decided that the statute of limitations starts to run at the time that a discriminatory employment policy is adopted, as opposed to when the policy affected the complaining employee.

131. See S. 2104, 101st Cong. (1990) (as introduced in Senate, Oct. 16, 1990).

132. See 136 CONG. REC. 30,136 (1990) (indicating passage of the Civil Rights Act of 1990 in the Senate); 136 CONG. REC. 29,606 (indicating passage of the Civil Rights Act of 1990 in the House of Representatives).

133. See President George H.W. Bush, Message to the Senate Returning Without Approval the Civil Rights Act of 1990, 2 PUB. PAPERS 1437, 1438 (Oct. 22, 1990).



resonated with whites who had been complaining that affirmative action is reverse discrimination.<sup>134</sup> The President's veto barely survived legislative override<sup>135</sup> and as a result, restrictive Supreme Court decisions remained controlling law.

Bipartisan support for legislation reversing the Supreme Court decisions, however, did not die with the 1990 bill. Supporters with a broad vision of civil rights returned in 1991 with another measure that the President continued to call a quota bill despite provisions specifically prohibiting quotas.<sup>136</sup> The President persisted with quota rhetoric that called into question his commitment to equal employment opportunities. Like President Reagan, President Bush was very concerned about the adverse impact of affirmative action, political correctness, and multiculturalism on white males.<sup>137</sup> President Bush's campaign against the 1990 and 1991 civil rights initiatives caused one congressman to remark that President Bush's quota attack was "intemperate, racially inflammatory . . . [and an] appeal to the worst in human characteristics—ignorance, prejudice, intolerance."<sup>138</sup>

Despite the President's opposition, the Civil Rights Act of 1991 gained quick congressional approval and was sent to his desk for signature. On this occasion, the legislation was veto proof. While the 1991 bill was awaiting his approval, the President issued a directive terminating affirmative action in the federal government.<sup>139</sup> The directive was issued one day before the President was scheduled to sign the 1991 civil rights legislation.<sup>140</sup> This plan leaked and because of congressional and public outcry, the President was forced to withdraw it.<sup>141</sup>

President Bush challenged the 1991 legislation even as he signed it. In order to leave his imprint on the legislation, the President offered some

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134. See Daniel Patrick Tokaji, Note, *The Persistence of Prejudice: Process-Based Theory and the Retroactivity of the Civil Rights Act of 1991*, 103 YALE L.J. 567, 580-81 (1993).

135. The vote was 66 to 34 in favor of overriding the veto. 136 CONG. REC. 33,406 (1990).

136. See H.R. 1, 102d Cong. § 111 (1991) (as introduced in Senate, June 1, 1991). In various speeches, Bush labeled the 1991 legislation a quota bill. See President George H.W. Bush, Remarks at the United States Military Academy Commencement Ceremony in West Point, New York, 1 PUB. PAPERS 589, 591-92 (June 1, 1991); President George H.W. Bush, Remarks to the National Federation of Independent Business, 1 PUB. PAPERS 596, 598 (June 3, 1991).

137. See Samuel L. Starks, Note, *Understanding Government Affirmative Action and Metro Broadcasting, Inc. v. FCC*, 41 DUKE L.J. 933, 972-73 (1992).

138. 137 CONG. REC. 13,205 (1991) (statement of Rep. William Clay).

139. See Govan, *supra* note 123, at 36-37.

140. See *id.* at 236.

141. See Stephen A. Plass, *Bedrock Principles, Elusive Construction, and the Future of Equal Employment Laws*, 21 HOFSTRA L. REV. 313, 375 & n.410 (1992).

interpretive guidance in his signing statement. There the President endorsed Senator Dole's legislative contention that the law does not address the affirmative action issue.<sup>142</sup>

Some have speculated that the President's response to the 1991 law was a reelection ploy because he felt it would galvanize the white vote for him. Others thought this may have been simply the work of a blundering leader.<sup>143</sup> And some observers have found it difficult to reconcile President Bush's quota attacks with his support for other minority-friendly schemes.<sup>144</sup> But determining why the President acted in a particular way may not be such a mystery. The core civil rights struggle has become a narrow battle between Democrats and Republicans who support and oppose preferential programs respectively. Extreme positions create the potential that the Chief Executive will alienate voters and lose congressional support. Bill Clinton recognized this and took a centrist position in order to ensure an effective civil rights legacy.

#### V. *The Clinton Presidency as a Model with Limits*

The election of William Jefferson Clinton as President marked a significant transformation in the relationship between an American president and blacks. President Clinton worked hard to demonstrate that the White House was occupied by a president whose beliefs about people fully matched America's independence declaration that all men are created equal.<sup>145</sup>

Although many twentieth century presidents advocated racial equality, they did not always activate their office for that cause. Even some presidents who took leadership roles in the area of civil rights did not have the level of support and confidence blacks gave to Clinton. For example, President Dwight Eisenhower's support for black equality has been questioned.<sup>146</sup> And President John Kennedy, now a symbol of America's equality dreams, has been

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142. See President George H.W. Bush, Statement on Signing the Civil Rights Act of 1991, 2 PUB. PAPERS 1504 (Nov. 21, 1991).

143. See Devins, *Reagan Redux*, *supra* note 95, at 955.

144. See Ruth Marcus, *What Does Bush Really Believe?: Civil Rights Record Illustrates Shifts*, WASH. POST, Aug. 18, 1992, at A1.

145. Unlike all his predecessors, Clinton's private life includes regular contacts with blacks. For example, Clinton is known to vacation and play golf with Vernon Jordan. See Stan Simpson, *Blacks Back Bill Clinton Because He Reciprocates*, HARTFORD COURANT, Feb. 11, 1998, at A3.

146. See HUTCHINSON, *supra* note 11, at 76 (contending Eisenhower expressed some sympathy for segregation); O'REILLY, *supra* note 26, at 165-66 (stating Eisenhower told "nigger jokes" both in and out of the White House).

criticized for not having a broad enough vision of civil rights<sup>147</sup> and being sympathetic to southern segregation.<sup>148</sup> Lyndon Johnson, an accomplished civil rights chief executive, also had questions raised about his earlier views on racial equality.<sup>149</sup> Richard Nixon, a supporter of minority entrepreneurship, was viewed as insensitive to racial realities,<sup>150</sup> as was Jimmy Carter, a strong supporter of civil rights.<sup>151</sup> But such criticism cannot overshadow their contributions.

In contrast to other presidents, Clinton was able to evade the personal attacks. President Clinton's private and public behavior, for the most part, consistently reflected a conviction that blacks are equal human beings and equal citizens in every respect. His belief in the equal worth of blacks dates back to his youth, thereby eliminating any doubt that he was being politically expedient.<sup>152</sup> As a result, Clinton's commitment to racial equality has not been challenged on a personal level even though he may have accomplished less than some of his predecessors in the area of civil rights.

In word and deed, Clinton tried to demonstrate his acceptance of the inherent equality of blacks and his commitment to ensuring fair treatment for blacks. Through cabinet appointments,<sup>153</sup> judicial appointments,<sup>154</sup> speeches,<sup>155</sup>

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147. See CARL M. BAUER, JOHN F. KENNEDY AND THE SECOND RECONSTRUCTION 300 (1977).

148. See HUTCHINSON, *supra* note 11 (stating that Kennedy called Reconstruction a black nightmare for the South).

149. See HUGH DAVIS GRAHAM, CIVIL RIGHTS AND THE PRESIDENCY 36 (1992) (noting Johnson flirted with segregation prior to becoming a civil rights leader).

150. See O'REILLY, *supra* note 26, at 281, 307 (contending Nixon identified Supreme Court judges with backward racial views).

151. See *id.* at 339 (citing a comment Carter made about ethnic purity).

152. See *id.* at 408.

153. Bill Clinton appointed record-breaking numbers of blacks to cabinet and other important White House positions. Clinton promised a diverse cabinet and delivered on that promise. See Eleanor Clift, *Clinton's Cabinet: Beyond White Men*, NEWSWEEK, Dec. 21, 1992, at 37; see also *Some Old, Some New, Some Borrowed . . .*, TIME, Jan. 4, 1993, at 10 (noting Clinton's first cabinet included four blacks).

154. See Carl Tobias, *Keeping the Covenant on the Federal Courts*, 47 SMU L. REV. 1861, 1867 (1994) (stating that Clinton nominated unprecedented numbers of women and minorities to the federal courts).

155. In a number of speeches, Clinton spoke out against discrimination and in support of affirmative action. See President William J. Clinton, Commencement Address at the University of California San Diego in La Jolla, California, 1 PUB. PAPERS 735 (June 14, 1997) (unveiling his initiative on race and speaking out against racism and in support of affirmative action); see also William Schneider, *The Meanings of Affirmative Action*, NAT'L J., Jan. 3, 1998, at 42, 42 (explaining how Clinton used a press conference to deliver a "seminar on America's race problem").

and other official acts,<sup>156</sup> Clinton pursued a program of weaving blacks into America's fabric of democracy. President Clinton outdid his predecessors in cabinet<sup>157</sup> and sub-cabinet appointments.<sup>158</sup> He took advantage of many opportunities missed by his predecessors to help repair some of the damage of racism. For example, he conferred Medals of Honor on black World War II veterans, none of whom had been recognized previously.<sup>159</sup> He apologized for the infamous syphilis experiment the government conducted on black men.<sup>160</sup> He even spoke up against the exclusion of blacks from sports management positions.<sup>161</sup>

Clinton's pursuit of equality, sometimes seemingly for its symbolic importance, represents a broad equal rights vision that could help to improve race relations. He demonstrated that a president could help move the nation

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156. Clinton's visit to Africa, his sympathy for the racial oppression blacks have endured, and his recognition of black achievement are major symbolic gestures that further national recognition of black equality. See Johanna McGeary, *Will Clinton's Trip Change the Way Americans View Africa, and Rewrite the Terms of U.S. Policy?*, TIME, Apr. 6, 1998, at 49 (noting Clinton's apology for American slavery, for complicity in apartheid, and for inaction in the face of Rwandan genocide). Clinton also used the Africa trip to prioritize black media by granting exclusive interviews to black media outlets and avoiding the White House Press corps. See Karen Breslau & Alan Zarembo, *Africa Dreams*, NEWSWEEK, Apr. 6, 1998, at 28. Such treatment of black reporters stands in stark contrast to the exclusion of black reporters from White House press conferences by Franklin Delano Roosevelt. See O'REILLY, *supra* note 26, at 115.

The President has even spoken up against the exclusion of blacks from sports management positions, see James Bennet, *President Leads TV Discussion on Role of Race in Sports*, N.Y. TIMES, Apr. 15, 1998, at A20, and has urged sports franchises to hire more minorities as coaches and upper-level managers. See Elizabeth Shogren, *Clinton Urges More Minorities in Sports' Upper Levels*, L.A. TIMES, Apr. 15, 1998, at 5.

157. Clinton continued to outdo his predecessors in his second term by appointing three blacks to cabinet positions. See David E. Rosenbaum, *Clinton Fills Cabinet After Scramble to Diversify*, N.Y. TIMES, Dec. 21, 1996, at 1.

158. Clinton's efforts to appoint blacks for coveted White House positions went beyond cabinet posts. One headline noted that Clinton appointed over sixty blacks to various positions in the White House. See *Record High of 60-Plus Blacks Working with Clinton at White House*, JET, Mar. 30, 1998, at 5.

159. See President William J. Clinton, Remarks Honoring African-American Veterans of World War II, 2 PUB. PAPERS 1564 (Sept. 16, 1994); see also Frank James, *Heroes Recognized, 50 Years Late: 7 Black Soldiers Get Medal of Honor*, CHI. TRIB., Jan. 14, 1997, at 1.

160. See President William J. Clinton, Remarks in Apology to African-Americans on the Tuskegee Experiment, 1 PUB. PAPERS 607 (May 16, 1997). This experiment caused blacks to distrust government health programs and hospitals generally. See Abigail Trafford, Op-Ed., *The Ghost of Tuskegee*, WASH. POST, May 6, 1997, at A19.

161. See Bennet, *supra* note 156, at A20 (noting Clinton urged sports franchises to hire more minorities as coaches and upper-level managers); see also Shogren, *supra* note 156, at 5 (stating Clinton urged more minority hires in the upper levels of professional sports).

beyond formal laws of equality to general acknowledgment of past and continuing wrongs with an insistence on equal treatment as national policy. In this respect, the Clinton presidency contrasts sharply with that of prior presidents. And if Clinton's presidency is compared with that of the presidents that preceded Abraham Lincoln, one can really appreciate the civil rights transformation that has occurred in the American presidency.

Recognizing that President Clinton's decisions about racial issues often transcended political expediency, blacks gave him their overwhelming support.<sup>162</sup> Blacks placed a great deal of hope in President Clinton in their attempt to hold on to civil rights achievements that included affirmative action. However, despite Clinton's presidency, equal treatment remains an elusive aspiration for blacks.

Discrimination remains rampant in all aspects of life, affirmative action is unpopular and declining,<sup>163</sup> and racially motivated violence remains a threat to full equality.<sup>164</sup> Despite President Clinton's sensitivity and attention to

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162. In 1992 Clinton received 83% of the black vote and went on to defeat George H.W. Bush. See Roger Simon, *Clinton Takes Heart from Blacks' Support*, CHI. TRIB., Feb. 2, 1998, at 1. In 1996 Clinton did even better with 84% of the black vote, which helped him defeat Senator Bob Dole. *Id.* And as Republicans hammered Clinton during the Monica Lewinsky sex scandal and white Democrats defected, blacks demonstrated unwavering support for the President. See Peter S. Canellos, *Blacks Remain Solidly Behind Clinton*, PITT. POST-GAZETTE, Sept. 18, 1998, at A12; Tara George et al., *Black Caucus Embraces Prez*, N.Y. DAILY NEWS, Sept. 20, 1998, at 3; David L. Marcus, *Clinton Thanks Black Leaders for Standing by Him in Crisis*, BOSTON GLOBE, Sept. 20, 1998, at A15; David Wald, *Blacks Are Forgiving Clinton*, STAR-LEDGER (Newark, N.J.), Sept. 20, 1998, at 3.

163. In fact, one of the biggest challenges to Clinton's initiative on race was the contention that the President's advisory board members all supported affirmative action, and the board chairman had refused to give an audience to affirmative action opponents. See James Carney, *Why Talk Is Not Cheap*, TIME, Dec. 22, 1997, at 32. Internal ethnic fighting between board members also highlighted additional challenges blacks faced as other racial groups tried to get their interests prioritized. *Id.*

Meanwhile, the Supreme Court left it up to voters and, to a limited extent, Congress, to decide the future course of affirmative action by refusing to review Proposition 209, a California voter initiative that prohibited the state from providing affirmative action programs. See Harvey Berkman & Marcia Coyle, *Race Referenda May Influence Lee's Prospects: Nominee to Run Civil Rights at Justice Is Challenged for Opposing Prop. 209*, NAT'L L.J., Nov. 17, 1997, at A1. The Court refused to upset the Ninth Circuit's determination that Proposition 209 is a legally sound measure. See *Coal. for Econ. Equity v. Wilson*, 522 U.S. 963 (1997), *denying cert. to* 122 F.3d 718 (9th Cir. 1997).

164. Black skin still remains a magnet for physical violence. See *3 Men with Suspected Ties to KKK Held in Dragging Death of Black Man*, MIAMI HERALD, June 10, 1998, at 7A (black man chained to pickup truck and dragged to death by whites); Jodi A. Enda, *Plain-Talking Clinton Lashes out Against 'Quiet Hatred' of Racism*, MIAMI HERALD, Mar. 30, 1997, at 17A (thirteen year-old black boy savagely beaten by white teens seeking to keep blacks out of "their" neighborhood); David M. Herszenhorn, *Family Describes a Readily Friendly Man*, N.Y. TIMES,

black concerns, racism remains a vibrant part of American life and culture, and the longstanding disparities between blacks and whites continue to exist. The Clinton presidency teaches us not only about the potential but also about the limitations on a chief executive in making, implementing, and enforcing civil rights policies.

President Clinton is credited with changing the way blacks are depicted to the nation, if only temporarily. Instead of the government-dependent images of blacks that some prior presidents embraced,<sup>165</sup> Clinton utilized historically relevant symbols to depict black reality. For example, Clinton portrayed black suffering as a continuing reality that fuels racial disaffection, rather than as a historical event that should be forgotten.<sup>166</sup> He also focused on the resegregation of schools,<sup>167</sup> the continuing economic disparities between blacks and whites,<sup>168</sup> and the lack of opportunities for blacks in particular occupations.<sup>169</sup>

Clinton also did his part to debunk the notion that blacks are not qualified for high office by hiring a black personal secretary,<sup>170</sup> appointing a significant number of blacks to cabinet posts,<sup>171</sup> and appointing many black federal judges.<sup>172</sup> Furthermore, at a time when affirmative action had become

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Aug. 13, 1997, at B3 (white New York City cops accused of beating and sodomizing black man with toilet plunger); Mark Morris, *Two Men Convicted in Hate-Crime Murder*, K.C. STAR, May 9, 2008, at A1 (black man walking down the street killed by two white men in racially-motivated murder).

165. See Kathleen A. Kost & Frank W. Munger, *Fooling All of the People Some of the Time: 1990's Welfare Reform and the Exploitation of American Values*, 4 VA. J. SOC. POL'Y & L. 3, 35-46 (1996); see also David J. Kennedy, *Due Process in a Privatized Welfare System*, 64 BROOK. L. REV. 231 (1998).

166. In June of 1997, President Clinton announced his initiative on race and reminded Americans that discrimination and prejudice remain one of America's toughest problems. See Clinton, *supra* note 155, at 737-39.

167. See President William J. Clinton, Remarks on the 40th Anniversary of the Desegregation of Central High School in Little Rock, Arkansas, 2 PUB. PAPERS 1233 (Sept. 25, 1997); see also *President Leads Ceremony Honoring Little Rock Nine: Clinton Laments Lingering Voluntary Racial Segregation*, BALTIMORE SUN, Sept. 26, 1997, at 3A.

168. Charles Ogletree, *The President's Role in Bridging America's Racial Divide*, 15 T.M. COOLEY L. REV. 11, 12-13 (1998).

169. For example, the President has prodded professional sports franchises to hire more minorities for coaching and managerial positions. See Bennet, *supra* note 156, at A20; Shogren, *supra* note 156, at A5.

170. Clinton's secretary was Betty Currie, whom the nation became familiar with because of the Monica Lewinsky scandal. See Amy Goldstein, *Summons Thrusts President's Gatekeeper into View*, WASH. POST, Jan. 23, 1998, at A20.

171. See Clift, *supra* note 153, at 37; *Record High of 60-Plus Blacks Working with Clinton at White House*, *supra* note 158, at 5; Rosenbaum, *supra* note 157, at 1.

172. See Tobias, *supra* note 154, at 1861, 1867.

unpopular, Clinton used his office to explain the continuing importance and need for narrow remedial measures,<sup>173</sup> rather than accept the argument that blacks get too much from the federal government.

President Clinton is also credited with fending off attacks by groups considered hostile to the interests of blacks. For example, he was viewed as a check on a Republican-controlled Congress bent on rolling back civil rights enforcement and remediation.<sup>174</sup> He is also credited with improving the economic prospects for blacks through his support for a higher minimum wage,<sup>175</sup> support for increased funding for historically black colleges,<sup>176</sup> support for greater assistance to small businesses,<sup>177</sup> and the pursuit of economic policies which has resulted in higher employment rates for blacks.<sup>178</sup>

Finally, Clinton took the bold step of asking the nation to confront its racial divide as a proactive measure rather than as a crisis management policy.<sup>179</sup>

173. President Clinton stated:

In our efforts to extend economic and educational opportunity to all our citizens, we must consider the role of affirmative action. I know affirmative action has not been perfect in America—that's why 2 years ago we began an effort to fix the things that are wrong with it—but when used in the right way, it has worked.

Clinton, *supra* note 155, at 738. Clinton added that

[affirmative action] has given us a whole generation of professionals in fields that used to be exclusive clubs, where people like me got the benefit of 100 percent affirmative action. . . .

[T]he best example of successful affirmative action is our military. Our Armed Forces are diverse from top to bottom, perhaps the most integrated institution in our society and certainly the most integrated military in the world. And more important, no one questions that they are the best in the world. So much for the argument that excellence and diversity do not go hand in hand.

*Id.*

174. See Courtland Milloy, *Returning Clinton's Embrace*, WASH. POST, Feb. 1, 1998, at B1; see also Raja Mishra, *Clinton's Backing Among Blacks Remains Solid*, FT. WORTH STAR-TELEGRAM, Sept. 14, 1998, at 6 (noting that "many blacks still see Clinton as a leader who has fought for them in a political climate that is turning ever more hostile toward the programs that grew from the civil rights movement").

175. See Ceci Connolly & Robert E. Pierre, *Clinton's Strongest Constituency: To African Americans, President's Record Outweighs Personal Problems*, WASH. POST, Sept. 17, 1998, at A1.

176. Carolyn Lochhead, *Clinton Budget Makes Big Promises: Large Share of Spending Set Aside for California*, S.F. CHRON., Feb. 8, 2000, at A1 (noting in his last budget as president, Clinton sought \$28 million for programs at historically black colleges).

177. Julianne Malveaux, *Q: Do Black Voters Have Good Reason to Support President Clinton?*, INSIGHT ON THE NEWS, Nov. 2, 1998, at 24 (noting that under the Clinton administration, loans to small businesses owned by African-Americans doubled).

178. See *id.* (explaining how Clinton's policies helped to lower African-American unemployment).

179. Clinton followed through on his initiative on race, and was "obsessed" with promoting

Instead of allowing the nation to slip into divisive camps and segregation, he continually called on the nation to try to understand our racial history and talk about our differences in order to find common ground, gain mutual respect, and promote cooperation.<sup>180</sup> Albeit ambitious, this is a major initiative by the chief executive and a model future chief executives may follow. It is never too late to start treating people equally. And pursuing equal treatment should always be an executive priority. As presidents pursue their priorities and handle the crises that beset them, they should not relegate to low priority the ever-present domestic problem of discrimination and its effects.

This seems to be the indictment against President George W. Bush by the United States Commission on Civil Rights.<sup>181</sup> President Bush has prioritized the Iraq war and related military interests,<sup>182</sup> the energy crisis,<sup>183</sup> and tax cuts for the wealthy.<sup>184</sup> Since he took office, one can hardly tell that the deep-rooted problem of discrimination and its legacy of inequality remain a major domestic problem. The war on poverty is not an executive priority,<sup>185</sup> and, while the President has advocated merit and achievement as the touchstone for minority opportunity,<sup>186</sup> his administration has been famous for decisions grounded in cronyism and partisan politics.<sup>187</sup> The President has also

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dialogue between the races and preparing Americans to live with each other respectfully. See Karen Breslau, *Clinton on Race: "We Still Have a Long Way to Go"*, NEWSWEEK, June 16, 1997, at 31.

180. See Christopher Edley Jr., *Why Talk About Race?: President Clinton's Initiative Is More than a Gabfest*, WASH. POST, Dec. 7, 1997, at C1.

181. See U.S. COMM'N ON CIVIL RIGHTS, *REDEFINING RIGHTS IN AMERICA: THE CIVIL RIGHTS RECORD OF THE GEORGE W. BUSH ADMINISTRATION, 2001-2004*, at vii (2004), available at <http://www.lib.umich.edu/govdocs/pdf/bushcivilrights.pdf> (Draft Report for Commissioners' Review) (concluding that President Bush has made civil rights a low priority issue and has failed to demonstrate leadership in this area).

182. HOUSE JUDICIARY COMM. DEMOCRATIC STAFF, *GEORGE W. BUSH VERSUS THE U.S. CONSTITUTION* (Anita Miller ed., 2006).

183. See Michael T. Klare, *Essay: The Bush-Cheney Energy Strategy: Implications for U.S. Foreign and Military Policy*, 36 N.Y.U. J. INT'L L. & POL. 395 (2004).

184. Susan Pace Hamill, *An Evaluation of Federal Tax Policy Based on Judeo-Christian Ethics*, 25 VA. TAX REV. 671, 711-13 (2006).

185. See Thomas W. Ross, *The Faith-Based Initiative: Anti Poverty or Anti-Poor?*, 9 GEO. J. ON POVERTY L. & POL'Y 167, 190-91 (2002) (concluding that President Bush views poverty as an issue to be dealt with by churches).

186. See President George W. Bush, Remarks on the Michigan Affirmative Action Case, 1 PUB. PAPERS 56 (Jan. 15, 2003) (stating that the President will ask the Supreme Court to invalidate a University of Michigan admissions program that uses race as a beneficial factor for minority applicants). The President stated that rewards grounded in race are discriminatory, divisive, and unconstitutional. *Id.*

187. See Amy Goldstein & Dan Eggen, *Immigration Judges Often Picked Based on GOP Ties*, WASH. POST, June 11, 2007, at A1 (noting that the Bush administration appoints



condemned affirmative action programs using quota rhetoric<sup>188</sup> which is effective only in promoting racial division.

More effective would be discussion and educational programs that inform the nation about the causes of racial inequality and offer innovative proposals to fix the problem. To simply say that the use of race to grant opportunity is wrong and unconstitutional, or that factors other than race are preferable, does little to promote equal treatment. Equally important is the enforcement of existing civil rights laws so that the ends of those prescriptions can be achieved.<sup>189</sup> For the foreseeable future, executive civil rights policymaking should be grounded in and shaped by an acknowledgment that discrimination remains a national problem. This acknowledgment should help coerce executive enforcement of existing laws so that their goals can be achieved. Divisive rhetoric should be avoided, along with the well-worn apologies for slavery and discrimination that do not change present harmful behavior. At the same time, a continuing search for solutions must be undertaken.

### *Conclusion*

The meaning of civil rights has changed since the days of George Washington. Executive civil rights policymaking has moved from fighting slavery, to fighting segregation and its subordinating practices, to fighting for the continuation of preferential programs that assist minorities and create more opportunities for them. History teaches that gaining civil rights protection takes a long time and only occurs with activism. This means that forces that seek to narrow civil rights protection or limit its enforcement can be devastating if unchecked. A president can be a powerful force on this battleground, and a president insensitive to the discriminatory realities blacks live with can do great damage to civil rights gains.

Race discrimination, racial disparities, and the quest for racial equality remain a thorny domestic problem that future presidents will confront. As

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Republican loyalists who are inexperienced and unqualified); *see also* Richard T. Sylvester, *President Bush and Hurricane Katrina: A Presidential Leadership Study*, 604 ANNALS AM. ACAD. POL. & SOC. SCI. 26 (2006); Michael Hedges, *Study Says Firms Used Insider Ties to Win Contracts*, HOUSTON CHRON., Oct. 31, 2003, at A2; William Neikirk, *Critics Say Contracts Open to Cronyism: Cheney's Ex-firm Cited as Example*, CHI. TRIB., Apr. 13, 2003, at 1.

188. *See* Bush, *supra* note 186, at 56 (describing the University of Michigan admissions programs as "a quota system").

189. The Bush administration has been accused of failing to use the Voting Rights Act of 1965 for its intended beneficiaries—racial minorities—and at the same time, in an unprecedented move, using the same law to sue a black man. *See* Emily Wagster Pettus, *Federal Discrimination Suit Is Filed Against Black Leader*, MIAMI HERALD, May 3, 2006, at 8A.

chief executives prioritize and attend to pressing national and international issues that will shape their legacy, they must also craft responses to racially discriminatory behavior. And this will require programs that promote racial equality and racial reconciliation.

Racial equality and national progress are not mutually exclusive. The president's power to execute the laws; issue proclamations and executive orders; shepherd legislation; and appoint cabinet members, judges, and agency heads, give the chief executive unique authority to promote equal opportunity and fair treatment for all. Presidents have to rise above party ideology and see civil rights as an important national issue that will shape their legacy. History has shown that presidents can help shape the nation's attitude about equality, even as competing factions disagree on the question of what equality means.