

1. THE INSTITUTIONALIZATION OF THE CIVIL RIGHTS REVOLUTION

Of the grand civil rights coalition and movement of the sixties, there are many questions still to be asked. Some people want to know what happened to it; others want to know whether it can be revived; still others are curious about its death and decline. A few are concerned about its impact. And some would raise the question, looking at the current plight of black people, if the movement occurred at all.

There are numerous answers. For instance, a lieutenant of the Reverend Martin Luther King, Jr., the Reverend Wyatt T. Walker, saw the apex of the movement in 1963. Social activist Bayard Rustin saw the transformation of the movement from protest to politics in 1964.¹ Some analysts date the demise of the movement, and therefore of the coalition that gave impetus to the movement, with the rise of the "Black Power" slogan in 1966, while others view it as the response to white backlash and consider the riots and burnings of 1968 as its death knell. Still others blame the Vietnam War, the death of black leaders (especially King and Malcolm X), and the election of Richard Nixon to the presidency in 1968 for the disruption of the movement and collapse of the coalition. A few would credit the political appeal and rhetoric of George Wallace

and his American Independent party as the lethal weapon. And so the argument about the coalition and the movement continues. Despite the wide array of opinions, the fact remains: the coalition and its movement did exist, and they did shape public policy in American society.²

*Whither the Civil Rights Movement:
The Coming of the Civil Rights Regulatory Agencies*

The civil rights movement has, to some extent, been institutionalized in America. It has become, along with some of its goals, *legitimate* and *acceptable*. As civil rights became a policy concern of the government, the government itself sanctioned the need to struggle for this cause. It agreed to place part of its power and authority and financial resources behind the quest for and the establishment of these rights and concerns. In short, the government came to support civil rights, at least in part. But as recent events and shifts in governmental policies have shown, the achievements of the movement can also become de-institutionalized. We are presently in an era where a sitting President has systematically attempted to de-institutionalize the gains made by this movement in the early 1960s. The government can drop its concern for, lessen its authority to and reduce its financial support of, civil rights regulatory efforts. But let's look first at how and why the civil rights movement became institutionalized in America.

There are two important reasons for this. First, the movement took both a political and moral approach to the resolution of fundamental problems to policy not just a moral one. About this tendency in sociopolitical movements, Pendleton Herring has observed that "when these movements enter national contests they are forced to fight for power rather than for principles . . . If they refrain they are thrown back upon criticism and theorizing rather than seeking to create through legislation appropriate administrative devices for achieving their ends."³ The civil rights movement never succumbed to the temptation to fight only for principles. Several factions in the movement compromised its moralism by forcing it to enter the political melee and fight not only for a change in the hearts of people but for a change in their behavior, as it is regulated through social legislation.⁴ Even King, the principal spokesman for the movement, would respond to his critics, who argued that the government could not legislate morality, by stating that he was not trying to legislate morality but that human behavior could be regulated.⁵ Stateways could impact folkways.

One should clearly separate the coalition from the movement, if only for analytical purposes. The coalition was composed of a broad array of groups, and its unity was from the outset precarious and very fragile. Segments of the coalition were political. Some of these were groups or factions within the par-

ties; many were elected officials. Not all who were thus involved were black; for example, the late Senators Hubert Humphrey and Everett Dirksen took the moralism of the movement and fashioned it into a legislative reality. The civil rights movement in the streets also became a movement in Congress.⁶ There was also support from the White House. President Lyndon B. Johnson made some of the concerns of the movement concerns of his presidency. Eventually, the judicial branch of government was also led into the struggle behind the legislative and executive branches. This combination of political tactics and moral appeal assured the movement a significant policy impact. However, it should be noted that those forces opposing the civil rights coalition also had a political element—for example, Senators Richard Russell and John Stennis—that fought valiantly to see to it that the legislative desires of the pro-civil rights forces never came to fruition or were only minimally realized.⁷ And as the first coalition had some impact, the second coalition, a counter group, as we shall later see in this work, had some impact on policy as well.

The civil rights movement's dual focus on morality and practicality was only one of the reasons that the civil rights movement became institutionalized. The second reason lies in the range of alternatives open to citizens of a democratic society (though some would argue that it is a nondemocratic society).⁸ The first option can be called a do-nothing alternative. The government could simply ignore the movement, its demands and its leadership. Various sociopolitical movements, including earlier civil rights efforts, have been ignored by the government. Usually this means that the movement is not considered to be *legitimate*, it can be openly attacked by various segments of society, with implicit and indirect governmental assistance. Under pressure from this type of opposition a movement usually runs out of steam, as its grand coalition of support slowly trickles away. American history is filled with the stories of such sociopolitical groups that failed to influence governmental policy. Earlier civil rights attempts are clear-cut examples.⁹

A second option is for the government to fully support the movement. In this instance, the government *legitimizes* the movement, supports its concerns, its leaders and its aims and objectives, even to the point of making the movement a functional part of the government. When the government takes this approach, it can pass laws of the land, put its leadership in governmental roles, or assign specific governmental departments and agencies a function that expresses the group's demands. Or finally, it can create departments and agencies. In the case of the civil rights movement, there are the government-created offices of civil rights compliance within various federal agencies.

A third option is a mixture of the first two, where the government alternates between supporting and opposing a socio-political movement. Many earlier civil rights efforts have suffered such an off-and-on relationship with government, one whereby the government sometimes frustrates the aims of the move-

ment and sometimes supports its aims. The government compels the movement to undergo a cyclical process, alternating between high points of success and low points of defeat. Such instability puts the movement in limbo, for it never knows quite where it is or what kind of support it might get next.

Government has a fourth option, to actively oppose the movement. An apt example is the government's response to radical economic movements that have tried to gain a foothold in American society. These groups have found themselves harassed, intimidated and undone by various federal agencies. Under this type of pressure, a movement usually fades from the social and political scene.

These four options are not static or fixed. The government may shift among them in dealing with any one movement. In short, the four options are malleable, useful according to the realities of the environment and the variables of the moment. The survival of a socio-political movement can depend on how well it responds to shifts among the options.

Robert Tucker has developed a theoretical framework to show why governments eventually institutionalize revolutionary movements. These movements, he indicates, cause instability, internal conflict, stagnation, deadlock and a good deal of distraction and disruption. He writes, "when a radical movement grows large and strong, acquires a big organizational structure, a mass social constituency and a recognized place in society, this very wordly success fosters deradicalization."¹⁰ He continues, "moreover, when society begins to accord a measure of acceptance to a radical movement, this may tend to weaken, if not eventually dissipate the sharp sense of alienation from this world and the commitment to a future order which characterized the movement in its earlier phases."¹¹

Arthur Schlesinger reveals that American democratic society has absorbed many socio-political movements. "Every great period of social change in American history," he notes, "has been set off by the demand of some excluded but aggressive group for larger participation in the national democracy; in the age of Jackson by the frontier farmer, the city worker, the small entrepreneur; in the Progressive era by the by-passed old upper classes of the cities; in the New Deal by labor in mass production industries, the unemployed and the intellectuals."¹² In the last two decades such groups have included women, consumers, pacifists, environmentalists and young people in addition to blacks and their supporters in the civil rights revolution. Some have had an impact on public policy, some have become institutionalized and some have simply been co-opted.

The civil rights movement was institutionalized with Titles VI and VII of the 1964 Civil Rights Act.¹³ Title VI of the act set up provisions for the enforcement of nondiscrimination in federal financial assistance programs, and Title VII provided for the enforcement and prohibition of discrimination in employment. Title VI and the civil rights compliance agencies that have

emerged as a result of that act are the foci of this work. Title VI of the 1964 Civil Rights Act created the basis for a new group of federal regulatory agencies. This work will explore the nature and scope of these agencies in light of historical realities and political conditions which have changed over time. Put differently, one of the achievements of black protest and electoral politics have been not only civil rights (or anti-discrimination) laws but administrative agencies which could regulate behavior that violated these laws. It is *now* crucial that a comprehensive assessment and evaluation of these regulatory agencies be made.

The Civil Rights Regulatory Agencies: A Brief History

There are precedents for these sort of governmental regulatory agencies. First came the well-known federal regulatory agencies, especially the essentially economic ones.¹⁴ A second group grew out of the brief and limited attempts by the federal government to create civil rights employment regulatory agencies.

The economic regulatory agencies grew out of the Populist movement, the Progressive movement and the New Deal. Such agencies as the Securities and Exchange Commission (SEC), the Federal Power Commission (FPC), the Federal Trade Commission (FTC), the Interstate Commerce Commission (ICC), and the Federal Communications Commission (FCC) were regulatory agencies created to oversee and control economic monopolies and natural resources and to manage access to and use of limited national holdings. Regulations were aimed at corporations, conglomerates, and private partnerships to protect the public from exploitation and manipulation. A furor attended the coming of these regulatory agencies; they were rarely accepted by those forces they were intended to regulate. Legislative and political fights are still waged over the scope of authority held by these agencies, even though they are many decades old.

An example of such furor is that which attended the creation recently of a new agency, the Environmental Protection Agency (EPA). The establishment of this agency was fought by business, labor, farmers, politicians, newspapers, and many others. The EPA came into being despite their opposition and continues to struggle in the face of opposition. The EPA survived, but a proposed consumer protection agency never quite made it. Congress never passed a bill to set one up; the opposition to it proving to be too much.

The point is that regulatory agencies never have smooth histories. They face, at times, stiff and formidable opposition. They suffer setbacks, defeat, and sometimes even death at the hands of their opponents.

Whether one is examining the old or new regulatory agencies, all of these

agencies eventually emerged out of congressional legislative mandates. This is certainly not true with the *initial* attempts to create civil rights regulatory agencies. The control of *key* congressional chairs by Southern congressmen made it all but impossible at least until the sixties, to try to establish civil rights regulatory agencies via congressional legislative mandates. A former congressman writes: "In 1963-64, 24 southern committee chairmen could be arranged against" a civil rights bill.¹⁵ In addition to this institutional power, congressional opponents of civil rights laws had such legislative weapons as the Senate filibuster, the right to offer amendments that could severely weaken the bills, and the well-known tactic of compromise that could remove or dilute sections of a bill that proved to be too strong or unacceptable. Finally, southerner's had the legacy of a weak legislative history of civil rights bills. No strong civil rights bill had ever made it through Congress and particularly the Senate. Here the famous southern filibuster prevailed. Not even Cloture or Rule 22, a device to limit debate, had ever succeeded or prevailed against the great southern weapons used to halt legislation that would mandate a civil rights regulatory agency. "Tried 11 times on civil rights bills, it had failed 11 times."¹⁶ Therefore the road to establish civil rights regulatory agencies had to take other, and often circuitous, routes. Let's look briefly at such efforts.

The Civil Rights Section in the Justice Department: 1939

The first efforts to create a civil rights regulatory agency came from the federal bureaucracy, the Justice Department, while the second one came from the efforts of the president, Franklin D. Roosevelt. Thus, the federal bureaucracy and the chief executive moved before Congress on this matter. Of the Justice Department's effort, Robert Carr, who first recorded that effort, writes: "In 1939 the federal government was jolted out of its cautious tradition when Attorney General Frank Murphy issued his order erecting a civil liberties unit in the Department of Justice." The "Order of the Attorney General, No. 3204; February 3, 1939" reads as follows:¹⁷

Effective this date (February 3, 1939) there is established within the Criminal Division of the Department of Justice a unit to be known as the Civil Liberties Unit.

The function and purpose of this unit will be to make a study of the provisions of the Constitution of the United States and Acts of Congress relating to civil rights with reference to present conditions, to make appropriate recommendations in respect thereto, and to direct,

supervise and conduct prosecutions of violations of the provisions of the Constitution or Act of Congress guaranteeing civil rights to individuals.¹⁸

However, "in June, 1941 when Victor Rotnem became chief of the unit, he asked that the name be changed to 'Civil Rights Section'."¹⁹ This title was used until the section was upgraded to a division by the 1957 Civil Rights Bill.

The creation of this bureaucratic unit was done singlehandedly by Attorney General Frank Murphy, because of his special concern for this matter, his public record, and his commitment to civil liberties. Carr, who interviewed Murphy, writes: "He created the Civil Liberties Unit as a warning that the might of the United States government was on the side of oppressed people in protecting their civil liberties."²⁰ Moreover, he was well aware of what happened to Americans' civil liberties before, during, and after World War I.²¹

In this instance then, "Establishment of the unit was solely an act of administrative discretion. . . ." Funds for its operation were made available from the amounts already appropriated for use by the criminal division of the Justice Department and "if the creation of the unit didn't result in the setting up of new or elaborate machinery, it did provide an important impetus to the federal government's civil rights program."²²

Although the creation and establishment of this bureaucratic regulatory device was relatively easy, giving it a firm legal basis and techniques for carrying out its program was not. Understanding that it couldn't get enabling legislation and greater powers from Congress, "the Civil Rights Section had to start almost from scratch in devising administrative techniques and procedures," as well as the legal justification and constitutional foundations on which to regulate racially discriminatory behavior.²³

Murphy, as described by Carr, felt that government had both a duty and a role to protect civil liberties in a democratic society. And that this protection had to be both a shield and a sword.

The shield, then, is a negative safeguard. It enables a person whose freedom is endangered to invoke the Constitution by requesting a federal court to invalidate the state action that is endangering his rights. The sword is a positive weapon wielded by the federal government, which takes the initiative in protecting helpless individuals by bringing criminal charges against persons who are encroaching upon their rights.²⁴

Therefore, to provide this new bureaucratic regulatory unit with a legal basis for action, two departmental attorneys prepared a detailed circular setting forth the

constitutional foundations upon which a federal sword could be wielded. Since the Bill of Rights at this time could not “serve as a basis for a program of positive governmental action directed toward the protection of civil liberties,” such a federal program of safeguarding civil rights had to rest on the Civil War amendments (13th, 14th, and 15th) and those provisions of the Civil Rights Acts passed by Congress during Reconstruction which had not been invalidated by subsequent Supreme Court decisions.

These three amendments, which grant freedom, citizenship, and the right to vote were later buttressed by seven different pieces of congressional legislation. Robert Carr goes on to say:

These acts admittedly were motivated by a general concern on the part of Congress for the newly freed Negro, and by a specific desire to safeguard his rights. But, without exception, no mention is made of the Negro as such. Instead the wording is sufficiently broad to cover the rights of all citizens, if not all inhabitants or persons.²⁵

Therefore, after clarifying its constitutional foundations, the authors of the circular went on to clarify the statutory legal bases for the new unit. Here, the attorneys went to the *United States Codes*, “Section 44 of the same title,” and used these criminal sanctions to develop a federal civil rights regulatory protection device. With these legal bases—one resting in the constitution and the other in statutory criminal law—the new unit moved to regulate discriminatory behavior.

Overall, “the task which confronted the CRS—(Civil Rights Section) was a unique one. It was expected to build a program to safeguard civil liberty throughout America, by using certain fugitive and largely moribund statutory provisions, all nearly seventy-five years old.”²⁶ Thus, with such a shaky legal foundation, this regulatory unit of the Justice Department began a cautious and experimental program. It remained “a small agency with limited powers and resources of its own.” For instance, “CRS had no field officers of its own to report civil rights violations to the Washington office” and it had to rely on FBI agents in their local field offices to pass complaints on to it.²⁷ Needless to say, many southern offices were reluctant to do so. But even with this cumbersome complaint procedure the unit had 8,612 complaints in 1942, 13,490 in 1943, and 30,000 by 1944. But the resolution of these complaints was not only slow and cumbersome, but the successful prosecution of cases was at best only minimal. Not only did it not find much support in the Federal Courts, but Congress ignored this unit. Thus, this first bureauratic initiative to sidestep Congress and devise a civil rights regulatory unit that would have sword-like powers saw at best only marginal success. Yet it did set the stage for the executive branch of government to act in this policy area.

The Executive-Created Civil Rights Regulatory Agencies

Civil rights regulatory agencies created by presidential order are rooted in the efforts of President Franklin D. Roosevelt. Much of this initiative can be directly linked to President Roosevelt's Executive Order 8802, issued on June 25, 1941, when blacks under the leadership of A. Philip Randolph, president of the Brotherhood of Sleeping Car Porters, threatened to march on Washington, D.C. Roosevelt's order banned "social and religious discrimination in defense industries and government training programs."²⁸ On July 19, 1941, less than a month after the order was issued, the President selected the five unsalaried members of the Committee on Fair Employment Practice, or the FEPC as it was popularly known, and put it under the Office of Production Management. It was later transferred to the War Manpower Commission. However, on May 27, 1943, by Executive Order 9346, the FEPC was reconstituted, enlarged from five to seven members, and established as an independent regulatory agency in the Executive Office of the President.²⁹

In its new form, the "FEPC was given power to receive and investigate complaints of discrimination prohibited by the executive order, to conduct hearings, make findings of fact, "and to take appropriate steps" to eliminate discrimination."³⁰ But this forerunner of the current civil rights regulatory agencies had very limited success, to say the least.³¹ Robert Brisbane writes: "The greatest weakness of the FEPC was its total lack of power to enforce its orders. The powers to subpoena witnesses and records, to compel testimony and to enforce directive through the courts or the Attorney General" did not exist. He continues: "But, like all other bodies which originated from the war powers of the Chief Executive, the FEPC had to refer noncompliance cases to the President for his disposition. He could order governmental seizure and operation of the plant involved."³² President Roosevelt chose not to do this, and when Congress refused to make the FEPC a permanent agency of the government in 1947, it ceased to exist.

During the Truman administration this agency was revived with a new name, the Committee on Government Contract Compliance, but it had no significant power. When President Eisenhower came into office in 1953, he issued a new executive order that created the Committee on Government Contracts and made the Vice-President its chairman. The Committee was authorized to receive complaints against government contractors and was required to "send such complaints to the federal agency holding the contract with directions to investigate the charges and take appropriate action to eliminate any discrimination found to exist."

By 1955 Eisenhower set up the Committee on Government Employment

Policy “to supervise the nondiscrimination program within the federal establishment.”³³ This committee was created to review the employment practices of the departments and agencies of the federal government and to determine if such practices had been nondiscriminatory.³⁴ This new committee, created in 1948 by another executive order, replaced the Fair Employment Board created by President Truman in the Civil Service Commission.³⁵ But this new board, like its predecessors, had very little power to impact the entire system. What Eisenhower had done was to create a second toothless administrative structure.

On March 5, 1961, shortly after he took office, President Kennedy issued Executive Order 10925, which combined these two committees and their functions into a single new one called the Committee on Equal Employment Opportunity.³⁶ His executive order not only designated the vice-president as chairman and the secretary of labor as vice-chairman but it went on to spell out in great detail the expanded duties and enlarged powers of the new body.

Three years later Title VII of the Civil Rights Act of 1964, would create a legislative agency, the Equal Employment Opportunity Commission (EEOC), with five members, each having five years’ tenure with one member selected as chairperson by the president and another member as vice chairman. This title empowered the Commission to eliminate, through certain devices, discrimination in employment because of race, color, religion, sex, or national origin. Yet this new commission, created by legislative initiative like its counterpart created by the executive branch, met with only limited success. Therefore, Congress subsequently amended Title VII of “the 1964 Civil Rights Act with the addition of the Equal Employment Opportunity Act of 1972, banning all employment discrimination within the Federal employment sector. The Civil Service Commission (CSC) was given the authority to enforce the promises of this act.” In 1976 a new president considered a new approach to the matter.³⁷

In February, 1977, “within three weeks of taking office, President Carter noted that there were a number of agencies responsible for implementing equal employment opportunity requirements and stated that it was his goal to move toward consolidation of these functions.” He subsequently created a “Civil Rights Reorganization Task Force within the Office of Management and Budget.”³⁸ And, although he did not establish one civil rights office, his task group did help him shift all contract compliance functions from all the other agencies into one location, the Office of Federal Contract Compliance Programs in the Department of Labor. Additionally, the EEOC got a new, vigorous chairman who promised swift action.

In sum, there have been numerous attempts by the executive branch and one by the legislative branch of the federal government to create civil rights regulatory agencies. All of them, however, have had only limited success. However, their emergence did have some impact, for they fostered the formation of counterparts on the local and state levels.

Efforts by the States

After World War II several northern and western states created civil rights agencies based on the FEPC model. "Prior to 1945, thirteen states had statutes prohibiting discrimination in various fields of employment, although no state had a fair employment practice law."³⁹ Then, on March 12, 1945, "Governor Thomas E. Dewey signed into law the first state fair employment practice statute enacted in the United States. It became effective on July 1, 1945."⁴⁰ The law created a state commission of five salaried members. This body was empowered to "eliminate and prevent discrimination in employment because of race, creed, color, or national origin by the employers, labor unions, and employment agencies" through persuasion or a cease and desist order which could be enforced by a court decree. Violation, willful resistance, and refusal were treated as a contempt of court matter and the fines were five hundred dollars and/or a year in jail.

By 1960 the number of states with FEPC laws stood at seventeen, while the number of municipal or local governments with such ordinances stood at forty. Local governments in California, Michigan, Minnesota, Ohio, and Pennsylvania had passed local fair employment ordinances before the legislatures acted to outlaw discrimination in employment on a statewide basis."⁴¹ In July 1966, the number of states with such laws stood at thirty-three; of that number, twenty-eight, or more than half, had commissions. Only one state, Nevada, has a statute that gives enforcement powers but establishes no commission. Despite their numbers, these state and local commissions have proven to be of extremely limited power and effectiveness, much like their national counterpart.

One observer, Herbert Hill, labor secretary for the National Association for the Advancement of Colored People (NAACP), has been even more critical. "Given the significant developments in the American economy during the last twenty years together with the current status of the Negro wage-earners in the states with FEPC laws, we must conclude on the basis of the evidence that State FEPC laws have failed. They have failed because their potential was in fact never realized."⁴²

Two academics looking at the same laws made a slightly different evaluation. They wrote, "in states and cities having established and enforceable laws, racial discrimination in employment is considerably less prevalent today than it was prior to the enactment of the laws."⁴³ Yet, the most recent analysis of these laws and commissions, that by Duane Lockard, agreed with Herbert Hill's; Lockard noted that "there are reasons beyond discrimination in hiring that account for job inequality. But, even by a less exacting standard of achievement it seems fair to say that the experience with FEPC has been a failure to meet its potential."⁴⁴ It is Lockard's opinion that these failures stem from a "predominant concern with individual cases, the failure to pursue contract compliance proce-

ture, the bureaucratic slowness of many agencies, the failure to establish real contact with the Negro slum dweller and other shortcomings.”⁴⁵

Despite the problems with the state and local civil rights agencies and the failure of the first one established by the executive branch of the national government, the executive branch which was quite conscious of these weaknesses and the budding civil rights movement, attempted to move in that direction again in 1957.

On September 1, 1957, Congress created the Commission on Civil Rights. President Dwight D. Eisenhower had requested such in his State of the Union Message on January 10, 1957. Martin Luther King, Jr., had led his first march on Washington (called the Prayer Pilgrimage) on May 17, 1957. Needless to say, southern congressmen in both houses vigorously fought the bill and succeeded in severely restricting the power of the commission. Bernard Schwartz writes, “As finally passed, the 1957 statute scarcely deserved the title of Civil Rights Act.” Opponents, he said, were right to be “jubilant,” for they “well knew” that they had “a mild measure” with “little substance.”⁴⁶ Senator Richard Russell, the leader of the southern bloc that reduced the power of the commission, called his effort “the sweetest victory of my 25 years as a Senator.”⁴⁷ This new attempt to fashion a civil rights regulatory agency ended up creating a fact-finding agency composed of six commissioners and a staff that would submit its report to Congress and the president “not later than the last day of the fiscal year 1958” and within sixty days after that would cease to exist.⁴⁸

Eventually, the life of this commission was extended. President Eisenhower, in a special message to Congress on January 5, 1959, made the request: “I recommended legislation to extend the life of the Civil Rights Commission for an additional 2 years . . . because of the delay in getting the Commission appointed and staffed, and additional 2 years that should be provided for the completion of its task and the making of its final report.”⁴⁹ Because the Senate Judiciary Committee was under the control of southern opponents of civil rights legislation, nothing was done in the Senate to pass this new bill and extend the life of the commission. Therefore, a rider that would extend the life of the Commission two more years was added to the foreign aid bill that was passed in September 1959.⁵⁰

Although the commission was saved for a while longer, the attempt to enlarge its power and scope failed. “Proponents of civil rights legislation” in both houses of Congress “failed in their efforts to add strengthening amendments, notably one providing for a voting registrar” plan through federal enrollment officers and one adding the third part of the original 1957 Civil Rights Act.⁵¹ The southern filibuster which made the addition of these elements impossible did relent in its opposition once the bill was severely weakened. The president signed the legislation into law on May 6, 1960. The Civil Rights Commission at this time was limited to fact-finding about voting rights or

discrimination, although it could explore other areas.

The new Civil Rights Act signed into law on July 2, 1964, contained eleven titles. Title V extended the life of the commission for four years, broadened its scope, and increased its powers. The first historian of the commission, Foster Rhea Dulles, notes: "The section dealing with the Civil Rights Commission did not break very much new ground. It established certain new requirements in respect to the conduct of hearings . . . broadened existing functions with authority to serve as a national clearing house for Civil Rights and to investigate voting practices as well as denial of the right to vote."⁵²

This new law gave the members of the commission a boost in morale, as they gained confidence and a sense of a new direction. But there were problems. Although the new law gave the agency certain additional functions, its scope was far from clear.⁵³ The commission had to seek a new focus. In Father Hesburgh's view (Theodore Hesburgh, both at this writing and then, was president of the University of Notre Dame), its old fact-finding function had been enlarged. The commission held a lengthy session to explore and define its new role and future orientation.⁵⁴

However, even under the new law, this quasi-regulatory agency continued to have difficulty carrying out its functions. Donald Strong has shown that the commission had great difficulty in simply getting cooperation to get the facts. At a January 1959, public hearing in Montgomery, Alabama, held by the commission, "Attorney General Patterson (then governor-elect) made every effort to frustrate the Commission's activities. On his own advice, the Macon County registrars took refuge in the Fifth Amendment and refused to testify or produce any records."⁵⁵ Even when the commissioner, a former governor of Virginia, pleaded with them to be more cooperative, they refused to give even rudimentary facts.

The Commission on Civil Rights never had the power to become a true regulatory agency. At best, all it could do was gather facts and report behavior that violated the constitutional principles of the nation with regard to human equality and equal rights. Such action can have impact, but exactly how much it can reshape and refocus behavior is not determinable. The best that a fact-finding body can hope to achieve is to plant the seed for stronger action and policy initiatives in the future. In fact, the commission is a future-oriented enterprise.

Prior to 1964, the history of civil rights regulatory agencies in America was short, nebulous, and evolutionary. Two experiments had been tried on the national level; they set into motion carbon copies of themselves at the state and local levels. Efforts at all these levels were weak.

The first experiment, the FEPC, was created by the executive branch of government during the early years of World War II. It was reorganized by each succeeding president. The second experiment, the Commission on Civil Rights, had been created by the legislative branch. All attempts to give it pow-

ers beyond fact-finding ended in failure, but the commission itself continued to exist. Despite these failures, a modest beginning was made between 1939 and 1964 to create civil rights regulatory bodies. These early efforts would see new life with the passage of the 1964 Civil Rights Act.

*The Administrative Impact of Titles VI and VII
of the 1964 Civil Rights Act*

Titles VI and VII of the 1964 Civil Rights Act set into motion two new attempts at regulating racially discriminatory behavior. Specifically, Title VII created the Equal Employment Opportunity Commission (EEOC) and in so doing brought to culmination the FEPC and related attempts by several presidents to bring about equality of job opportunity for all Americans through the use of executive orders. Much has been written about the EEOC and its role in trying to get compliance in the employment field.⁵⁶

Title VI, on the other hand, did not specifically mandate a compliance agency, but it made provision for quite a few. Little has been written about the numerous civil rights regulatory agencies that have come into existence as a result of Title VI. Few analyses have been made of their activities, and no effort has been made to put them into perspective, judging their performance in the light of work by past and current agencies or to assess what their role might be in the future.

Title VI is based on one of the powers vested in Congress by Article I, Section 8, i.e., the power to tax in order to provide for the general welfare. The power to tax, it has long been settled, includes not only the power to spend but also, just as significantly, the power to lay down the conditions upon which federal funds are to be dispensed. In this title, Congress used these powers to mandate that "no person in the United States shall, on the ground of race, color, or national origin . . . be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance" (Section 601). Section 602 of the title asserts that "Each federal department and Agency which is empowered to extend federal financial assistance to any program or activity by way of grant, loan or contract . . . is authorized and directed to effectuate the provision of Section 601 with respect to such programs or activity by issuing rules, regulations, or orders of general applicability."⁵⁷

If Section 602 makes possible the creation of compliance components in all the federal departments and agencies, then that same section provides them with the authority to deal with discrimination when they find it. Discrimination or noncompliance can be dealt with by: (1) "the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express trial on record . . ." and by (2) "any other

means authorized by Law.”⁵⁸ Over the years, the phrase “any other means authorized by law” has meant the use of judicial enforcement procedures.

Title VI is not without its limitations, however. The Commission on Civil Rights itself declares straightforwardly: “Title VI does not cover all forms of federal financial assistance.” In most cases it does not cover direct assistance extended by the federal government or contracts of insurance guaranty. Moreover, its application to employment discrimination is limited and it does not prohibit sex discrimination.⁵⁹ The areas that Title VI does cover are immense and pervasive. As the Civil Rights Commission points out, “Federal financial assistance extends into every area of . . . national life.” Such assistance has “helped to build hospitals and private health care, to construct airports and highways, to revitalize urban areas and aid in . . . orderly growth, to provide housing, to improve education and recreation facilities and to assist economically disadvantaged individuals and communities.”⁶⁰ Occasionally this same federal financial assistance has, in addition, provided for the surviving spouses of war veterans and foster care for children.

In short, “federal financial assistance covered by Title VI is extended through more than 400 programs totaling an estimated \$50 billion annually. These programs are administered by approximately 25 agencies,” which are themselves responsible for enforcing Title VI. Thus, this title, simply because of the vast number of programs that it covers, has the power to cut off or withhold vast funds. It certainly has a major potential to create and set into motion a different type of regulatory agency in the area of American civil rights policy.

The Civil Rights Regulatory Agencies: A New Approach

The initial effort to create a civil rights regulatory agency, as the previous discussion indicates, came from *one* agency in the federal bureaucracy. The second effort came from various chief executives, beginning with Franklin D. Roosevelt in 1941. Congress was finally prodded into action in 1957 and 1960, but both efforts were negated and compromised by the formidable opposition of Southern congressmen.

Therefore, in 1964, Congress tried a third time and on this occasion overcame the solid and stiff opposition of the Southern congressmen and passed legislation that would allow for the creation of the most unique and comprehensive civil rights regulatory agencies to evolve to date in this society. And to accomplish this reality it had taken the federal government a quarter of a century—1939-1964.

Commenting on this problem of elapsed time, Duane Lockard writes: “Where there is a dominate majority race, the white majority gives in, if it does

at all, at its own pace and in its own manner . . . Furthermore, where the dominate majority race is being pushed to act, there is a tendency for the resisters to convert actual liberating policies into symbolic gestures, appearing to act staving off change by only pretending to change or inserting into programs reservations that undercut operational measures.”⁶¹ Lockard’s remarks about the time lag situation are quite clear, whether his remarks about efforts to “undercut operational measures”—have any validity will be examined in detail in the forthcoming chapters.

At this point in the discussion, it is necessary to describe the nature and scope of these new civil rights regulatory agencies. In this work, such an agency is defined as an organization on the federal, state, or local level that uses the law and provisions or techniques provided by the law *to regulate or to promote human relations in such a way that the conflicts and tensions between different social groups will be ameliorated, their causes removed, and positive action taken to relieve unjust conditions and to eliminate unjust actions affecting members of one or more groups.*⁶² These organizations were made possible by Title VI of the 1964 Civil Rights Acts and have come to be known federally as offices of civil rights compliance. They are new structures in the federal bureaucracy. Unlike the old regulatory agencies that tried to oversee and control economic monopolies and national resources, they are aimed at the protection of the public by regulating human behavior. In his recent book on regulatory agencies, James Q. Wilson labeled these offices as those concerned with “processes,” agencies “that regulate nonbusiness organizations.”⁶³ Jeremy Rabkin, who wrote an article on the Office of Civil Rights in the Department of Health, Education and Welfare (HEW) for the Wilson book, describes that agency’s regulatory focus as being concerned “with vast social engineering schemes” and setting forth “complex schemes of social regulation.”⁶⁴ Although both men understand that these agencies are new, and quite different from the more traditional agencies, they are rather vague and overly optimistic in their descriptions of them. The very essence of these new agencies is that they have been created to deal with much different realities and forces in the socio-political environment than was the case with regulatory bodies of the past.

The Commission on Civil Rights notes that there were six reasons why Congress created these new regulatory bodies as it did. First, there were numerous ambiguous federal statutes on the books that provided federal financial assistance on a nondiscriminatory bases but that at the same time permitted, through certain provisions, “separate but equal facilities for minorities and non-minorities.” “These separate-but-equal provisions were enacted before the Supreme Court’s decision, in *Brown v. Board of Education*, that separate but equal is inherently unequal, but that decision did not directly invalidate those provisions.”⁶⁵

The second reason was that private individuals had to follow a slow,

costly, and tortuous road in bringing private lawsuits to resolve discrimination that they encountered in their daily lives.

The need for a clarification of duties and functions was the third reason that Congress established these new agencies. Long before 1964 several federal departments and agencies like the post office, labor, and commerce had acted on the assumption that they could cut off funds where segregation or discrimination was found. Other federal agencies did not operate on such an assumption. The new law gave each federal agency and department the same basis for action.⁶⁶

The famous so-called Powell amendment, a nondiscrimination amendment attached by the black congressman from Harlem, Adam Clayton Powell, to nearly every bill that came to the House of Representatives, was the basis for the fourth reason.⁶⁷ Such amendments were time consuming; they led to extensive debates every time there was an attempt to reject the rider. The new law, ironically, resembled the old "gag rule" that forbade the reading of antislavery petitions in the House early in the nineteenth century.

Morality in the commission's view was the fifth reason for the creation of these agencies. Commissioners used President Kennedy's message to Congress on civil rights to illustrate their point. He stated, "Simple justice requires that public funds, to which all tax payers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidise or results in racial discrimination."⁶⁸ Such a position was carefully considered and used in the passage of the law that created the new agencies.⁶⁹

The sixth "and possibly the most important reason" for the new law, argued the commission, was that in the "early 1960s discrimination was pervasive in federally assisted programs," such as those in higher education, medical care, and agricultural assistance. In the South many governmental agencies operating with federal funds retaliated against the black protest movement by refusing them federal assistance, funds, and products.

Overall, then, the commission saw legal, practical, and moral reasons for Congress creating a different type of regulatory agency. Essentially, liberal congressmen supported the passage of the legislation for the same reasons. On the other hand, the southern congressmen who opposed the creation of the new regulatory agencies felt that such action would lead to (1) bureaucratic tyranny by bigoted bureaucrats who would impose foreign social customs in the South; (2) a more powerful federal government—one that could involve itself in nearly every facet of the individual's life; and (3) a more massive and expensive federal bureaucracy. They attempted to defeat the bill, and failing that, to eliminate the sections of the legislation that gave the new agencies significant powers. These were the same strategies they had followed in opposing the FEPC and the Commission on Civil Rights. The bill passed over their vociferous opposition and became the Civil Rights Act of 1964. In failing to amend the bill so as to af-

fect the structure and operation of the new agencies, the southern members of Congress only helped to bring about their worst fears. The structure and regulatory approaches in the new agencies were left up to the bureaucrats themselves.

A key point to be made here is that the legislative struggle over the new regulatory agencies did not concern a definition of their structure and regulatory approaches but, rather, whether these agencies were to exist and whether they were to have any real enforcement powers. This was, to say the least, a very narrow though crucial basis for debate concerning the creation of such pioneering bureaucracies. But the southern congressmen had by and large set the lines of battle. Ironically, southerners in the House of Representatives showed little interest in Titles VI or VII. For instance, when Title VI was called for discussion and debated in the House on Friday, February 7, 1964, only one southerner Oren Harris (D-Ark.) offered an amendment that would (have) drastically weakened the section and removed all provisions for judicial review. It was voted down 80-205.⁷⁰

When Title VII was called by the clerk for debate and discussion, Howard W. Smith (D-VA.) rose and offered an amendment—which would insert the word “sex.” He had hoped that “by adding the word sex to the list of discriminations (race, creed, color, and national origin) prohibited in employment,” the men in the House would vote the title down. It was, however, accepted by a vote of 168-133.⁷¹

In the Senate, the southerners concentrated not on these titles per se, but on either defeating the entire legislation, or on getting a compromise which would give them the right to remove several of the titles they considered most objectionable. If these two tactics failed, a third one was to offer a series of amendments calling for a Trial by Jury for Title XI.⁷² All of these tactics failed. But if there were problems of a lack of unity around tactics among the southerners—there were also some among the civil rights movement.

The civil rights movement had not itself defined exactly what it wanted. Even Martin Luther King, Jr., considered by many to be the chief spokesman for the movement, never specifically called upon Congress to pass legislation creating civil rights regulatory agencies. Scattered throughout his writings are calls for legislation that “would eventually alter peoples’ social habits,” and in his last policy-oriented book he called for a “bill of rights for the disadvantaged.” But he made no specific request for agencies like those which were developed to administer and enforce provisions of Title VI.⁷³ In fact, David Garrow has shown that although King and his associates drafted and sent to President John F. Kennedy a 115-page policy proposal brief called the “Second Emancipation Proclamation,”⁷⁴ the Kennedy administration did not even inform King of its plans to send to Congress a comprehensive Civil Rights Bill.

Garrow writes: "Martin King knew little about the government's decision to propose comprehensive civil rights legislation until Tuesday, June 11, 1963," when President Kennedy went on national television.⁷⁵

When the Johnson administration took over and decided to back the Kennedy sponsored legislation, King had little or no input. Although the administration did summon black civil rights leaders to the White House to keep them informed, the actual drafting and shaping of the legislation took place in the Justice Department with the assistance of several key congressional leaders.⁷⁶ In effect those most responsible for making civil rights a national concern were literally forced to stand on the side lines in the *policy formulation* stage and could do little more than criticize in the *policy adopting* stage. At this stage of the policy process, when southern Senators threatened to weaken the legislation, King declared: "I would rather see no bill at all than a bill devoid of these sections" (i.e. public accommodations and fair employment title).⁷⁷ To stop the Senate from eliminating these titles, King promised a "Massive Freedom Army" operating during the summer of 1964 in Alabama, and in face to face meetings with President Johnson, he asked the president to fight to keep them in the bill. However, even after the 1964 Civil Rights Act was passed, King gave no indication of the directions the Title VI agencies might follow, and there is little on record of attempts by King to get any Title VI agency to deal with racial discrimination. In sum, King appears to have overlooked the *role* of the federal bureaucracy by not giving any attention to the issue of policy implementation. As Lockard has indicated, in this instance the majority race took complete control of both the policy formulation and policy adoption process and shut the minority reformers completely out.

Seemingly then, the idea that federal departments and agencies might withhold federal funds to enforce desegregation began with President Kennedy's request to Congress for discretionary withholding authority. By the spring of 1963 the Commission on Civil Rights would urge President Kennedy to issue an executive order "forbidding federal funds to segregated facilities."⁷⁸ He rejected the request, but by the summer of 1963 "the House Judiciary Committee had transformed President Kennedy's request for *discretionary authority* to a *mandatory enforcement provision*."⁷⁹ Thus, only a small number of congressmen were behind the Title VI fund-termination proposals, and these congressmen, like people in the civil rights movement, were more concerned with the passage of the legislation than with the structure and regulatory processes of the new agencies. In fact, throughout the legislative debates there is little about how the Title VI agencies might resemble the traditional regulatory agencies, nor is there any comment about earlier attempts to fashion such civil rights regulatory agencies along the lines of the FEPC, the state and local human relation agencies, and/or the Commission on Civil Rights.⁸⁰

*The Policy-Oriented Literature on Civil Rights
Regulatory Agencies: Two Trends*

When these new regulatory agencies began to operate, they attracted quite a bit of journalistic and scholarly attention. Shortly after their emergence, the scholarly literature began to reveal a series of impact or compliance studies. These studies analyzed the attitudes of those being regulated and usually contrasted the attitudes of those who complied with the new law *with those* who did not comply. Scholars working in this area have typically sought to identify the demographic correlates of those communities where compliance took place. The empirical findings of the impact studies generally reveal how well “compliance law” is doing its job at the local level throughout the country. Thus, these impact studies show “how environmental and psychological variables interact to shape” the individual’s and the decision maker’s “compliance behavior.”⁸¹

In part, these studies grew out of the behavioral movement in political science, a primary concern of which was individual motivation. Compliance impact studies do just that, reveal which attitudes are correlated with observed behavior. The second field of scholarship influencing these studies came out of the area of judicial behavior which focuses on U.S. Supreme Court decisions and their impact on society.⁸² Many of these studies date from the late 1950s and the 1960s, following the 1954 *Brown* decision and the various landmark decisions in religion, criminal justice, social welfare, and school desegregation.⁸³ Findings made in the subfield of judicial behavior found their way into the study of the impact of civil rights laws.

For instance, a pioneering study by Frederick Wirt looked at the impact of civil rights laws on one Mississippi county—Panola—to determine the five conditions that made the implementation of the law successful.⁸⁴ Wirt’s book established a standard for rigor and scholarship, setting into motion a host of subsequent studies. Another such study was done by Charles S. Bullock and Harrell R. Rodgers, Jr., which dealt extensively with Title VI and the Office of Civil Rights Compliance in HEW.⁸⁵

Using the work of Wirt as a guide, Rodgers and Bullock conducted an impact study of the behavior of thirty-one Georgia school districts from 1965-66 to 1973-74 to identify “the variables that determine whether the school officials involved would comply with the law” as well as whether individuals would do so.⁸⁶ This study, which included 189 whites and 61 blacks, reviewed its findings in the light of then current compliance impact literature.⁸⁷ Although the authors found that certain attitudes and demographic factors were strongly correlated with compliance, they concluded that “federal enforcement activities” were particularly critical in the desegregation of schools. “The coercion necessary to eliminate dual schools in a community was associated with factors as-

sumed to measure local decision makers' perception of the costs of compliance. In communities in which compliance costs were perceived to be high and rewards low, the most severe coercion was required."⁸⁸ Wirt had found earlier that "in civil rights matters, southerners move very little toward the goal of equality unless under direct federal pressures which threaten specific, injurious sanctions."⁸⁹

The merit of the impact studies lies in what they reveal in specific instances and cases. They show the strong relationship between federal enforcement and compliance behavior. But their weakness stems from the fact that they are case studies and do not provide much insight into other, dissimilar cases. Second, they emphasize a "micro" perspective; i.e. they look at the behavior at the point of impact and do not give much emphasis to the larger enforcement system and process. These studies tend to emphasize the coercive aspect of the federal enforcement system without conveying some understanding as to how the larger system is organized, structured, and operates. Third, by not giving much emphasis to the larger system, these studies foster the notion that the entire enforcement apparatus is working in a proper fashion and thus incorrectly evaluate the enforcement process based only on what they have observed. For instance, at the same time that the Bullock and Rodgers study looked at the impact of HEW's Office of Civil Rights Compliance in Georgia in the area of education and found it to be successful, the General Accounting Office (GAO), civil rights groups, and Congress found that this same office failed to enforce Title VI in regard to health facilities in several parts of Georgia, and other places.⁹⁰ One therefore has to be very careful about accepting generalizations based on the single-case impact studies.

Finally, these impact studies suffered from the same limitation that beset most behavioral studies.⁹¹ By focusing *solely* on individual psychological attitudes, they ignore the enormous role that the government itself can play.

The earlier impact studies have been supplemented by more recent implementation studies, which analyze *how* federal agencies carry out the law at the local and state level. They rely essentially upon government statistics about complaints and government accounts of the ways those complaints are resolved.

Like the earlier impact studies, this new implementation literature takes a single case approach to the data. Yet it differed in that it looked at basically only three areas: voting rights, job discrimination and school desegregation and bus-ing. Although the job discrimination books were not always case site specific, it was essentially true for the other two areas—school desegregation and voting rights. In fact scores of books appeared on school desegregation particularly in the large metropolitan cities, while the works on voting rights looked at the south in general or specific parts of the south where black voter participation was facing grave obstacles. In fact, at one point, these implementation studies

were so skewed towards voting rights, education and school desegregation that it was hard to determine federal government regulating effort in other areas.

To put it bluntly, something of an intellectual and academic logjam had taken place in terms of the focus and emphasis of these implementation studies. Although new studies proliferated and some questionable generalizations emerged in the area of school desegregation, there was little outward movement in the area. Then, Bullock and Charles Lamb started to look at civil rights regulatory agencies from the standpoint of a comprehensive implementation approach. They attempted to generate a *standard* list of crucial variables that would “. . . explain why a policy meets with a greater success at one time or another . . .” And besides the construction of a standard list of variables they broaden the scope by looking at other regulatory agencies. They explored the traditional voting rights, school desegregation and the job discrimination matters but added fair housing and the matter of equal educational opportunities.

The Bullock and Lamb effort was not only new in its approach and conceptualization, it argued that it was possible to compare different areas of civil rights policy and thus to explain variation in patterns of implementation over time. They write: “Such an exercise would go beyond the case study approach which although valuable in identifying potential explanatory variables, is not suited to determining whether the causes of implementation success are broadly applicable or are limited to a unique fact situation.”⁹² Thus, with this work a break began to appear in the intellectual logjam.

Therefore, into this morass of single case studies and a narrow focus on the regulatory areas, i.e. voting rights, job and school desegregation, Bullock and Lamb's volume had tried to forge a new path. But, basically speaking, this direction and path was in the area of implementation. Bullock and Lamb write: “Books, lectures and courses in policy implementation” have now become “a recent phenomenon in political science.” Civil rights regulatory matters got submerged under the concerns with implementation problems and realities. But regulatory activity, civil rights or otherwise, is only partially concerned as we shall see with the realities of policy implementation.

There were other problems with this new volume besides its implementation emphasis. Several scholars looking at implementation in the civil rights regulatory areas had developed their own *standard* list of crucial variables.⁹³ Hence, students of this literature found themselves facing competing lists of explanatory variables about implementation success and without any basic criteria for choice among them. The other problem which is typical of much of the civil rights implementation literature is that it does not sufficiently link implementation performance with the multifaceted capacity or lack thereof, of the bureaucracy to execute the law. Several factors, as the forthcoming chapters will reveal, impact the bureaucracy's capacity to make the law effective. Thus, while bold and daring, the Bullock and Lamb volume had some severe limitations.

But when they are taken collectively, i.e. the single case implementation studies and the broad gauge studies of Bullock and Lamb and Augustus Jones, a key theme emerges for which most of these studies offer significant empirical proof. And this theme is that as one of the many variables shaping the successful outcome of implementation, management is related to implementation performance. And this finding in the civil rights implementation studies is quite similar to the findings in most implementation studies. And perhaps, it was this key finding that has drawn the ire of several critics, most notably among them is Lester Salamon.

Salamon writes: "The new field of implementation research has already become stuck in a rut. Like Antimochus' hedgehog, which knew only one big thing, both students and practitioners of implementation have taken to discovering repeatedly a single, simple truth: that programs cannot work if they are poorly managed."⁹⁴ He continues; "without doubting the critical importance of good management, it seems clear that 'public management' is fast becoming for students of policy implementation what 'political culture' became for students of political development: a kind of universal solvent expected to unravel all mysteries and explain all problems."⁹⁵

These insights then lead Professor Salamon to conclude: "most important . . . while demonstrating that, poor management is associated with poor performance, no one seems to be able to show that the converse is true, giving rise in some quarters to the conclusion that it is not the absence of management, but the presence of government, that is the real explanation of public-program failure." At this point one must hasten to add that this is not the intention of the civil rights implementation literature. Yet many of the current conservatives and neo-conservatives who have read and analyzed these studies and some of the conservatives who are writing these civil rights implementation studies have come to the conclusion that it is the *presence* of government and/or poor management that is responsible for the problem. But it is Duane Lockard's insights that the white majority adds reservations that undercut operational measures which enables one to see these *presence* of government arguments as little more than a smoke screen. Not everything as Salamon reminds us, can be attributed to poor management and the presence of government.

The reason for this narrow vision, argues Salamon, is that " . . . the major shortcomings of current implementation research is that it focuses on the wrong unit of analysis, i.e. the individual programs."...Or even a collection of programs grouped according to major 'purpose'... "The focus, as Salamon sees it, should be on the "techniques of social interventions."

Perhaps the most important part of all, before one looks at how a law is implemented, one needs to see how the designated departments and agencies are themselves prepared internally and organizationally to carry out congressional mandates. *Thus, anterior to the question of implementation is the question of*

whether the responsible parties themselves are prepared to undertake the task of implementation. In sum, there is a stage before implementation that is crucial in shaping the outcomes of implementation.

Given these severe and unresolved conceptual, methodological, analytical and interpretative problems in the impact and implementation literature, any new study and/or reexamination of these new civil rights regulatory agencies must begin with a new and different approach—recognizing that these new civil rights regulation agencies are unique and different in their own right.

When Congress included Titles VI, VII and to some extent Title XI (it establishes a Community Relation Service agency within the Department of Commerce to help states and communities resolve discrimination disputes) in the Civil Rights Act of 1964, it had in effect, created the basis for an entirely new type of regulatory structure. In short, the law created a two-dimensional regulatory structure.

Title VI created, or at least made possible, a civil rights administrative unit “within *each* federal agency and department, whose congressional mandate is not solely limited to the enforcement of civil rights laws.”⁹⁷ As Professor Michael Preston states: “. . . policymakers tend to take an existing instrument (a government agency) and use it regardless of the similarities between its present function and the new uses to which it is to be put.”⁹⁸ He goes on to write: “. . . where new programs are grafted onto old structures without a proper assessment of the relationship between the existing instrument and the new purpose, the results are likely to lead to faulty implementation of new programs . . .”⁹⁹ The Cabinet-level department and agencies in which created Title VI regulatory units were developed saw themselves and their mission as one of dispensing benefits and desired programs and not as bureaucracies with civil rights regulatory authority. Thus if Preston insights are correct, we will be able to see problems inherent in the very creation of the new regulatory agency immediately.

Title VII on the other hand created the classic regulatory body, the Equal Employment Opportunity Commission (EEOC). It is an independent and separate agency not unlike the earlier economic regulatory agencies, e.g. SEC, FCC, ICC, and the FPC. Much like the economic regulatory agencies, the EEOC’s chairman and members are selected by the President and approved by Congress and attempt to operate independently of Congress and the chief executive. President Reagan however, has clearly sought to alter this previous pattern in a host of regulatory agencies and particularly in the civil rights area.

Looking at regulatory bodies that are structured organizationally the way that Title VI and Title VII civil rights regulatory agencies have been structured, one academic observer has categorized those regulatory bodies that are within cabinet departments (like Title VI units) as “Dependent Regulatory Agencies,” (hereafter DRAS) and those outside such departments (like the Title VII unit)¹⁰⁰ as “Independent Regulatory Commissions” (hereafter IRCS). While this

is an intriguing typology and has been little explored, this study will reveal if this dual approach has one unit being more successful than the other.¹⁰¹

Besides these two different types of civil rights regulatory agencies—a traditional and a new one, the 1964 Civil Rights Act also with Title X gave the Department of Commerce—the Community Relations Service agency and continued the Civil Rights Division within the Justice Department. Thus, from the outset, this new law created an entirely different and unique set of regulatory bodies for civil rights. Why this mixed approach? Lester Salamon writes: “The problems the Federal government has recently been called upon to resolve—poverty, urban distress, environmental degradation, (civil rights), etc.—can rarely be solved through individual programs.”¹⁰² To address them meaningfully requires the successful orchestration of a number of different activities.”¹⁰³

Moreover, “Federal *regulatory activities*, once primarily economic in focus, have now become major vehicles for the promotion of a wide array of health, safety, environmental and social goals.” Beginning in the 70’s there was a significant expansion of social regulatory agencies and these agencies had new and different types of techniques and procedures for managing their spheres of activity.¹⁰⁴

One scholar sums it up as follows: “The proliferation, expansion, and extension of these and other tools of Federal policy have substantially reshaped the landscape of Federal operations. Instead of a single form of action, virtually every major sphere of Federal policy is now made up of a complex collage of widely assorted tools involving a diverse collection of different types of actors performing a host of different roles in frequently confusing combinations.”¹⁰⁵

Not only had the 1964 Civil Rights Act created a new and broad type of regulatory structure, with a new and different type of regulatory powers, i.e. cutting off of federal dollars, but it had also created a new type of internal environment within the federal bureaucracy, which had employees of different races working to carry out these laws. Frank Thompson called these efforts, the making of representative bureaucracies.

Burton Levy writes: “Most civil rights agencies have developed a degree of internal interpersonal conflict with some aggressiveness and hostility directed by employees against the agency itself.”¹⁰⁶ Black public servants and their white allies might find “racism” inside the bureaucracy that hindered them in their efforts to do something significant for people who had been discriminated against. Such internal tensions added a new dimension to these already unique and different agencies.

Moreover, rather than look at one agency or a collection of these agencies, this study will analyze and evaluate *each* and *every* one of the federal cabinet departments for both its Title VI and Title VII functions. And although it will cover specifically and in detail these regulatory bodies, it will also include some analyses of the EEOC and other independent federal agencies that have Title VI

units, particularly in terms of the budget and personnel practices.

The analysis starts in 1964 and covers each agency through 1984—for a full two-decade look. And furthermore, where possible it will include some budgetary and personnel and organizational data through 1986. The point here was to avoid some narrow and limited time frame and actually do a time series analysis so that the reader can see changes, continuities, and tendencies in these new regulatory agencies. This would avoid the old snapshot and episodic studies now in the literature.

Being a time series analysis, this study has gathered, where possible and available, governmental statistics on organizational structures and flow charts, budgets, personnel numbers, number of complaints and compliant resolutions as well as pre- and post-award analyses.

Needless to say, federal data, particularly on these new social regulatory agencies has not been competently kept and data is non-continuous and spotty and sketchy as well as very unreliable. But where such conditions exist in the data, the reader is constantly made aware of it and in every case the most reliable data available is used. Thus, the portrait drawn about personnel, budgets, and enforcement efforts is drawn from a careful empirical assessment of the data.

Once the data is analyzed, the interpretation of it is rooted in a historical context. Historians of the Reconstruction period have collected some data for the 1870-1877 period and this data permits some degree of historical continuity to be shown in a reliable fashion by comparing the regulatory efforts of that period with the new regulatory efforts of today. Thus, a sense of success and failure in the federal government's civil rights regulatory effort past and present can be made.

But for some, success and failure rest not on the nature, scope, and realities of the regulatory machinery but in the very nature of the regulatory policy itself. For instance, one student of the civil rights regulatory effort has asserted that: "In the final analysis, what has blocked bargaining over official compliance standards for OCR is the notion that Civil Rights cannot be compromised, that 'civil rights' like constitutional guarantees, must stand as an outer boundary on the free play of political preferences."¹⁰⁷ But it is precisely this historical continuity and overview which will permit the reader to see beyond the supposedly inherent nature of civil rights policies that lead to certain regulatory consequences and observe how the question of management, and the political process itself have developed sundry techniques and devices which resulted in compromises that lead to debilitating regulatory consequences. Hence, a historical perspective is central and germane.

Finally, this study seeks to avoid the problems of values that many students of implementation studies carry with them when they see civil rights regulatory efforts as redistributive programs and policies instead of as protective regulatory programs. Randall Ripley and Grace Franklin write: "Redistributive

policies and programs are intended to readjust the allocation of wealth, property, rights or some other value among social classes or racial groups in society." Then they define protective regulatory programs as policies that "can both prevent certain types of private activity and require private activities in explicit terms."¹⁰⁸ Yet, they write that "equal rights programs are often thought of as protective regulatory efforts. However, we think they should be treated along with other redistributive programs because their aim is to enlarge the political, economic or social rights of persons whose rights are limited on the basis of some sort of racial, ethnic, or sex discrimination."¹⁰⁹

They conclude that policymakers who support such programs and policies do not feel this way, i.e. seeing them as redistributive programs. But what counts is "that a number of whites view equal rights and affirmative actions programs as taking their rights from them in some sense in order to give them to minorities."¹¹⁰ And since the dominant white majority objects, these authors feel that such programs and policies ought to be labelled redistributive. This clever and sleight of hand device makes justice in this society rest on the will of the dominant white majority. Might in this instance becomes right.

Thus, such a picture raises all sorts of philosophical and ethical and moral questions which Ripley and Franklin quickly brush aside. Rights can be affirmed or denied. Whether they can be redistributed is another question all together. And such reasoning and typology permit and justify the existence of groups, individuals, and academic studies and support for the very people that the regulatory programs are designed to restrain. For instance, one recent academic study justifies an end to busing because, using this topology, busing is considered a redistributive policy and under this policy whites lose too many of their rights—conversely it could be argued that the rights that they have, are ones that they are not willing to share with blacks so that blacks can have equal education under the law.¹¹¹ Therefore, to avoid this value problem and ideological stance, this study sees the new regulatory programs as essentially protective regulatory bodies and nothing else.

When the marching of the grand civil rights movement stopped—in fact just before it stopped—there were already in place in America a substantial new set of civil rights regulatory units within the federal bureaucracy. The grand civil rights movement had given rise to these administrative units and the federal government had literally gone into the civil rights business. The civil rights movement had become institutionalized in the structure of American government. And just what did this new institutionalization via civil rights regulatory units mean? How did the federal bureaucracy perform after Congress enacted a law designed to meet the challenges of the civil rights movement? To what extent did the behavior of the federal bureaucracy in its implementation of civil rights policies change over time? These are the questions that this study will answer.