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Be Careful What You Wish For: Ronald Reagan, Donald Trump, The Assault on Civil Rights, and The Surprising Story of How Title VII Got Its Private Right of Action

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INTRODUCTION

President Donald Trump is likely to try to undermine the effectiveness of civil rights and employment discrimination enforcement. By slashing the three major employment-based civil rights agencies' budgets and appointing commissioners and senior staff hostile to their goals, he can at best neutralize them and at worst turn them into voices for white supremacists, Islamophobes, homophobes, misogynists, extremist religious fundamentalists, and gender traditionalists. If the eight years of Ronald Reagan's presidency are any guide, Trump will probably succeed. President Reagan turned these agencies into potent anti-affirmative action advocates, routinely siding with employers or white male workers claiming reverse discrimination when the agencies intervened in cases and submitted *amicus curiae* briefs.

But for those of us committed to enforcing civil rights, this essay reviews the efforts by Reagan to turn back the clock with an important message: we're still here. As bad as the enforcement agencies were under Reagan, employment discrimination law has survived and continues to be an often-effective tool against racism, misogyny, homophobia, religious hatred, and other forms of discrimination. Title VII cases (and claims under parallel statutes) continue to be a major part of the caseload in federal courts. Why? Because the Civil Rights Act is largely enforced by private civil rights groups and lawyers in private practice who bring cases before independent judges pursuant to a private right of action.

Did a progressive Congress have the foresight to recognize that a private right of action would protect the victims of discrimination from future administrations hostile to civil rights, and thus include it in the statute as a check against enforcement agencies captured by civil rights opponents? Hardly. Rather, moderate and conservative Senate Republicans, resigned to the fact that an employment discrimination law was inevitable, and fearful of a powerful federal agency that would restrict business autonomy in the manner of the National Labor Relations Board (NLRB), substituted a private right of action for agency adjudication in an attempt to sabotage the effectiveness of Title VII. In 1964, the adoption of a private right of action was widely seen as a great loss for civil rights advocates, turning Title VII from an enforceable law to an ineffectual call for voluntary compliance with anti-discrimination policies. Almost no one foresaw the development of a private bar of plaintiffs' employment discrimination lawyers.

This paper reviews the impact of President Reagan's policies on civil rights enforcement in the 1980s and then rewinds back to the 1960s to tell the surprising story of how Title VII got its private right of action. Part I reviews Reagan's rise to the presidency on a white supremacist platform. Part II

recounts his efforts to reverse the progress of civil rights through his appointments to and policies at the Equal Employment Opportunity Commission (EEOC), the Department of Justice's Civil Rights Division, and the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP). Parts III and IV return to the 1960s to tell the story of how Title VII got its private right of action, beginning with a proposal for agency adjudication, watered down to agency prosecution in the House of Representatives (Part III), and then switching to a private right of action in the Senate (Part IV). In the conclusion, we argue that those who tried to sabotage the enforcement of civil rights through a private right of action should be turning in their graves, having inadvertently given civil right advocates a powerful tool to resist assaults on civil rights.

I.

1980: CANDIDATE REAGAN, WHITE SUPREMACIST HERO

Ronald Reagan started in electoral politics as an opponent of civil rights. His first big campaign was not on his own behalf, but as a campaigner for Barry Goldwater in his 1964 bid for president, and for the proponents of California Proposition 14, the voter initiative to overturn California's housing discrimination law and legalize racial discrimination in housing across the state.[†] Reagan praised Goldwater for his courage in opposing the 1964 Civil Rights Act,¹ which Reagan framed as a violation of "individual rights"² (that is, the right to discriminate). In support of the housing discrimination initiative, Reagan declared his support for "upholding the right of a man to dispose of his property or not dispose of it as he sees fit."³ When the Voting Rights Act was proposed (and passed) in 1965, Reagan opposed it as "humiliating to the South."⁴

In running for California governor in 1966, Reagan centered his campaign on his opposition to the Free Speech Movement at Berkeley, which

See TAYLOR BRANCH, *PILLAR OF FIRE: AMERICA IN THE KING YEARS 1963–65* 242 (1999); THOMAS W. CASSTEVEN, *POLITICS, HOUSING AND RACE RELATIONS: CALIFORNIA'S RUMFORD ACT AND PROPOSITION 14* 53–67 (1967) (detailing the statewide campaign on Proposition 14); David B. Oppenheimer, *California's Anti-Discrimination Legislation, Proposition 14, and the Constitutional Protection of Minority Rights*, 40 *GOLDEN GATE U. L. REV.* 117, 124 (2010).

1. Juan Williams, *Reagan, the South and Civil Rights*, NATIONAL PUBLIC RADIO (June 10, 2004, 12:00 AM), <http://www.npr.org/templates/story/story.php?storyId=1953700>; Pat Horan, *Reagan, Goldwater and Rise of Conservatism*, REALCLEAR HISTORY (Oct. 27, 2014), http://www.realclearhistory.com/articles/2014/10/27/reagan_goldwater_and_rise_of_conservatism_184.html.

2. Williams, *supra* note 1.

3. *State Officials at Odds on Proposition 14 Status*, DESERT SUN, May 12, 1966, at 1.

4. Matthew Yglesias, *Reagan's Race Record*, THE ATLANTIC (Nov. 9, 2007), <https://www.theatlantic.com/politics/archive/2007/11/reagans-race-record/46875/>.

was closely linked to the Civil Rights Movement.⁵ As governor, Reagan spoke out again in support of housing discrimination, publicly opposing the 1968 Fair Housing Act.⁶ Of housing discrimination generally, Reagan asserted that “[i]f an individual wants to discriminate against Negroes or others in selling or renting his house . . . he has a right to do so.”⁷

But Reagan truly became a hero among white supremacists in his 1980 presidential campaign, where his opposition to civil rights enforcement and to affirmative action helped drive him to victory. To make it clear to white voters where he stood, he opened his post-convention campaign at the county fairground adjoining the small town of Philadelphia, Mississippi,⁸ where three civil rights workers—James Chaney, Andrew Goodman, and Michael Schwerner—were murdered by the local police and the Ku Klux Klan on June 21, 1964, only two days after Congress passed the 1964 Civil Rights Act over his opposition. He used the fairground venue to open his campaign with a speech about his support of “states’ rights,” the code words for opposing desegregation and supporting discrimination.⁹

II.

1981–89: PRESIDENT REAGAN—GUTTING THE CIVIL RIGHTS ENFORCEMENT AGENCIES

Once elected, President Reagan appointed anti-civil rights leaders to the three main federal agencies that enforce civil rights laws, the Justice Department’s Civil Rights Division, the Equal Employment Opportunity Commission, and the Department of Labor’s Office of Federal Contract Compliance Programs.¹⁰

At the Justice Department, he appointed William Bradford Reynolds as Assistant Attorney General for Civil Rights.¹¹ Reynolds, who led the Civil Rights Division from 1981 to 1988, had no background in civil rights law but

5. The Free Speech Movement began as a campaign to allow pro-civil rights students at University of California, Berkeley to set up tables in Sproul Plaza urging students to picket Berkeley stores that discriminated against Black workers. See *Free Speech Movement Chronology*, THE BANCROFT LIBRARY, <http://bancroft.berkeley.edu/FSM/chron.html> (last visited Oct. 15 2017).

6. See Pedro Noguera & Robert Cohen, *Remember Reagan’s Record on Civil Rights and the South African Freedom Struggle*, THE NATION (Feb. 11, 2011), <https://www.thenation.com/article/remembering-reagans-record-civil-rights-and-south-african-freedom-struggle/>.

7. Yglesias, *supra* note 4.

8. IAN HANEY LÓPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS* 58 (2014) (citing Paul Krugman, *Republicans and Race*, N.Y. TIMES, Nov. 17, 2007, at A23).

9. *Id.* (citing Bob Herbert, Opinion, *Righting Reagan’s Wrongs?*, N.Y. TIMES, Nov. 13, 2007, at A29).

10. See NORMAN C. AMAKER, *CIVIL RIGHTS AND THE REAGAN ADMINISTRATION* 108–130 (1988).

11. HANEY LÓPEZ, *supra* note 8, at 70.

was a fierce critic of affirmative action.¹² He began dismantling all of the Department's efforts at broad-based relief for civil rights violations,¹³ even opposing voluntary efforts to reduce discrimination.¹⁴ When he arrived at the Department of Justice, there were over fifty cases around the country where the Civil Rights Division had intervened in support of an affirmative action remedy.¹⁵ Under Reynold's instruction, the government quickly switched sides, moving from supporting minority workers to supporting white intervenors or discriminatory employers and unions.¹⁶ By May 1983, the National Association for the Advancement of Colored People (NAACP) was lobbying Congress to disband the division.¹⁷ But, with a few exceptions, federal judges ruled in favor of the minority employees.¹⁸

At the EEOC, Reagan appointed Clarence Thomas as Chair.¹⁹ The budget was cut, and the EEOC dropped the number of cases it initiated by more than fifty percent.²⁰ It essentially stopped bringing class actions and dramatically dropped the number of systemic discrimination cases (from sixty-two in 1980 to ten in 1983), pattern and practice cases, and the filing of amicus briefs.²¹ When it did file amicus briefs, it was often in support of employers, not employees.²² The percentage of "no cause findings" nearly doubled,²³ while the percentage of cases settled declined by nearly fifty percent.²⁴ Instead of taking on the major problems of anti-discrimination law,

12. *Id.*

13. AMAKER, *supra* note 10, at 124; HANEY LÓPEZ, *supra* note 8, at 69–70; Drew S. Days III, *Turning Back the Clock: The Reagan Administration and Civil Rights*, 19 HARV. C.R.–C.L. L. REV. 309, 318 (1984).

14. Days III, *supra* note 13, at 339–341, 345.

15. CLAUDIA WITHERS & JUDITH A. WINSTON, *THE CITIZENS' COMMISSION ON CIVIL RIGHTS, ONE NATION INDIVISIBLE: THE CIVIL RIGHTS CHALLENGE FOR THE 1990S* 197 (Reginald C. Govan & William L. Taylor eds., 1989).

16. ROBERT R. DETLEFSEN, *CIVIL RIGHTS UNDER REAGAN* 59–103 (1991). For examples of cases accepted by the Supreme Court for review in which the DOJ switched sides, see *Connecticut v. Teal*, 457 U.S. 440 (1982); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421 (1986); *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986); *U.S. v. Paradise*, 480 U.S. 149 (1987).

17. DETLEFSEN, *supra* note 16, at 61.

18. *Id.* at 59–103.

19. AMAKER, *supra* note 10, at 109.

20. Lynn C. Burbridge, *Changes in Equal Employment Enforcement: What Enforcement Statistics Tell Us*, REV. OF BLACK POL. ECON., 73–75, 77–79 (1986); Anthony Cook, *The Ghosts of 1964: Race, Reagan, and the Neo-Conservative Backlash to the Civil Rights Movement*, 6 ALA. C.R. & C.L. L. REV. 81, 101–03 (2015).

21. Burbridge, *supra* note 20, at 74–75; AMAKER, *supra* note 10, at 110–11; Neal Devins, *Reagan Redux: Civil Rights Under Bush*, 68 NOTRE DAME L. REV. 955, 963–64 (1993).

22. DETLEFSEN, *supra* note 16; AMAKER, *supra* note 10, at 126–28.

23. Burbridge, *supra* note 20, at 76–77.

24. *Id.*

the EEOC switched its focus from systemic discrimination cases against large employers to small businesses.²⁵

At the OFFCP, large cuts were made to the budget.²⁶ The number of administrative complaints plummeted from fifty-three in 1980 to five in 1982.²⁷ The back pay recovered dropped from \$9.3 million in 1980 to \$2.1 million in 1982.²⁸ Disbarments of contractors dropped to zero.²⁹

In sum, the eight years of Reagan's presidency was a terrible time to be a pro-civil rights lawyer in a federal anti-discrimination agency or one of their clients/complainants. It was a good time to be an employer suspected of discrimination.

In spite of this, the enforcement of civil rights did not disappear. Instead, the focus shifted from public to private enforcement. And with the benefit of an independent judiciary, a vocal and active civil rights bar, and a private right of action under Title VII and related statutes, the legal movement for civil rights pressed on. For all his efforts, Reagan could not turn back the clock on private enforcement of civil rights, and Trump is likely to suffer the same fate. Parts III and IV recount how Congress made private enforcement the key mechanism for bringing Title VII cases.

III.

1963: FROM BIRMINGHAM TO THE HOUSE OF REPRESENTATIVES—THE DEMAND FOR JOBS AND FREEDOM

A. *Birmingham*

President Reagan's efforts to undermine civil rights for Black Americans from 1964 onward were a direct threat to the most important legislation passed in the twentieth century, the 1964 Civil Rights Act. After years of legislative stalemate, the opportunity to pass comprehensive federal civil rights legislation finally emerged in 1963, just as Reagan was finding his anti-civil rights voice. The boycotts, marches, and police riots in Birmingham, the ensuing series of nationwide demonstrations culminating in The March on Washington for Jobs and Justice, and the assassination of President Kennedy in Dallas all combined to transform what had long been an intransigent atmosphere in Washington into a moment of political opportunity.³⁰ Since the Reconstruction Era, civil rights proponents had

25. Devins, *supra* note 21, at 966.

26. Burbridge, *supra* note 20, at 75–77.

27. *Id.*

28. *Id.*

29. *Id.*

30. See TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954–63, 883–887, 918 (1988); David B. Oppenheimer, *Martin Luther King, Walker v. City of Birmingham, and the Letter from Birmingham Jail*, 26 U.C. DAVIS L. REV. 791 (1993); David B. Oppenheimer, *Kennedy, King,*

worked to secure meaningful anti-discrimination protections from the federal government. Yet these efforts had proved largely unsuccessful; time and again proponents simply could not generate the necessary support in Congress to overcome the solidly segregationist South.³¹ In May 1963, during what one Kennedy Administration official dubbed the “interminable crisis in Birmingham,” the legislative reality shifted.³² A prolonged boycott of segregated commercial facilities in Birmingham culminated in Dr. Martin Luther King’s Good Friday arrest and Bull Connor’s unleashing of fire hoses and police dogs on hundreds of school-aged children as they took part in peaceful demonstrations, all of which played out on national television. In June, when President Kennedy relented from his prior opposition and announced his intention to send Congress a major civil rights proposal, he directly attributed it to the events in Birmingham.³³ By fall of 1963, observers on all sides of the political spectrum recognized that passage of a major federal civil rights legislation was within reach.³⁴ Nonetheless, but for President Kennedy’s assassination and Lyndon Johnson’s masterful lobbying, the moment might have passed.

And, even for those who saw a civil rights bill as inevitable, major unanswered questions remained. What would be included, and what would have to wait? Would the bill assist or upset ongoing school desegregation efforts? Would it apply to places of public accommodations, like restaurants, hotels, and theaters? Would it prohibit employment discrimination, even in the private sector? In addition to crafting substantive prohibitions on discrimination, legislators also faced the daunting task of determining how newly-created federal rights were to be legally enforced. Could proscribed behavior be effectively rooted out through voluntary action and moral suasion, as Senator Taft and others had proposed in the late 1940s?³⁵ Or would enforcement be through the Justice Department, investigating and bringing suits in federal court? Or through the use of federal bureaucrats and administrative processes? Or, though it was largely an afterthought until late in the legislative process, should the law be enforced through a private right of action?

Although not included in the Kennedy Administration’s initial proposal, liberal civil rights supporters believed that the post-Birmingham political

Shuttlesworth and Walker: The Events Leading to the Introduction of the Civil Rights Act of 1964, 29 U.S.F. L. REV. 645 (1994).

31. HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY, 1960–1972*, 18–24 (1990).

32. Oppenheimer, *Martin Luther King*, *supra* note 30, at 825.

33. *Id.* at 794 (citing *Transcript of the President’s Address*, N.Y. TIMES, June 12, 1963, at 20).

34. GRAHAM, *supra* note 31, at 120, 134–35.

35. David Freeman Engstrom, *The Taft Proposal of 1964 & the (Non-) Making of American Fair Employment Law*, 9 GREEN BAG 2D 181, 183 (2006).

environment called for the inclusion of provisions barring discrimination in employment.³⁶ The demonstrations in Birmingham and the dozens of others that followed in cities across the country during the summer of 1963 were a response not only to the prolonged failure to desegregate public facilities and commercial outlets, but also to the outright refusal of government agencies and most private businesses to hire African-Americans on equal terms with whites.³⁷ An omnibus civil rights package that failed to bar discrimination in employment would amount to a rejection of several express goals of the civil rights campaign that had made such a legislative accomplishment possible in the first place. So, when lobbyists and legislators began work on the Kennedy Administration's legislative proposal in June 1963, many saw the inclusion of an employment law title as critical to securing passage of the bill as a whole.³⁸ For liberal Democrats and liberal Republicans alike,³⁹ the key question was procedural: how would an employment discrimination prohibition be enforced?

Political observers recognized three competing viable approaches to civil rights enforcement.⁴⁰ Under agency enforcement approaches, a federal administrative body like the NLRB would control the complaint resolution process.⁴¹ One variant of the agency approach—the “agency adjudication model”—called for complaints to be filed with and resolved by the administrative body itself, which would hold quasi-judicial powers and whose determination of liability would be entitled to deference by reviewing courts.⁴² This would yield an employment discrimination equivalent of the NLRB. Other, more modest variants—“agency prosecution models”—left the determination of liability with courts, but allowed federal attorneys to investigate, authorize, file, and litigate claims on behalf of aggrieved individuals.⁴³ By contrast, under a private enforcement approach, aggrieved

36. GRAHAM, *supra* note 31, at 74–76, 82–84.

37. *Id.* at 72.

38. THE CIVIL RIGHTS ACT OF 1964: THE PASSAGE OF THE LAW THAT ENDED RACIAL SEGREGATION 55 (Robert D. Loevy ed., 1997).

39. It may seem hard to imagine today, but there were indeed liberal Republicans in the Congress and in State Houses in the 1960s. In both the House and the Senate, the 1964 Civil Rights Act received greater support from Republicans than Democrats. See *H.R. 7152. Civil Rights Act Of 1964.*, GOVTRACK, <https://www.govtrack.us/congress/votes/88-1964/h182> (showing that 76% of House Republicans voted in favor compared to 61% of House Democrats); *H.R. 7152. PASSAGE.*, GOVTRACK, <https://www.govtrack.us/congress/votes/88-1964/s409> (showing that 82% of Senate Republicans voted in favor compared to 69% of Senate Democrats).

40. See generally SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.*, 96–98 (2010); JACK GREENBERG, *RACE RELATIONS AND AMERICAN LAW*, 270–72 (1959).

41. Michael A. Bamberger & Nathan Lewin, Note, *The Right to Equal Treatment: Administrative Enforcement of Antidiscrimination Legislation*, 74 Harv. L. Rev. 526, 527 (1961).

42. *Id.*

43. See, e.g., Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 245 (codified as amended at 42 U.S.C. § 2000b (2012)) (empowering Attorney General to file civil actions).

individuals are asked to investigate claims on their own accord and would need to file lawsuits in court where a judge or jury would make the determination of liability. Though the precise models varied, the key distinction between private and agency enforcement hinged on the presence or absence of public investigative and prosecutorial resources to assist in complaint resolution. A third enforcement option was to avoid legal compulsion altogether and to rely instead on moral suasion.⁴⁴ This “voluntarist” approach, championed by President Eisenhower and other moderate pro-business Republicans, saw integration as normatively desirable, but sought to accomplish it without the threat of legal liability.⁴⁵

In previous attempts to pass federal civil rights legislation, choosing between enforcement models had proven to be a major sticking point. In 1957, Congress passed the first federal civil rights law enacted in over eighty years, but only after it was so watered down by the threat of a Southern filibuster that it was largely unenforceable.⁴⁶ In debating the bill, a bipartisan coalition of liberal Democrats and liberal-moderate Republicans pressed for an agency prosecution model of enforcement, authorizing the Attorney General to file lawsuits on behalf of any aggrieved individual who claimed a violation of any federal civil rights law.⁴⁷ But, aided by the threat of a Senate filibuster, Southern Democrats and conservative Republicans successfully limited the scope of the Attorney General’s enforcement authority to actions for injunctive relief to remedy voting rights violations.⁴⁸ The same process unfolded in the buildup to the Civil Rights Act of 1960, another voting rights measure. Liberals in the House of Representatives again sought to authorize the Attorney General to file lawsuits to aid comprehensive civil rights enforcement efforts, and again their efforts were blocked by a bipartisan group of conservatives, who successfully demanded a muddled ineffective procedure for voting rights protection.⁴⁹ The Civil Rights Commission favored a simple federal voter registration process that would intervene to remedy deficient state registrars.⁵⁰ Instead, the bill ultimately provided for a system of “voting referees,” appointed by courts after the Attorney General

44. A fourth option, criminal prosecution, was not seen as politically feasible or normatively desirable and was never seriously considered. See Bamberger & Lewin, *supra* note 41, at 526.

45. President Kennedy had championed such a proposal in 1961 in his “Plans for Progress” campaign, bringing together business leaders to pledge support for non-discrimination. See FRANK DOBBIN, *INVENTING EQUAL OPPORTUNITY* 33 (2009).

46. See DANIEL M. BERMAN, *A BILL BECOMES A LAW: THE CIVIL RIGHTS ACT OF 1960 7–9* (1962).

47. NINA M. MOORE, *GOVERNING RACE: POLICY, PROCESS, AND THE POLITICS OF RACE* 40–46 (2000); GREENBERG, *supra* note 40, at 138, 271.

48. See MOORE, *supra* note 47, at 64–65; JAMES L. SUNDQUIST, *POLITICS AND POLICY: THE EISENHOWER, KENNEDY, AND JOHNSON YEARS* 226 (1968); Daniel Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws*, 44 *IND. L. REV.* 113, 138–40 (2010).

49. SUNDQUIST, *supra* note 48, at 248–50.

50. BERMAN, *supra* note 46, at 35–36.

proved a pattern or practice of discrimination, who would then take applications and preside over public hearings to determine whether the applicant complied with state voter registration laws.⁵¹ In both of these prior legislative efforts, the substantive prohibitions of the proposed legislation gained widespread support while the means of enforcement proved much more contentious. And in both instances, liberals and conservatives alike shared the same understanding of the implications of settling on a given enforcement model.⁵²

B. Civil Rights Position

The civil rights proponents who helped shape Title VII uniformly believed that private enforcement approaches were ineffective. Writing in 1959 about the existing state of civil rights laws, NAACP legal counsel and soon-to-be Legal Director Jack Greenberg identified the oft-cited range of reasons for why requiring victims of discrimination to seek redress in federal courts would be unworkable.⁵³ First, there was the issue of simply getting the complaint filed: “Social factors often discourage some persons from participating in lawsuits. Outright intimidation and legal harassment may keep others out of court.”⁵⁴ Second, once filed, the lawsuits themselves were seen as unlikely to prevail, due both to resource disparities between claimants and defendants and to the biases of Southern fact finders, be they judges or juries.⁵⁵ Following the highly publicized acquittals in the Emmett Till murder trial⁵⁶ and largely unsuccessful school desegregation efforts, neither judges nor jurors were understood to offer much hope for Black Americans seeking redress for civil rights violations in court. Even if claimants could establish liability, the limited nature of available remedies deterred plaintiffs’ attorneys from taking their cases. And if Jim Crow-style segregation gave way to more subtle and systematic instances of employment discrimination in the labor market, these hurdles were likely to be even more difficult to overcome. In short, liberals saw the social and financial costs for aggrieved individuals to investigate, file, and litigate discrimination claims through private lawsuits as severely undermining the likelihood of effective enforcement.

51. SUNDQUIST, *supra* note 48, at 246; Civil Rights Act of 1960, Pub. L. No. 86-449, § 601, 74 Stat. 90, 90–92 (1960) (codified as amended at 52 U.S.C. § 10101 (2004)).

52. See generally George Rutherglen, *Private Rights and Private Actions: The Legacy of Civil Rights in the Enforcement of Title VII*, 95 B.U. L. REV. 733 (2015); ANTHONY S. CHEN, *THE FIFTH FREEDOM: JOBS, POLITICS, AND CIVIL RIGHTS IN THE UNITED STATES* (2009).

53. See GREENBERG, *supra* note 40.

54. *Id.* at 18.

55. See *id.* at 19.

56. See generally Hugh Stephen Whitaker, *A Case Study in Southern Justice: The Murder and Trial of Emmett Till*, 8 RHETORIC & PUB. AFF. 189 (2005).

By contrast, properly implemented agency enforcement approaches were understood to provide the necessary resources and flexibility to root out a much wider array of discriminatory practices. As Greenberg observed, even the milder agency prosecution variant could help overcome concerns about the “expense of investigation and proceeding.”⁵⁷ By leveraging federal resources, aggrieved individuals could more effectively challenge employers in court. This approach could be especially helpful if federal attorneys could initiate suits on their own, without relying on the “ad hoc activities of individual job seekers” which were so often constrained by unwritten social norms and fears of retaliation.⁵⁸ But Greenberg and others also realized that, especially in light of the evasion and heel-dragging that characterized earlier responses to efforts to dismantle Jim Crow, resource support alone might not be enough to dismantle a century of discriminatory, segregationist practices.⁵⁹ Many liberals agreed that only an agency adjudication model, wherein claims would be adjudicated by dedicated federal attorneys before administrative fact finders whose subject-matter experience would enable them to “become expert at discerning bias,” could provide the necessary legal flexibility to ensure effective enforcement.⁶⁰ In any event, simply giving individual claimants a right of action in federal court seemed unlikely to discourage systemic discrimination. Both the agency prosecution and agency adjudication models were viewed as significantly more potent mechanisms for enforcing civil rights laws.

These arguments in favor of agency enforcement approaches were informed and supported by the experiences of state-level fair employment practices commissions. Between 1945 and 1960, twenty states and numerous cities created administrative bodies to enforce statutory prohibitions on employment discrimination. In a highly influential 1961 Harvard Law Review article surveying the impact of these agencies, Michael A. Bamberger and Nathan Lewin observed, “[t]he major key to the success of the commissions to date has been their ultimate power to enter enforceable orders.”⁶¹ In states where agencies held no adjudication authority, the “expense, effort, and threat of community opprobrium” effectively barred civil suit.⁶² Even in places where agencies were given prosecutorial authority, the reluctance of aggrieved individuals to come forward and file claims left wide gaps in enforcement. The authors thus concluded, “[i]n order to achieve equality . . . it seems necessary for the commissions to take more of an

57. GREENBERG, *supra* note 40, at 196.

58. *See id.*

59. *Id.* at 20.

60. *Id.* at 15–17.

61. *See* Bamberger & Lewin, *supra* note 41, at 548.

62. *Id.* at 526.

initiatory role.”⁶³ Bamberger and Lewin’s review of state agency practices argued that the single most effective approach involved “utilization of [agencies’] dual functions as prosecutors and adjudicators.”⁶⁴

The flexibility of agency adjudication processes could even empower officials to bar forms of discrimination that were not explicitly precluded by general statutory language. The authors noted that in some states, armed with the power to make binding administrative rules, “[c]ommissions have elaborated upon the terms of the statute by regulations and decisions. Thus, although only some of the statutes explicitly prohibit segregation, all of the commissions have done so in practice.”⁶⁵ In short, Bamberger and Lewin found that the most effective state-level commissions were those that were granted the power to both initiate and adjudicate claims. This widely-cited understanding of state fair employment practices commissions formed a central part of the backdrop for the congressional debates in 1963 and 1964 that culminated in the passage of Title VII.⁶⁶

However, the civil rights community as a whole was not monolithic in its support for agency enforcement models. As early as the 1920s, questions about the public or private nature of harm, the individual or group nature of redress, and the utility of rights-based litigation efforts in securing social and economic equality had emerged as hotly-disputed issues within the movement.⁶⁷ As David Freeman Engstrom has meticulously demonstrated, in the immediate post-War period, local and state-level disputes often revealed fractures between mainstream civil rights groups like the NAACP and the Urban League and smaller, more militant organizations that showed a broader willingness to seek financial redress for individual claimants in court.⁶⁸ But these latter groups were not participants in the 1963 and 1964 debates, and thus their views were not represented.⁶⁹

In the early 1960s, the civil rights organizations that held any measure of influence in Washington were in complete agreement about the implications of settling on a given enforcement method. Throughout the Title VII legislative process, the lobbyists and members of Congress who sought to advance the cause of equality under the law all subscribed to the singular view that private enforcement methods would render newly-created rights all

63. *Id.* at 589.

64. *See id.*

65. *Id.* at 558.

66. During the Title VII congressional debates, this was the dominant understanding. *See, e.g.*, Proposed Statement by Leadership Conference on Civil Rights (Oct. 30, 1963) (on file with author).

67. *See* Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before Brown*, 115 *YALE L.J.* 256, 286–87 (2005).

68. David Freeman Engstrom, *The Lost Origins of American Fair Employment Law: Regulatory Choice and the Making of Modern Civil Rights, 1943–1972*, 63 *STAN. L. REV.* 1071 (2011).

69. *See id.* at 1140–41 (“[T]he legislative debate . . . was just a replay of the coalitional struggles” between the LCCR, labor unions, and Republicans).

but meaningless. The Leadership Conference on Civil Rights (LCCR), founded in 1950 by A. Philip Randolph, Roy Wilkins, and Arnold Aronson, operated as an umbrella organization that coordinated the lobbying efforts of various civil rights interest groups.⁷⁰ The organization's memoranda and correspondences produced during the 88th Congress demonstrate that influential civil rights proponents were in complete agreement as to the comparative desirability of strong agency enforcement approaches. Under a private enforcement approach, the Leadership Conference feared that aggrieved individuals would be forced to turn to attorneys who would be "lacking in expertise because of their need to earn their livings in other fields of law practice."⁷¹ Relegating enforcement to private lawsuits between aggrieved individuals and employers "would assure that there shall be no effective national policy against racial and other specified discrimination in employment."⁷² Wilkins and others observed that, at the very least, the employment title would need to be enforced by a federal agency with "the power to sue as a means of rectifying unfair employment practices."⁷³ Provisions for agency prosecution were described as the "irreducible minimum."⁷⁴ But, pushing beyond mere prosecutorial power, the Leadership Conference sought for Title VII to be "enforceable in the normal administrative manner and not through all too often hostile courts."⁷⁵ Only a "full [Fair Employment Practices Commission] with enforcement powers" could guarantee the flexibility and support necessary to root out discrimination; that is, even a shift from agency adjudication to agency prosecution might well render the proposed law unenforceable.⁷⁶ In short, as far as the main civil rights lobbyist organization was concerned, a strong agency enforcement model was the most effective approach to enforcement. And, in the post-Birmingham political atmosphere, securing such a result in Congress finally seemed viable.

70. JOSEPH L. RAUH, JR., *The Role of the Leadership Conference on Civil Rights in the Civil Rights Struggle of 1963–1964*, in *THE CIVIL RIGHTS ACT OF 1964*, *supra* note 38, at 51.

71. Memorandum from the Leadership Conference on Civil Rights, *An Analysis of Senator Dirksen's Proposed Amendment No. 511* (Apr. 21, 1964) (on file at the Library of Congress).

72. *Id.*

73. *Id.*

74. Memorandum from Arnold Aronson, Secretary, Leadership Conference on Civil Rights, to Cooperating Organizations (Jan. 20, 1964) (on file at the Library of Congress).

75. Statement from Roy Wilkins, Chairman, Leadership Conference on Civil Rights (Oct. 30, 1963) (on file at the Library of Congress).

76. Memorandum from Arnold Aronson, Secretary, Leadership Conference on Civil Rights to Cooperating Organizations (July 25, 1963); Statement from Roy Wilkins, *supra* note 75 (responding to the shift).

C. House of Representatives

Arguments in favor of the middle ground, an agency prosecution approach, would ultimately prevail in the House of Representatives. The Kennedy Administration's bill, which had no employment discrimination section, was submitted to House Judiciary Subcommittee 5 for markup on June 19, 1963.⁷⁷ When the bill arrived, liberal Representatives, led by Emanuel Celler (D-NY), immediately began drafting amendments to strengthen the proposal, including a new Title VII prohibiting employment discrimination.⁷⁸

In addition to bolstering the protections found in nearly every title of the Kennedy Administration's proposal, Subcommittee 5 incorporated a pre-existing Congressional proposal, numbered H.R. 405, as Title VII of the newly proposed Act.⁷⁹ Labeled "The Equal Employment Opportunity Act of 1963," H.R. 405 was a freestanding employment discrimination bill that called for the creation of an administrative body modeled on the NLRB, with full agency adjudication powers.⁸⁰ The bill called for the establishment of an EEOC Office of Administrator, which would hold educational, conciliatory, mediation, and investigative powers, along with discretion to bring complaints before the EEOC board, which would hold quasi-judicial powers and could enter enforceable orders subject to deferential judicial review in the U.S. Courts of Appeal.⁸¹ Further, the EEOC could investigate and adjudicate claims on behalf of aggrieved individuals even if no official complaint were filed.⁸² The result was a self-starting administrative body that, in theory, could overcome many of the perceived limits of private enforcement.

The bill had originally emerged from the House Committee on Education and Labor, which was long chaired by Adam Clayton Powell (D-NY), who was only the seventh Black American to serve in Congress since Reconstruction.⁸³ Powell was the chief pastor of the Abyssinian Baptist Church, the largest and most important church in Harlem, and represented Harlem in the U.S. Congress from 1945 to 1971.⁸⁴ For years, Powell had

77. June 19, 1963 also marked the 98th anniversary of Juneteenth, the date celebrated as the day in 1865 that slaves in Texas learned of the Emancipation Proclamation. However, the anniversary in 1963 went unnoticed in the mainstream white press.

78. GRAHAM, *supra* note 31, at 131.

79. *Id.* at 132.

80. H.R. 405, 88th Cong. (1963).

81. *Id.*

82. *Id.*

83. After the end of Reconstruction, Black participation in Congress took a precipitous decline until there were no Black representatives in 1900. See JENNIFER E. MANNING & COLLEEN J. SHOGAN, CONG. RESEARCH SERV., RL30378, AFRICAN AMERICAN MEMBERS OF THE UNITED STATES CONGRESS: 1870–2012 (2012).

84. Charles V. Hamilton, *Powell—Never a Bland Moment*, N.Y. TIMES, Apr. 9, 1972, at E2.

unsuccessfully demanded federal action on employment discrimination. In the 1961–1962 legislative session, Powell’s committee produced a compromise bill, H.R. 10144, which called for the establishment of an EEOC with primarily agency enforcement authority.⁸⁵ While the substantive prohibition on discrimination was precisely the same as that found in H.R. 405 and the Commission was still authorized to investigate allegations on behalf of aggrieved individuals, the price of bipartisan committee support for H.R. 10144 was that enforcement would have to occur exclusively through the use of civil lawsuits in federal court.⁸⁶ Yet, in the pre-Birmingham atmosphere, even this compromise proposal was dead on arrival on the House floor; there was no debate and no vote on the proposal. Powell was not to be denied, however, and in 1963 he worked with the progressive wing of his committee to report out H.R. 405 without any compromise.

For Powell, the agency adjudication approach authorized in H.R. 405 represented the best chance for effective enforcement: “[i]n addition to speed, this procedure would reduce costs for parties, allow for greater informality and flexibility, provide greater uniformity of result within a shorter period, tend toward the development and contribution of expertise in the area . . . and establish unified implementation of a truly national policy.”⁸⁷ In their dissenting views, committee Republicans cited “the absolute necessity . . . of providing for enforcement by an action brought in a U.S. district court.”⁸⁸ Lest one believe that the dissenters were concerned that claimants were being deprived of the right to bring their own lawsuits, Powell’s proposal did in fact explicitly establish a private right of action for aggrieved individuals, but only for those whose claims were not taken up by the EEOC.⁸⁹ Thus, H.R. 405 would not leave individuals totally without the opportunity for judicial redress. But it was not the lack of a judicial remedy that upset the Republican opponents. Rather, it was the risk of another NLRB-type agency pursuing a perceived anti-business agenda.

Conservatives were unable to prevent the amended omnibus package, which incorporated H.R. 405, from being reported out of committee, but their concerns about agency adjudication seemed likely to prevail if the measure were to be seriously considered by the House as a whole. As noted by the *Wall Street Journal* after Powell resisted agency enforcement in the Labor Committee:

“Republicans plan to push on the House floor for an amendment stripping the employment board of its enforcement powers, substituting a measure that

85. GRAHAM, *supra* note 31, at 129; Equal Employment Opportunity Act of 1962, H.R. 10144, 87th Cong. § 9 (1962).

86. H.R. 10144, 87th Cong. § 9 (1962).

87. H.R. REP. NO. 570 at 5 (1963).

88. *Id.* at 20.

89. The Equal Employment Opportunity Act of 1963, H.R. 405, 88th Cong. § 10(c) (1963).

would transfer them to the courts. Against the threat of a coalition of Southern Democrats and Republicans, Democratic backers of the bill may accede to the amendment.”⁹⁰

Nonetheless, three months later, after fully incorporating Powell’s work into the omnibus legislative package, the Celler-led progressives on Subcommittee 5 held their ground, and, in late October, reported the strengthened omnibus package back to the House Judiciary Committee.⁹¹ Due in no small part to the unyielding position taken on Title VII enforcement, many observers doubted the political viability of the Subcommittee’s finished product. Writing for the *New York Times*, Anthony Lewis (who would soon win the first of his two Pulitzer prizes for his civil rights reporting)⁹² observed: “Evidently the idea was to win the praise of civil rights groups with the subcommittee bill and then face reality.”⁹³

The reality was that even after Birmingham, and even in the House of Representatives, where legislative opponents lacked the threat of filibuster, there simply were not enough votes to support the strong agency adjudication approach.⁹⁴ When Subcommittee 5 completed its work and returned the bill to the House Judiciary Committee, the Kennedy Administration immediately went into damage control, cobbling together a bipartisan coalition to roll back the Subcommittee’s changes.⁹⁵ Described as “a concession to Republican views,”⁹⁶ committee moderates offered an alternative proposal to H.R. 405. Under the revised proposal, the newly established EEOC would be stripped of its adjudication authority.⁹⁷ While the substantive prohibition on discrimination remained unchanged, the primary objective for moderates was to shift Title VII enforcement from agency adjudication—which Republican leaders deemed too strong—to agency prosecution.⁹⁸ The Commission would still be allowed to field charges by or on behalf of aggrieved persons, investigate claims, and when appropriate, prosecute civil actions in court.⁹⁹ If the Commission declined to bring suit, then aggrieved persons could still file claims in court on their own accord, but they would now need to receive

90. *House Labor Committee Votes to Set Up an Equal Employment Opportunities Board*, WALL ST. J., July 12, 1963, at 2.

91. GRAHAM, *supra* note 31, at 98–99.

92. Adam Liptak, *Reporter Brought Law to Life, Elevating Supreme Court News*, N.Y. TIMES, Mar. 26, 2013, at A1.

93. Anthony Lewis, *Civil Rights Battle Sharpens*, N.Y. TIMES, Oct. 27, 1963.

94. Charles Whalen & Barbara Whalen, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 46* (1985).

95. Graham, *supra* note 31, at 132.

96. Anthony Lewis, *2 Parties Soften Civil Rights Bill; Key Test Today*, N.Y. TIMES, Oct. 29, 1963, at 20.

97. Graham, *supra* note 31, at 133.

98. *House Unit Votes Bipartisan Plan for Civil Rights*, N.Y. TIMES, Oct. 30, 1963.

99. H.R. REP. NO. 914 (1963).

sign-off from a member of the Commission.¹⁰⁰ In short, while the agency would still hold strong prosecutorial powers, the moderate alternative to Subcommittee 5's proposal represented a rejection of agency adjudication power. The House moderates and conservatives alike were unwilling to create another powerful adjudicatory agency like the NLRB.

On October 29, 1963, after a dramatic series of Committee votes, the compromise position of enforcement through agency prosecution prevailed.¹⁰¹ Moderates successfully moved to strike H.R. 405 from the legislative package, replace it with the Administration's favored agency prosecution alternative, and end debate on the matter.¹⁰² As approved by the House Judiciary Committee, Title VII was to rely on civil lawsuits brought in federal district court by the EEOC on behalf of aggrieved claimants when the agency could not reach a conciliated settlement.¹⁰³ Comments offered by Committee members in the accompanying House Report reiterate the prevailing understanding of this shift. Liberals predicted greater difficulty for aggrieved persons to obtain redress; Robert Kastenmeier (D-WI) stated: "Title VII of the reported bill is inferior to the [Fair Employment Practice Commission] section of the subcommittee bill because its procedure is slower and more cumbersome."¹⁰⁴ While George Meader (R-MI) and a number of other conservatives staunchly opposed agency prosecution and demanded the removal of Title VII altogether,¹⁰⁵ a bipartisan group of moderates was satisfied with authorizing the Commission to conduct investigations and initiate suit.¹⁰⁶ While this required the federal judiciary to make determinations of discrimination and liability, they believed the compromise would still provide for the fair and efficient resolution of complaints.¹⁰⁷

Having survived the drama of the Judiciary Committee, the omnibus legislative package still faced a series of hurdles in the House Rules Committee and on the House floor, where many predicted the most serious efforts to derail the entire proposal would unfold.¹⁰⁸ That political landscape changed on November 22, 1963 when President Kennedy was assassinated in Dallas. Four days later, Lyndon Johnson addressed a joint session of Congress to make clear the time had come to "write the next chapter" on equal rights and "to write it in the books of law."¹⁰⁹ Johnson, a Congressional

100. *Id.* at 12.

101. GRAHAM, *supra* note 31, at 132.

102. *Id.* at 134.

103. *Id.*

104. H.R. REP. NO. 914 at 41 (1963).

105. *Id.* at 57.

106. *Id.* at 29.

107. *Id.*

108. WHALEN & WHALEN, *supra* note 94, at 69.

109. RAUH, JR., *supra* note 70, at 60-61.

maestro, quietly set in motion a discharge petition to dislodge H.R. 7152 from the Rules Committee.¹¹⁰ After a moderate floor debate, partly out respect for Kennedy,¹¹¹ the House overwhelmingly passed the bill.¹¹²

The bill that reached the Senate reflected a compromise with respect to Title VII enforcement. Conservative members of the House of Representatives, keenly aware of the post-Birmingham election year political atmosphere, knew that voluntarist approaches would be rejected out of hand as insufficient.¹¹³ Liberals, including Emanuel Celler and others in Subcommittee 5, taking cues from the mainstream civil rights community, pushed for a strong agency adjudication model, but they too were forced to give ground.¹¹⁴ As a result of the moderate bipartisan coalition that formed in the House Judiciary Committee, the House settled on an agency prosecution model, wherein federal attorneys would be able to file lawsuits on behalf of aggrieved individuals, litigating their claims in federal court.¹¹⁵ While these federal resources bolstered the influence that Title VII would have on employer practices, the lack of flexibility and concerns about regional prejudice left it an open question of whether such an approach could meaningfully root out employment discrimination. More importantly, before that question could be answered, the bill would have to pass through the Senate.

IV.

1964: THE BILL MOVES TO THE SENATE: SENATOR DIRKSEN BREAKS THE FILIBUSTER AT THE COST OF AN AGENCY ENFORCEMENT MODEL

Throughout the House debates, Beltway insiders and media commentators generally recognized that the true test for the omnibus civil rights bill would be the U.S. Senate, where a coalition of Southern Democrats (aided by a few Republican ultra conservatives) had proven successful at wielding the filibuster and other procedural mechanisms to obstruct earlier civil rights legislation. To overcome this entrenched minority, civil rights proponents needed to win the support of moderate and conservative Republicans from the Midwestern and Mountain States, and this, in turn, required the support of Senate Minority Leader Everett Dirksen of Illinois. Swaying Dirksen, however, would require concessions. Throughout April 1964, as Southern Democrats carried out the longest filibuster in Senate

110. TODD S. PURDUM, AN IDEA WHOSE TIME HAS COME: TWO PRESIDENTS, TWO PARTIES, AND THE BATTLE FOR THE CIVIL RIGHTS ACT OF 1964 164 (2014).

111. GRAHAM, *supra* note 31, at 135.

112. ROBERT D. LOEVY, *Introduction: The Background and Setting of the Civil Rights Act of 1964*, in THE CIVIL RIGHTS ACT OF 1964, *supra* note 38, at 64.

113. *Id.*

114. FARHANG, *supra* note 40, at 103–104.

115. *Id.*

history, Dirksen negotiated a series of amendments to the House bill behind closed doors. Crucial among these was a drastic change in Title VII's enforcement mechanism: the EEOC's prosecutorial power would be replaced by a private right of action.

A. *The Senate Graveyard*

In contrast to the House, where Birmingham and the events of 1963 had precipitated a groundswell of bipartisan support for civil rights legislation, the Senate was far more embattled. Zealous civil rights opponents viewed the Senate as the final opportunity to prevent or undercut the bill.¹¹⁶ And they were well positioned to do so. Through the Senate's seniority system, Southern civil rights opponents had positioned themselves in many of the Senate's major gatekeeping roles, including several of its most powerful committees.¹¹⁷ Moreover, in comparison with the House, the structure of legislative procedure in the Senate was far more Byzantine. The Senate's unique procedural rules, intended to foster debate over important national issues, often afford an array of mechanisms by which a sectional minority can stymie swift action on pending legislation. With sufficient sophistication, a minority group—or even a single well-positioned individual—can bring Senate business to a standstill and frustrate the goals of an ardent majority.¹¹⁸ That is precisely what the Senate's Southern Democrats intended to do.

The first major hurdle for the omnibus civil rights bill was the prospect of referral to the Senate Judiciary Committee. It was widely recognized that if H.R. 7152 were referred to the Judiciary Committee, its Chairman, James O. Eastland—a Democrat from Mississippi and committed segregationist—would effectively kill the bill. Eastland was empowered as Chairman to invite remarks from legislative opponents and to prevent action on the legislation pending such remarks.¹¹⁹ Referral to the Judiciary Committee would thus allow Eastland to forestall civil rights legislation indefinitely. Under Eastland's stewardship, the Senate Judiciary Committee had garnered a reputation as the “graveyard of civil rights bills.”¹²⁰ Over the decade prior to 1964, only one of the 121 civil rights bills referred to Eastland's committee had ever reemerged on the Senate floor.¹²¹

Recognizing the risk posed by the Senate Judiciary Committee, civil rights proponents formulated a two-prong strategy to bypass it. First,

116. WHALEN & WHALEN, *supra* note 94, at 124–25.

117. NEIL MACNEIL, DIRKSEN: PORTRAIT OF A PUBLIC MAN 210 (1970).

118. See RAYMOND E. WOLFINGER, READINGS ON CONGRESS 259–62 (1971).

119. *Id.* at 270.

120. E.W. Kenworthy, *Rights Bill Wins 2 Tests in Senate by Wide Margins*, N.Y. TIMES, Mar. 27, 1964, at 10.

121. *Id.*

anticipating constitutional objections to the legality of the bill, proponents emphasized that the constitutional authority for the bill was anchored in Congress's Article I, Section 8 power to regulate interstate commerce, rather than in the more natural source of constitutional authority, Section 5 of the Fourteenth Amendment.¹²² This placed the bill under the primary jurisdiction of the Senate Commerce Committee, whose membership was far less hostile to civil rights legislation than the Senate Judiciary Committee.¹²³ This designation helped bring the bill beyond the reach of Eastland's committee, though the committee would later present a host of legal challenges to the constitutionality of the Act as passed.¹²⁴

Second, in an effort to avoid committee consideration entirely, civil rights proponents in the Senate, led by Senator Majority Leader Mike Mansfield, maneuvered to bypass referral to the committee process entirely. Mansfield, a former college professor from Montana and ardent civil rights advocate, moved to place H.R. 7152 directly on the Senate calendar.¹²⁵ He proclaimed, "[w]e hope in vain . . . if we hope that this issue can be put over safely to another tomorrow, to be dealt with by another generation of senators. The time is now. The crossroads is here in the Senate."¹²⁶ Mansfield's strategy proved successful. The Senate voted 54 to 37 to place the bill directly on the Senate floor. This move incensed civil rights opponents and yielded a "mini filibuster" over whether the bill had been appropriately studied or should be referred to the Senate Judiciary Committee for study.¹²⁷ Day after day, they stalled, bloviated, and prevented Senate consideration of the bill. Ultimately, however, after several weeks of resistance, opponents recognized that their intransigence at this stage could risk an early cloture vote and preclude resistance to the bill on the Senate floor. In a seven to five vote, the Southern caucus voted to end the mini filibuster, and the Senate voted overwhelmingly to take up consideration of the bill.¹²⁸

The bill had survived the Senate's civil rights graveyard, but Eastland's Judiciary Committee was merely the first hurdle. Civil rights proponents recognized that passage of the bill would require amassing sufficient support to overcome a full filibuster on the Senate floor led by Southern Democrats.

122. Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417, 1468–69 (2003).

123. GRAHAM, *supra* note 31, at 144.

124. GRAHAM, *supra* note 31, at 81; *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

125. PURDUM, *supra* note 110, at 216–17.

126. FRANK H. MACKAMAN, *THE LONG, HARD FURROW: EVERETT DIRKSEN'S PART IN THE CIVIL RIGHTS ACT OF 1964* 26 (2014).

127. *Id.* at 48.

128. PURDUM, *supra* note 110, at 238.

B. *The Southern Bloc*

On March 30, 1964, the day the civil rights bill came up for debate on the Senate floor, Senator Richard Russell (D–GA) led a congregation of Southern Democrats and one conservative Republican, John Tower (R–TX), in launching a filibuster against it. Hostility to H.R. 7152 among this “Southern Bloc”¹²⁹ was rooted largely in a long legacy of support for white supremacy and opposition to civil rights for Black Americans, though it was often couched in euphemistic phrases like “State’s Rights” or touted as opposition to government paternalism and federal interference with local property rights.

Senator Russell, an outspoken proponent of segregation and white supremacy, had long opposed civil rights legislation and had co-authored the “Southern Manifesto” in opposition to civil rights.¹³⁰ On the day that he orchestrated the Senate filibuster, Russell remarked in a letter to a constituent:

I do not believe that Federal compulsion can be properly employed under our Constitution to compel one group to share its rights with another at the same time and in the same place against its will. This is, in my opinion, an unconstitutional infringement upon one’s right to choose his associates.

This sentiment was echoed by Strom Thurmond (D–SC) who stated publicly:

This so-called Civil Rights Proposals [sic], which the President has sent to Capitol Hill for enactment into law, are unconstitutional, unnecessary, unwise and extend beyond the realm of reason. This is the worst civil-rights package ever presented to the Congress and is reminiscent of the Reconstruction proposals and actions of the radical Republican Congress.¹³¹

Complaints about government paternalism and federal overreach continued to animate white supremacists as they resisted civil rights legislation throughout the twentieth century. Indeed, the rhetoric of the Congressional debates over the 1957 and 1960 Civil Rights Acts centered overwhelmingly on the reach of federal enforcement power. A visitor unaware of the struggle for racial equality could be forgiven for thinking that a high-minded debate over principles of constitutional governance was at the heart of the dispute.

129. *Senate Defeats Filibuster, Passes Civil Rights Act, 73–27*, in CONG. Q. ALMANAC 1964 354, 354 (1965).

130. The Declaration of Constitutional Principles, known colloquially as the “Southern Manifesto,” was a document drafted and signed by 101 politicians from Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia in response to the Supreme Court’s ruling in *Brown v. Board of Education*. The Manifesto defended school segregation and condemned the *Brown* decision as a “clear abuse of judicial power.” 102 CONG. REC. 4459-60 (1956).

131. *1963 Year in Review: Civil Rights Bill*, UNITED PRESS INT’L (1963), available at <https://www.upi.com/Archives/Audio/Events-of-1963/Civil-Rights-Bill/>.

C. All Eyes on Dirksen

The filibuster by the Southern Bloc presented a serious impediment to passage of the bill. Senate cloture rules required two-thirds of the Senate, or sixty-seven cloture votes, to end debate and bring the bill to the floor for a vote. With Senate Democrats split between Northern civil rights supporters and Southern civil rights opponents, Democratic proponents of the bill needed to win the support of at least twenty Senate Republicans in order to secure the bill's passage.

As early as June 1963, civil rights advocates in the administration and at the Justice Department recognized that breaking the Southern filibuster would require courting the favor of the Senate Minority Leader, Everett Dirksen.¹³² Dirksen, a pro-business Republican from Illinois, was central to any hope of building a bipartisan coalition, and thereby swinging the votes of Republicans from the Midwestern and Mountain States necessary to reach the sixty-seven cloture votes. Following President Kennedy's assassination, President Johnson, under the specter of the impending filibuster, had reached out to Hubert Humphrey, the Democrat who would manage the bill on the Senate floor, emphasizing, "[t]he bill can't pass unless you get Ev Dirksen You and I are going to get Ev. It's going to take time. We're going to get him."¹³³

Dirksen, the son of German immigrants, was raised on a farm in the small town of Pekin, Illinois. He became involved in politics early in life after a short stint in the United States Army and several unsuccessful attempts at business ventures. He was first elected to Congress in 1932 as a pragmatic, pro-business Republican. After eight terms in the House, Dirksen was elected to the Senate in 1950 with the help of the infamous Senator Joseph McCarthy. By 1959, he was elected Senate Minority Leader, a position that he held until his death in 1969.

In his youth, Dirksen's attitude toward Black Americans was blatantly racist. As a student, he performed musical numbers and told jokes in "black-face" with a group of peers called the Eugene Minstrels.¹³⁴ In 1924, he wrote to his future wife describing Memphis, Tennessee:

In a sense girlie, this is terrible country. One would think that the Creator had either run out of fair material for this part of the South or had purposely created it as it is for punishment. Nothing but yellow and red soil from which the energy and fertility has been sapped years ago and at the same time the energy and ambition of those who till the land must have flowed away and

132. MACKAMAN, *supra* note 126, at 28–29.

133. WHALEN & WHALEN, *supra* note 94, at 148. The relationship that developed between Johnson and Humphrey during the Senate battle for the Civil Rights Act would ultimately help garner Humphrey a spot on Johnson's Presidential ticket and his election as Vice President in 1964.

134. MACKAMAN, *supra* note 126, at 32.

left a residue of indolent white trash and niggers who live in unpainted slatterns and seemingly care not what happens from this day to the next.¹³⁵

However, by the time he reached the Senate, Dirksen's views had moderated, and his reservations about the House bill were decidedly different than those of the Southern Bloc. While he too expressed concerns about government paternalism and federal overreach, his position was less anchored in white supremacy, the legacy of slavery, and segregation than were the members of the Southern Bloc. Rather, Dirksen's opposition stemmed from his station as the key Senate contact for the business community.¹³⁶ He was in communication with representatives of the National Association of Manufacturers and the Chamber of Commerce throughout Senate deliberation,¹³⁷ and he had developed a close relationship with the Illinois Manufacturers Association over his thirty years of public service.¹³⁸ Indeed, a contemporary commentator described him as "a broker for the small businessman."¹³⁹ Dirksen viewed the expansive House omnibus bill as hostile to business interests. Throughout the Congressional debate over the bill, the business community lobbied Dirksen to gut it.

The business community was particularly concerned about agency enforcement under Title VII. They were apprehensive of a "single-mission" agency—unmoored from political or judicial control—whose bureaucrats would zealously and uncompromisingly pursue the agency's mandate.¹⁴⁰ Business leaders feared that an agency with the ability to enforce or prosecute employment discrimination claims would replicate what they saw as the fervent and uncompromising economic interventionism of the NLRB.¹⁴¹ They worried that the EEOC would become a bureaucratic monolith, and would prove to be a permanent thorn in the side of American business. Thus, the Chamber of Commerce recommended that the EEOC be stripped of all powers except "conciliation and persuasion."¹⁴²

Dirksen was particularly sensitive to the fear of a powerful EEOC because of recent developments with the Illinois Fair Employment Practice Commission (FEPC). Even after a recent state law weakened the

135. *Id.* at 32.

136. FARHANG, *supra* note 40, at 107.

137. *Id.*

138. Alexander Gourse, "Such Power Spells Tyranny": *Business Opposition to Administrative Governance and the Transformation of Fair Employment Policy in Illinois, 1945–1964*, in *THE RIGHT AND LABOR IN AMERICA: POLITICS, IDEOLOGY, AND IMAGINATION 199–200* (Nelson Lichtenstein & Elizabeth Tandy Shermer, eds., 2012).

139. Murray Kempton, *Dirksen Delivers the Souls*, *NEW REPUBLIC*, May 2, 1964, at 9.

140. FARHANG, *supra* note 40, at 107–09.

141. *Id.* at 109.

142. *Id.* at 107 (citing Wolfinger, *American Business and the Civil Rights Bill*, typescript, University of California, Berkeley (1968) 24–25; U.S. EQUAL EMP. OPPORTUNITY COMM'N, *LEGISLATIVE HISTORY OF TITLES VII AND XI*, 2012).

Commission,¹⁴³ it still issued a decision against the Motorola Corporation finding that the company had violated the Illinois FEPC by adopting an “intelligence test” that had a discriminatory impact on Black applicants.¹⁴⁴ (The case was a forerunner to *Griggs v. Duke Power Company*¹⁴⁵ decided in 1971 by the U.S. Supreme Court.)¹⁴⁶ In the publicity that followed, Arthur Krock of the *New York Times* warned that civil rights legislation pending in Congress would “project the rationale of the Illinois FEPC throughout the free enterprise system of the United States.”¹⁴⁷

Faithful to these concerns, Dirksen focused principally on the employment discrimination provisions of Title VII, as well as on Title II, the public accommodations section.¹⁴⁸ With respect to Title VII, Dirksen complained that the agency prosecution model effectuated in the House bill would unduly expand federal power and interfere with business interests. On the Senate floor, Dirksen condemned the expansive agency approach in the House bill, complaining of “layer upon layer of enforcement,” which would be used to “draw and quarter” the business community.¹⁴⁹ He predicted that, if left untouched, it would provide government bureaucrats footing “for harassing business men.”¹⁵⁰ In private correspondence with leaders in the Illinois business community, Dirksen opined on the agency prosecution model: “if the powers granted in this Title are exercised, it will be one great headache for industry and business all over the country.”¹⁵¹ He similarly stated “I am frank to say that in its present form the broad powers delegated to the Government in [Title VII] have become a matter of genuine concern . . . the effects on business and industry will be incalculable.”¹⁵²

143. Gourse, *supra* note 138, at 198 (citing *NAACP Hits FEPC Bill in State Senate*, CHI. TRIB., May 18, 1961; Joseph Minsky, *FEPC in Illinois: Four Stormy Years*, 41 NOTRE DAME LAW. 152, 155–58 (1964)).

144. The decision in *Myart v. Motorola Co.* is reprinted in 110 CONG. REC. 5562–64 (1964).

145. See 401 U.S. 424, 434 n.10 (1971); see also 110 CONG. REC. 9025 (Apr. 24, 1964) (describing *Myart* as a pilot case).

146. For a discussion of how *Myart* affected the testing provisions of Title VII and *Griggs*, see MICHAEL K. BROWN ET AL., *WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY* 170–72 (2003).

147. Gourse, *supra* note 138, at 199 (citing JUDITH STEIN, *RUNNING STEEL, RUNNING AMERICA: RACE, ECONOMIC POLICY, AND THE DECLINE OF LIBERALISM* 83 (1998)).

148. See John H. Averill, *Humphrey and Dirksen Differ on Rights Bill*, L.A. TIMES, Mar. 4, 1964, at 8 (“Senate Minority Leader Everett M. Dirksen (R-Ill.) renewed his argument that the bill’s prospects would be improved by softening at least two of its key provisions—public accommodations and fair employment.”).

149. FARHANG, *supra* note 40, at 108.

150. MACKAMAN, *supra* note 126, at 49.

151. *Id.* at 46.

152. Letter from Sen. Everett Dirksen to Censored Recipient (Mar. 25, 1964) (on file with the Dirksen Congressional Center).

Dirksen instead favored a system of largely voluntary compliance backed by state enforcement agencies.¹⁵³ Although it may seem far-fetched today, an anti-discrimination program premised on voluntary compliance had considerable support in the 1950s and early 1960s. Voluntary compliance was at the heart of President Eisenhower's efforts¹⁵⁴ and many of President Kennedy's.¹⁵⁵ They called on business and religious leaders and people "of good conscience" to demonstrate "tolerance" for Blacks and Jews and to voluntarily support an end to discrimination and segregation. As such, Dirksen's efforts were concentrated on blunting the effect of the House bill's enforcement, leaving the business community free to pursue antidiscrimination efforts (or not) without federal intervention.

An astute politician, Dirksen recognized that he lacked the leverage necessary to excise Title II and Title VII entirely.¹⁵⁶ The events of Birmingham, the August 1963 March on Washington for Jobs and Freedom, and the impassioned advocacy of leaders like Dr. Martin Luther King, Jr. had brought broad national attention to the issue of civil rights. Congressional Republicans understood that they could not be seen as colluding with the Southern Bloc to kill the bill. Overtly orchestrating the bill's failure would have costly electoral consequences for Senate Republicans. With the need for civil rights proponents to overcome the Senate filibuster, however, Dirksen and his Republican colleagues were well positioned to dilute the bill. Dirksen had objected to Mansfield's maneuver to bypass the Senate Judiciary Committee, arguing that H.R. 7152—and Title VII in particular—had not been appropriately studied.¹⁵⁷ Having failed to refer the bill, however, Dirksen instead set to work on drafting changes to the House bill that would weaken and make it "less onerous for employers."¹⁵⁸

On April 7, 1964, Senator Dirksen privately presented forty proposed amendments to Title VII to a group of Republican Senators at a luncheon hosted by the Senate Republican Policy Committee. These proposals almost uniformly were designed to blunt the impact of the bill. Principal among them

153. E.W. Kenworthy, *Dirksen Offers Proposal on 'Voluntary' F.E.P.C.*, N.Y. TIMES, Apr. 22, 1964.

154. GRAHAM, *supra* note 31, at 17.

155. *Id.* 54–59.

156. Joseph Hearst, *Dirksen Seeks Compromises on Rights Bill*, CHI. TRIB., Apr. 8, 1964, at 2 ("Dirksen said there are a number of senators who are finding it difficult to accept the titles dealing with equal employment and public accommodations, and would like to see them come out of the bill. But the votes to do that aren't available, so they want to see the bill perfected as far as possible, he said."); Kempton, *supra* note 139, at 9 ("One substantial Republican, from a small, white Midwestern state, argued against any amendments at all And Dirksen answered . . . that he too would like to see it voted up or down . . . but that they didn't have the votes.").

157. PURDUM, *supra* note 110, at 219.

158. *Rights Bill Move Near*, AUSTIN AM. STATESMAN, Apr. 7, 1964 ("The amendments are described by Dirksen as designed to improve the administration of the section and make it less onerous on employers.").

was a proposal to drastically alter how the employment discrimination prohibitions would be enforced.¹⁵⁹ Dirksen insisted that the House's agency enforcement model be replaced with a private enforcement plan. His amendment would "shift[] the burden of enforcing the equal employment standards in Title VII from the federal Equal Employment Opportunity Commission, as specified in H.R. 7152, to the individual complainant."¹⁶⁰ The EEOC would no longer be empowered to bring suit to enforce the Title. Rather, private plaintiffs would be required to bring suit in federal court on their own behalf.

It seems likely the Illinois Manufacturers Association (IMA), who had proposed a series of amendments to Dirksen, helped draft the legislative language for the amendment to substitute a private right of action for agency enforcement. In defense of business interests, the IMA, whose top leadership included executives from Caterpillar Tractor, Morton Salt Company, Standard Oil of Indiana, and U.S. Steel, developed an impressive legislative machine. Beginning in 1945, the IMA defeated Illinois's fair employment practices bills by tracking them at every turn, thoroughly educating members on political action, and then pressing them to contact legislators.¹⁶¹ When their opposition finally gave way to social progress with the 1963 Illinois FEPC, the IMA turned its attention to the national civil rights debate. In its own estimation, it accomplished its mission of securing an enforcement regime as favorable to business as possible. As Alex Gourse reports, "[a]fter President Lyndon Johnson signed the Civil Rights Act into law on July 2, 1964, IMA vice president James L. Donnelly reassured member firms that 'most of the major amendments suggested by the IMA were eventually incorporated into law.'"¹⁶²

D. *The Leadership Compromise*

Throughout April and early May of 1964, Dirksen and his key staff members, nicknamed the "Dirksen Bombers," held meetings with key proponents of the bill, including Senate Majority Leader Mansfield, floor manager Hubert Humphrey, and Attorneys General Nicholas Katzenbach and Robert Kennedy. Their proposed private enforcement model was no surprise. Administration officials had suggested as early as July 1963 that they might need to cave on agency enforcement in order to preserve protections against

159. WHALEN & WHALEN, *supra* note 94, at 161; *see also* Anthony Lewis, *Job Proviso Held Key to Rights Bill*, N.Y. TIMES, Apr. 13, 1964 ("[T]hese two changes would effectively make Title VII a voluntary affair, without the force of meaningful law.").

160. John G. Stewart, *Tactics I*, in THE CIVIL RIGHTS ACT OF 1964, *supra* note 38, at 249.

161. CHEN, *supra* note 52, at 134.

162. Gourse, *supra* note 138, at 199–200.

discrimination in public accommodation.¹⁶³ This assessment proved prescient. After extensive negotiations, the leadership arrived at a compromise whereby Dirksen would abandon his opposition to Title II in exchange for a weakened Title VII.

Dirksen's private enforcement model won the day. Enforcement power would be placed in the hands of the complaining party, who could bring a private lawsuit in United States District Courts. The government would have the authority to file suits only where an employer was engaged in a "pattern or practice" of discrimination. But even in these cases, the EEOC would not have independent enforcement powers; suits would instead have to be brought by the Department of Justice. This was significant, as "the Justice Department was a relatively small, elite cabinet agency . . . and so prided itself on enforcement through key case selection rather than through massive litigation . . . pos[ing] a smaller threat of potential harassment to employers than would a new mission agency like the EEOC"¹⁶⁴

Importantly, however, the Democratic leadership succeeded in securing a fee-shifting provision, allowing a court to waive a plaintiff's filing fees and to award prevailing plaintiffs their reasonable attorneys' fees from the defendant. The availability of fee-shifting was crucial to addressing the concern that plaintiffs would not be able to bring private suits, especially in situations where the case was time consuming or the expected monetary award was small.

On June 10, 1964, the Senate reached cloture and ended the southern filibuster, and on June 19, 1964, one year to the date of the bill's referral to the House and the 99th anniversary of the first Juneteenth, the Senate passed the bill. Proponents of the bill, having succeeded in the Senate, maneuvered to bypass a conference committee review of the bill. Differences between the House and Senate versions of legislation are typically hammered out at conference committee comprised of legislators from each house. The proponents of the bill were concerned about the involvement of Senator Eastland, the Mississippi Democratic Chair of the Senate Judiciary Committee. Thus, the proponents sent a message to the House requesting it to concur with the Senate's changes to the House bill.¹⁶⁵ While it is extremely unusual for one chamber to accept *carte blanche* significant changes to a major piece of legislation without conferring, House bill supporters understood the risk of contesting the Senate revisions to the bill. The House

163. *Washington Wire*, WALL ST. J., July 12, 1963, at 1; see also *Civil Rights Bill Will By Rules Committee*, WALL ST. J., Jan. 24, 1964 (discussing theorizing by Democrats that "the equal-hiring provision may provide a handy sacrifice to preserve the public accommodations section").

164. GRAHAM, *supra* note 31, at 146.

165. Stewart, *Tactics II*, in THE CIVIL RIGHTS ACT OF 1964, *supra* note 38, at 314.

voted to approve the Senate's version of the bill by a vote of 289 to 126.¹⁶⁶ Thus, Title VII's private right of action was born.

CONCLUSION: IS SENATOR DIRKSEN TURNING IN HIS GRAVE?

Why did Everett Dirksen and pro-business Congressional Republicans advocate for a private right of action? While they may have had a natural inclination toward market solutions over government action,¹⁶⁷ the historical record strongly supports the view that they were mostly trying to constrain and dilute the overall impact of employment discrimination enforcement on American business interests. They preferred the private right of action because the prevailing wisdom at the time was that the private right of action was unlikely to work.

The historical record provides compelling evidence that the adoption of the private right of action was motivated primarily by a desire for under-enforcement and not by concerns with institutional control over enforcement. Significantly, Dirksen negotiated for a variety of other changes to the House version of the bill, irrelevant to institutional control over enforcement, but obviously calculated to limit enforcement. For instance, Dirksen's substitute for H.R. 7152 removed the authority for outside groups, like the NAACP, to sue on behalf of aggrieved workers. Allowing outside groups to mount challenges on behalf of claimants would limit the number and sophistication of claims leveled against businesses. The all too obvious motivation for this provision—to blunt enforcement—is the same rationale motivating the turn to private enforcement.

Further, Dirksen's compromise bill required claimants to exhaust administrative remedies with states' fair employment practices offices before filing suit.¹⁶⁸ If Dirksen's objection to agency enforcement stemmed from a principled objection to government entanglement in individuals' lives, he would have objected to complicating Title VII enforcement by involving state agencies. The best explanation for its adoption is, again, the cynical one: requiring workers to exhaust state administrative remedies would exacerbate the effort required to bring suit and thus limit businesses' exposure to employment discrimination litigation.

By contrast, in 1964 it was reasonable for Dirksen to fear that a strong administrative agency, modeled on the NLRB, could be expected to vigorously attack businesses engaged in discrimination. Similarly, on judicial attitudes toward employment discrimination legislation, Alex Gourse cites former Illinois Supreme Court justice Floyd Thompson, who "testified before

166. Rodriguez & Weingast, *supra* note 122, at 1474.

167. FARHANG, *supra* note 40.

168. Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(b), 78 Stat. 241, 259-60 (as enacted July 2, 1964).

the House Executive Committee that the bill entailed ‘a restriction of civil rights and a slander against the American employer.’” He also argued that the FEPC put at risk the “freedom of the individual to conduct business under the American competitive system.”¹⁶⁹

The day after the private right of action was substituted for agency prosecution, Anthony Lewis commented that the enforcement of Title VII had become “voluntary.”¹⁷⁰ Neither Lewis nor Dirksen (nor anyone else commenting at the time) could foresee the development of a large, well-funded private bar committed to enforcing Title VII through the private right of action.

Given the weakening of the EEOC and NLRB under Reagan and subsequent conservative presidents, which is likely to happen again under Trump, the business interests who favored a weak Title VII would ironically have been far better off with a strong agency enforcement system, and a limited or non-existent right to bring a private action. Thanks to the Dirksen compromise, employment discrimination cases are the second largest category of litigation in the federal courts, second only to petitions by prisoners.¹⁷¹ Everett Dirksen set out to sabotage enforcement of Title VII through the private right of action, but he failed. If he is not turning in his grave, perhaps he should be. And again, from those of us committed to the enforcement of civil rights, we’re still here, and we’re not going away.

169. Gourse, *supra* note 138, at 194.

170. See Lewis, *supra* note 159 (“[T]hese two changes would effectively make Title VII a voluntary affair, without the force of meaningful law.”); see also Anthony Lewis, *Case Cautions Against Moves to Dilute Rights Bill*, N.Y. TIMES, Apr. 20, 1964.

171. FARHANG, *supra* note 40, at 3.

