ARTICLE

THE POSITIVE POLITICAL THEORY OF LEGISLATIVE HISTORY: NEW PERSPECTIVES ON THE 1964 CIVIL RIGHTS ACT AND ITS INTERPRETATION

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INTRODUCTION

A central issue in the contemporary debate about how statutes ought to be interpreted is the proper role of legislative history.[1] The

[1] *See, e.g.*, WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 207-38 (1994) (providing a historical summary of the various uses of legislative history and explaining the technique's present-day role); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 29-37 (1997) (criticizing the increasing reliance on legislative history by judges and lawyers and calling for "an end to [the] brief and failed experiment" of legislative history as an interpretive device); Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 61 (1988) (using two cases—*California Federal Savings & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987), and *United States v. Locke*, 471 U.S. 84 (1985)—to consider the use of legislative history in statutory interpretation and to develop a textualist approach); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 675 (1997) (developing an argument that "textualism . . . rest[s] on a special constitutional injunction against the *legislative* creation of unenacted interpretive authority," and that the use of legislative history violates a "well-settled element of the separation of powers—the prohibition against legislative self-delegation"); Peter L. Strauss, *The Courts and the Congress: Should Judges Disdain Political History?*, 98 COLUM. L. REV. 242, 243 (1998) (responding to Manning's argument that textualism is constitutionally required

use of legislative history in statutory interpretation is often seen as problematic, in part because the legislative process, involving many different legislators with different points of view, provides contradictory information about a statute's meaning. Scholars of very different normative stripes—including textualists,[2] purposivists,[3] and those who

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by suggesting that "[j]udicial willingness to learn from and respect the political history of legislation . . . is a necessary element of appropriate legislative-judicial relationships"); Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 WIS. L. REV. 205, 206-10 (arguing that Justices Breyer and Stevens have developed a jurisprudence Tiefer terms "institutional legislative history" during the 1990s in order to respond to textualist attacks on the technique's role in judicial decision making); Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of* Holy Trinity Church, 50 STAN. L. REV. 1833, 1838-39 (1998) (contending that, even if legislative history is a constitutional interpretive technique, structural characteristics of the adjudicative process will lead courts "systematically to err in their attempts to discern legislative intent from legislative history," and arguing that a textualist approach will, in fact, more accurately approximate legislative intent); Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 281-86, 308-09 (1990) (concluding that the textualist view of legislative history rejects the use of any extrastatutory materials, and arguing in favor of a role for extrinsic materials in illuminating ambiguous text).

The debate over the utility of legislative history goes back many years. *See, e.g.*, Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 542-43 (1947) (surveying the gradual incorporation of legislative history as a tool of statutory interpretation and offering the following examples of relevant legislative materials: "A painstaking, detailed report by a Senate Committee bearing directly on the immediate question may settle the matter. A loose statement even by a chairman of a committee, made impromptu in the heat of debate . . . will hardly be accorded the weight of an encyclical."); Harry Wilmer Jones, *Extrinsic Aids in the Federal Courts*, 25 IOWA L. REV. 737, 741 (1940) (discussing the benefits of using "extrinsic evidence," such as legislative history, to interpret when "legislative intention" is vague or nonexistent); Charles B. Nutting, *The Relevance of Legislative Intention Established by Extrinsic Evidence*, 20 B.U. L. REV. 601, 607-10 (1940) (questioning the use of legislative materials to assist statutory interpretation); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 873 (1930) (providing the seminal treatment of the textualist approach: "Successive drafts of a statute are not stages in its development. . . . That is not to say that some conclusions, principally negative ones, can not be drawn from the legislative history. . . . But in the end, all that we know is that the final form displaced the others . . . .").

[2] *See, e.g.*, SCALIA, *supra* note 1, at 29-30 ("My view that the objective indication of the words, rather than the intent of the legislature, is what constitutes the law leads me, of course, to the conclusion that legislative history should not be used as an authoritative indication of a statute's meaning."); Easterbrook, *supra* note 1, at 66 ("An appropriately modest judicial role would depend less on imputed intent—'intent' that ultimately can be found only in the mind of the judge."). *See generally* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 625 (1990) (finding that the textualist objection to using contextual evidence for statutory interpretation was, at the time, prevalent in the Supreme Court and suggesting how the Court might further implement textualist principles).

eschew reliance on legislators' will altogether[4]—raise questions about the historical reconstruction of legislative intent. Indeed, a common conclusion in the literature on statutory interpretation is that legislative history can be used to rationalize any point of view,[5] leading some to conclude that it is useless to the enterprise of statutory interpretation.

In this Article, we revisit this enduring conversation about the proper place, if any, of legislative history in statutory interpretation. Our perspective is distinct from traditional arguments in that it relies on a different underlying theoretical foundation and, significantly, a positive political theory of statute creation. This theory, in turn, provides both a theory of legislative rhetoric and of statutory interpretation.

To summarize the basic theory: Legislation is the product of choices made by legislators pursuing strategic aims within the structure of legislative institutions, rules, and norms.[6] The principle of ma-

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[3] *See, e.g.*, HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1375 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) ("The words of a statute, taken in their context, serve both as guides in the attribution of general purpose and as factors limiting the particular meanings that can properly be attributed.").

[4] *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE 316 (1986) (arguing for a method of statutory interpretation that "takes note of the statements the legislators made in the process of enacting [the statute], but . . . treats them as political events important in themselves, not as evidence of any mental state behind them"); JEREMY WALDRON, LAW AND DISAGREEMENT 142-46 (1999) ("There simply is no fact of the matter concerning a legislature's intentions apart from the formal specification of the act it has performed."); Heidi M. Hurd, *Sovereignty in Silence*, 99 YALE L.J. 945, 952 (1990) (challenging the idea that statutes are communications, and in turn challenging "those who are convinced that legislative interpretation ought to proceed via an inquiry into the authorial intentions of the legislators responsible for drafting or enacting particular statutory provisions"); Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 338 (1985) ("[N]o concept of legislative intention is appropriate to legal interpretation.").

[5] Justice Scalia has made the argument that

> [l]egislative history provides . . . a uniquely broad playing field. In any major piece of legislation, the legislative history is extensive, and there is something for everybody. As Judge Harold Leventhal used to say, the trick is to look over the heads of the crowd and pick out your friends. The variety and specificity of result that legislative history can achieve is unparalleled.

SCALIA, *supra* note 1, at 36.

[6] This insight is at the foundation of theories that are broadly characteristic of the positive political theory of legislation. *See* Kenneth A. Shepsle & Barry R. Weingast, *Positive Theories of Congressional Institutions*, *in* POSITIVE THEORIES OF CONGRESSIONAL INSTITUTIONS 5, 10-32 (Kenneth A. Shepsle & Barry R. Weingast eds., 1995) (discussing four perspectives on the positive political theory of legislation and offering concerns and criticisms of the informational and partisan rationales underlying these ap-

jority rule requires that legislators collect a majority of votes to transform their hopes into law. For most contemporary social legislation, this democratic imperative is hard to achieve.[7] On important legislative issues, ardent supporters and ardent opponents can fulfill their objectives only by collecting enough support from moderates and undecided legislators—legislators whose support is pivotal to the final outcome. As a price of this support, ardent supporters must typically accept compromises to their legislative vision. Although these compromises typically leave the bill with less than they had originally sought, ardent supporters nonetheless accept the compromise because they judge it superior to no legislation at all.[8] Moreover, it is these negotiations that transform the initial legislative proposal—one that cannot pass—into a bill that becomes law.[9]

This conclusion may perhaps seem so commonplace as to approach a truism, yet, as we show below, its implications for statutory interpretation are not commonly understood. First, it implies that legislation is the product of coalitions of legislators with different views about the legislation. Second, it yields a theory of legislative rhetoric: different legislators typically say different things about the legislation. Ardent supporters, for example, usually emphasize expansive readings of the legislation; moderates, by contrast, typically focus on the compromises necessary to garner their support, a focus which may narrow the scope of the legislation or restrict it in various ways.

Our theory of legislative rhetoric helps explain why the legislative record yields contradictory accounts of the legislation and hence its

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proaches); *see also* WILLIAM H. RIKER & PETER C. ORDESHOOK, AN INTRODUCTION TO POSITIVE POLITICAL THEORY 1-7 (1973) (using positive political theory to explain politics as, at a minimum, "the selection, enforcement, and evaluation of social choice"); Morris P. Fiorina, *Formal Models in Political Science*, 19 AM. J. POL. SCI. 133, 150 (1975) (stating that most models in political science are rational choice models, which "reflect a view of man as a purposive being: individual behavior is seen as an attempt to maximize individually held goals"). *See generally infra* Part II (considering the passage of the 1964 Civil Rights Act from the perspective of positive political theory).

[7] *See, e.g.*, CHARLES STEWART III, ANALYZING CONGRESS 337-41 & 340 tbl.9.1 (2001) (detailing the "hurdles that all legislation must jump in the two chambers").

[8] This does not mean that ardent supporters will always do so. Of course, if, under these circumstances, the ardent supporters refuse to compromise their vision, then the legislation is unlikely to pass. *See infra* text accompanying notes 43-54 (noting that the positive political theory of legislative decision making stresses that legislatures must act through collections of coalitions to pass laws).

[9] Two influential recent books that put this insight into explicit, theoretical terms are DAVID W. BRADY & CRAIG VOLDEN, REVOLVING GRIDLOCK: POLITICS AND POLICY FROM CARTER TO CLINTON (1998); KEITH KREHBIEL, PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING (1998).

meaning. Because legislator preferences and aspirations about the legislation differ, the legislators create a record reflecting these disagreements. Of necessity, therefore, the legislative record for complex acts contains multiple and conflicting views.

The theory of legislative rhetoric also explains how these contradictions in the legislative record grant judges a degree of freedom in interpretation. To rationalize expansive readings of the act, judges emphasize the evidence provided by the ardent supporters; to rationalize narrow readings, judges emphasize the evidence provided by the moderates. Hence, Judge Harold Leventhal's well-known aphorism has it exactly right: aspects of statutory interpretation are akin to a judge looking over a crowded room and picking out his friends.[10]

Our fundamental claim is that the nature and scope of the bargain struck by the ardent supporters with the coalition of pivotal legislators is central to the meaning of the statute.[11] When supporters alter the legislation to gain the pivot's support, these changes become part of the legislation. Unfortunately, these changes are often ignored when the courts focus largely on the legislative champions, who typically are ardent supporters. Put another way, we do not privilege the pivot by virtue of her being the last to join the support coalition. Rather, the focus on the pivot is in part an accounting device to focus attention on the changes in the legislation that got her on board. By virtue of transforming legislation from a proposal that would not pass into a bill that did pass, the changes as well as the resulting text are part of the law and should be considered such by the courts.

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[10] *See* SCALIA, *supra* note 1, at 36 (citing Leventhal's aphorism); Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (recounting a similar conversation with Judge Leventhal); *see also* Convoy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) ("Judge Harold Leventhal used to describe the use of legislative history as the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends.").

[11] This perspective draws on the recent work of Professors McCubbins, Noll, and Weingast (collectively, "McNollgast"). *See, e.g.*, McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, LAW & CONTEMP. PROBS., Winter 1994, at 3, 7 [hereinafter McNollgast, *Legislative Intent*] (proposing a method for interpreting legislation that identifies the pivotal political actors who were able to strike legislative bargains when developing coalitions around particular bills); McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 711-12 (1992) [hereinafter McNollgast, *Positive Canons*] ("[I]f statutory interpretation is guided by the principle of honoring the spirit of the legislative bargain, it must not focus only on the preferences of the ardent supports, but also *on the accommodations that were necessary to gain the support of the moderates.*").

To resolve legislative ambiguities, courts often turn to those who write the legislation for an understanding of the legislation's meaning. Yet this approach can be misleading, as the bill's authors are typically ardent supporters who have strategic incentives to expand the meaning of the act—in part by speaking to courts in their interpretive role—and to minimize the impact of the changes necessary to gain the moderates' support. Because the ardent supporters' proposed legislation would not pass, this version cannot be considered the law; the moderates' support typically requires legislative compromises integral to the legislation and hence to its meaning.

Another implication of our theory, then, is that contradictions in the legislative record do not imply that reliance on legislative history is hopeless and necessarily arbitrary. Our theory provides a means for understanding the logic of the contradictions and hence for steering through the thicket of contradictory evidence. It is from the vantage point of the pivotal legislators and the views they communicate via the statute's legislative history that we can critically examine judicial interpretations of the statute.

We apply our approach to reading legislative history to the passage and interpretation of the Civil Rights Act of 1964 (the Act).[12] The history of the Act is interesting in its own right;[13] by any measure, this statute represents one of the landmark pieces of modern social legislation and a major effort by the national government to address racial injustice in twentieth-century America. Further, the Act is an excellent vehicle for the consideration of our analysis of statute making, legislative rhetoric, and the relevance of our views to the current normative debate over statutory interpretation.[14]

Standard accounts of the Act's history properly emphasize overcoming the Senate filibuster by southern Democrats as the central di-

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[12] Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

[13] *See, e.g.*, PHILIP A. KLINKNER & ROGERS M. SMITH, THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA 273-78 (1999) (describing how foreign policy interests, the need for domestic order, and the effect of the Kennedy assassination combined to push the Act through Congress); JAMES L. SUNDQUIST, POLITICS AND POLICY: THE EISENHOWER, KENNEDY, AND JOHNSON YEARS 259-71 (1968) (discussing the historical and legislative processes driving the creation of the Act).

[14] For similar reasons, Professors William Eskridge, Philip Frickey, and Elizabeth Garrett open their well-known text with the story of the Act. *See* WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 2-23 (3d ed. 2001) (telling "the story of the Civil Rights Act of 1964 and the procedures of statute-creation").

lemma underlying the bill's passage.[15] The basic legislative dilemma was this: A vote of cloture to end the filibuster required sixty-seven votes in the Senate. Although there were sixty-seven Democrats in the Senate, twenty were from the solid South and thus ardent opponents of the legislation. Thus, at most forty-seven Democratic votes were available for cloture. This basic legislative arithmetic helps explain why Congress failed to enact significant civil rights legislation during the nearly one hundred years following Reconstruction.[16] To pass the bill in 1964, then, northern Democrats needed at least twenty of the thirty-three Senate Republicans to vote for cloture. Although there were, in the early 1960s, some liberal and moderate Republicans, there were not twenty of them. As demonstrated below, the median Republican was more conservative then *every* northern Democrat and nearly as conservative as the median southern Democrat.[17] This simple fact of Senate life in the 1960s implies that the conservative Republicans were the political pivots. Without their support, no civil rights legislation could become law.[18]

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[15] *See, e.g.*, ROBERT D. LOEVY, TO END ALL SEGREGATION: THE POLITICS OF THE PASSAGE OF THE CIVIL RIGHTS ACT OF 1964, at 7 (1990) ("[I]n the Senate, and by far the largest obstacle of all, was the filibuster."); NINA M. MOORE, GOVERNING RACE: POLICY, PROCESS, AND THE POLITICS OF RACE 64-65 (2000) (arguing that the civil rights debates generated "arguably the fiercest active opposition ever pitted against a set of legislative proposals"); SUNDQUIST, *supra* note 13, at 222 (describing the filibuster as "[t]he one insurmountable obstacle"); STEPHEN THERNSTROM & ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE: ONE NATION INDIVISIBLE 143 (1997) ("The bill would be especially difficult to get through the Senate, where it would take a two-thirds majority to break the filibuster that southern senators would inevitably employ to block it."); CHARLES W. WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 148 (1985) ("[Supporters] would face a fierce filibuster . . . that could be stopped only by cloture. And cloture . . . had never been successful on a civil rights bill.").

[16] *See* MICHAEL GOLDFIELD, THE COLOR OF POLITICS: RACE AND THE MAINSPRINGS OF AMERICAN POLITICS 256-58 (1997) (discussing the split between northern and southern Democrats over social and racial issues during the 1930s and 1940s); MOORE, *supra* note 15, at 38-50 (chronicling the opposition to civil rights and then the slow emergence of the civil rights movement after World War II). For a discussion of the struggle over the 1957 Civil Rights Act, see, for example, ROBERT A. CARO, THE YEARS OF LYNDON JOHNSON: MASTER OF THE SENATE 886-989 (2002); THERNSTROM & THERNSTROM, *supra* note 15, at 117-18.

[17] *See infra* text accompanying notes 146-49 (comparing the voting patterns of Republicans with those of northern and southern Democrats).

[18] To be sure, the political baseline facing supporters had shifted in the years leading up to 1964. While the threat of the filibuster, along with entrenched committee obstacles, made the prospects of passage quite difficult, it ought not to be overlooked that the number of civil rights supporters within Congress had increased during this period. *See, e.g.*, EDWARD G. CARMINES & JAMES A. STIMSON, ISSUE EVOLUTION: RACE AND THE TRANSFORMATION OF AMERICAN POLITICS 59-84 (1989) (discussing the rea-

But how would the support of pivotal Republicans be won? Most standard histories are schizophrenic on this question. Nearly all scholars emphasize the fight over the filibuster as the central drama of the Act's passage.[19] Yet most also minimize the impact of this fight on the substance of the legislation.[20] These accounts give the most credit to the leaders (and hardest workers) of the civil rights coalition, including Senator Hubert H. Humphrey and President Lyndon B. Johnson,[21] who ostensibly outmaneuvered the Republicans and succeeded in getting passed a relatively pure version of their bill.[22]

Circumstantial evidence supports the standard account. Republican leaders at times discussed a major restructuring of the Act—a restructuring that never happened. Moreover, although the Republicans sought dozens of amendments, most scholars deem them as rather modest.[23] Further, the Republicans themselves contributed to this standard view because few of them made credible counterclaims that they materially altered the Act.

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lignment of parties in the racial debates between 1940 and 1980); Charles S. Bullock III, *Congressional Voting and the Mobilization of a Black Electorate in the South*, 43 J. POL. 662, 670-73 (1981) (studying the impact of increased black participation in elections on southern legislators' voting patterns); Mary Alice Nye, *Changing Support for Civil Rights: House and Senate Voting, 1963-1988*, 46 POL. RES. Q. 799, 807-21 (1993) (using cohort analysis to show changes in voting patterns for civil rights between 1963 and 1988).

[19] Sources cited *supra* note 15.

[20] There are important exceptions to this account. *See, e.g.*, HUGH DAVIS GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960-1972, at 141-52 (1990) (detailing the role played by Republican minority leader Senator Everett Dirksen in reaching a compromise with the bill's supporters); NEIL MACNEIL, DIRKSEN: PORTRAIT OF A PUBLIC MAN 229-38 (1970) (recounting the extraordinary steps Senator Dirksen undertook to compromise with Democrats, bring his fellow Republicans on board, and win the cloture vote); MOORE, *supra* note 15, at 72-78 (same).

[21] *See* ESKRIDGE ET AL., *supra* note 14, at 15-22 (highlighting the maneuvering of President Johnson and Senate majority leader Mike Mansfield).

[22] *See id.* at 19-20 (reporting that President Johnson refused to compromise on weakening the bill, leaving Senator Dirksen with "acceptable but minor amendments"); LOEVY, *supra* note 15, at 38 (examining the coordination among Senators Dirksen, Humphrey, and Mansfield to successfully introduce viable civil rights legislation); THERNSTROM & THERNSTROM, *supra* note 15, at 143 ("[I]n the end, Congress bought the whole loaf . . . ."); David B. Filvaroff & Raymond E. Wolfinger, *The Origin and Enactment of the Civil Rights Act of 1964*, *in* LEGACIES OF THE 1964 CIVIL RIGHTS ACT 9, 25-30 (Bernard Grofman ed., 2000) (describing how supporters of the Act pushed the legislation through Congress without significant amendment); *see also* MICHAEL R. BESCHLOSS, TAKING CHARGE: THE JOHNSON WHITE HOUSE TAPES, 1963-1964, at 336-37 (1997) ("LBJ: '[T]hey would like very much to say I weakened the bill. And I'm not going to. That's not my position. I'm against any amendment. I'm going to be against them right up until I sign them.'").

[23] *See infra* Part II.D.1 (describing the Innocuous Dirksen Thesis, one interpreta-

Our approach suggests that we must not take this evidence uncritically. The theory of legislative rhetoric suggests that statements by ardent supporters are strategic and should be taken as self-serving; they are often informative, but not definitive. Based upon our analysis of this legislative episode, we arrive at very different conclusions from the standard account described above. Drawing on the positive political theory of statute making and legislative rhetoric, we show that the price demanded by the Republicans was that the Democrats agree incrementally, through a large number of seemingly small and innocuous steps, to minimize the impact of civil rights legislation on the North and hence on Republican constituents. A careful analysis of the amendments shows that their force was not trivial; rather, these changes materially affected the legislation.

Why have historians missed this? We begin with an observation: The Republicans asked for a lower price than they could have, a fact which seems to corroborate the ardent supporters' claim that they successfully manipulated the Republicans into supporting their bill. Yet the fact that the Republicans asked for a lower price than they could have does not mean that their participation was inevitable or that their price was zero. Although the Republicans decided in the end to leave the Act's structure intact, we demonstrate that the changes they demanded were far from trivial and have often been ignored in the literature.

In addition, and more importantly, we argue that the Republicans had three strategic reasons to conspire with the Democrats to allow the latter to play center stage and claim the lion's share of credit for the bill, thus minimizing the perceived importance of the Republican changes. First, we show that all supporters of the legislation—ardent and pivotal members alike—had incentives to minimize the impact of the Republicans' alterations so as to increase the likelihood that the House would accede to the Senate's changes. If the House had called for a conference committee to reconcile differences, it would have risked dooming the bill. Second, the Republicans downplayed their role for fear that emphasis on their changes would allow the Democrats to paint them as selling out in the upcoming elections. Third, and most subtly, the civil rights legislation had the potential to loosen the Democrats' solid hold on the South—a potential Democratic loss

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tion by scholars in which the changes made by Senate Republicans amounted to technical, minor amendments).

and Republican gain. Hence, the Republicans had incentives to lay low and obtain long-term rewards as they made electoral inroads in the South. Moreover, the stronger and more offensive the bill to the South, the better the bill would serve Republican southern electoral ends. This helps explain why the Republicans asked for less than they could have and why their strategy of weakening the bill's impact on the North did not hurt their "southern strategy." In sum, because participants had strategic reasons for their rhetorical claims, historians, legal theorists, and courts should not be misled by strategic rhetoric of the participants.

Indeed, the Civil Rights Act of 1964 and the Voting Rights Act of 1965[24] had fundamental effects on American politics and society. First, they altered racial relations and ended a range of institutionalized discrimination.[25] Second, and more important for our purposes, this legislation altered the American political landscape, transforming American national politics from the New Deal era dominated by Democrats to one of divided government where Republicans more often than not held the presidency.[26]

Our analysis of the Civil Rights Act has several implications for statutory interpretation. We emphasize the role of the pivotal Republican legislators, particularly Senate minority leader Everett Dirksen of Illinois. We demonstrate that the bill that passed the Senate and was enacted into law reflected the compromises struck within a divided Senate. These compromises fundamentally altered the ensuing Act's meaning and these alterations ought, for reasons we explain below, to affect how ambiguous statutory terms are interpreted. Moreover, our conclusions not only bear on the interpretation of the Act, but on all

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[24] Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1971 (2000)).

[25] *See* EARL BLACK & MERLE BLACK, THE RISE OF SOUTHERN REPUBLICANS 77 (2002) ("Desegregating public accommodations and protecting black voting rights meant that white supremacy no longer defined the southern political order and that black citizens would be an integral part of the political community."); JAMES L. SUNDQUIST, DYNAMICS OF THE PARTY SYSTEM: ALIGNMENT AND REALIGNMENT OF POLITICAL PARTIES IN THE UNITED STATES (1973) (examining the political realignment caused by both race issues and the civil rights legislation of the 1960s). *But cf.* THERNSTROM & THERNSTROM, *supra* note 15, at 149-80 (exploring how the legislative victories of 1964 and 1965 were undone in the eyes of "ordinary working people" by "[r]iots, a skyrocketing crime rate, ugly black power rhetoric, [and] a marked increase in the number of welfare dependents").

[26] *See, e.g.*, BLACK & BLACK, *supra* note 25, at 74-83 (describing the civil rights era and its legislative battles as turning points in contemporary southern politics and the character of the Democratic party).

statutes in which there is evidence of similar compromise and negotiation among ardent supporters and pivotal legislators.

Moving from theory to application, we examine a series of cases involving interpretations of Title VII of the Civil Rights Act to reveal how the courts have used legislative history in arriving at their results. In a number of key civil rights cases, federal courts relied on the history and purposes of the statute to support what can fairly be described as expansionary readings.[27] Two of the more notable cases are *Griggs v. Duke Power Co.*, in which the Supreme Court read the Act to provide a cause of action for employer conduct that created a disparate impact on protected employees,[28] and *United Steelworkers v. Weber*, in which the Supreme Court permitted a company to adopt hiring goals for African American craft trainees.[29] In these, as in many other important Title VII cases, the Court drew from the Act's broad provisions and, at least as the Justices saw it, its aspirational history to support a view of the statute consistent with the hopes and dreams of its most ardent supporters. Indeed, the powerful rhetoric of leading civil rights advocates, such as Senator Humphrey and Representative Emanuel Celler, found its way into the published legislative history of the Act and, eventually, into judicial decisions. The Act's ardent supporters succeeded not only in their effort to pass a historic bill, but also in their effort to shape the meaning of the Act through expansionary judicial decisions. In important ways, the Supreme Court's interpretations ignored the central compromise that made the Act's passage possible.

In reviewing the history of the Civil Rights Act and its interpretation by the courts, we should emphasize what this Article is *not* about. It is not about whether civil rights should have been broadened beyond the 1964 Act. There are many reasons for rationalizing an ex-

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[27] *See, e.g.*, Neal Devins, *The Civil Rights Hydra*, 89 MICH. L. REV. 1723, 1733 (1991) (reviewing HUGH DAVIS GRAHAM, THE CIVIL RIGHTS ERA (1990)) (observing that, despite Senator Dirksen's attempts to statutorily limit the Equal Employment Opportunity Commission's complaint processing role, the Supreme Court validated a broad reading of Title VII of the Civil Rights Act in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), that was, in the EEOC's own estimate, "at odds with explicit statutory language"); *see also infra* Part III.A (explaining that the expansive rulings of the courts reflect an effort to give the Act a meaning beyond that negotiated by pivotal legislators); *cf.* William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613, 618-32 (1991) (arguing that the Court acted independent of legislative history and statutory purpose both in expanding and later restricting the scope of civil rights legislation).

[28] 401 U.S. at 434-36. See *infra* Part III.A.1 for a discussion of *Griggs*.

[29] 443 U.S. 193, 202-08 (1979). See *infra* Part III.A.3 for a discussion of *Weber*.

pansion of civil rights beyond that envisioned by the 1964 Act. We do not join the debates over these reasons or the best form of civil rights policy.[30]

Instead, the purpose of this Article is to examine the explicit reasons articulated by the Supreme Court to justify the expansion of civil rights. The Court relied heavily on the legislative record and used its reading of the record to justify its rulings.[31] It is this reasoning that we contest.

Further, we are persuaded by William Eskridge's positive political theory argument that, had the courts not broadened statutorily granted civil rights in the 1970s, Congress would likely have passed a new, more expansive civil rights act.[32] Thus, civil rights appears *not* to be a straightforward case of activist judges imposing their preferences on a reluctant society, whose representatives—per positive political theory models—are impotent to resist.[33] Again, the point is to examine the logic underlying judicial use of legislative history.

Part I of this Article presents our positive political theory of legislative decision making, on which our characterization of coalitional strategies and statute making is based. We focus on three intersecting questions. First, what is the structure of legislative decision making within which bargaining over the legislation's scope takes place? Second, what coalitions form to consider, and then to influence, the legislation? And third, how and why do legislators undertake to influence the implementation of the statute through the strategic use of

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[30] *Cf.* ESKRIDGE ET AL., *supra* note 14, at 81-85 (considering the resilience of the *Griggs* decision as a function of the civil rights policies embedded in the holding).

[31] *See infra* Part III.A (discussing the Court's interpretation of the Act).

[32] Eskridge, *supra* note 27, at 650-53.

[33] Standard positive political theory models emphasize a range of judicial discretion on statutory interpretation issues given the multiple veto points in Congress. The classic model is BRIAN A. MARKS, A MODEL OF JUDICIAL INFLUENCE ON CONGRESSIONAL POLICYMAKING: *GROVE CITY COLLEGE V. BELL* (Hoover Inst., Working Papers in Political Sci. No. P-88-7, 1988). *See also* William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 556-64 (1992) (using game theory to analyze judicial review of administrative decisions in light of legislative delegation and statutory directives); Rafael Gely & Pablo T. Spiller, *A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the* State Farm *and* Grove City *Cases*, 6 J.L. ECON. & ORG. 263, 265-66, 295-96 (1990) (arguing that the Supreme Court makes decisions based on self-interest and ideology, subject only to political constraints by Congress and the President); Mathew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 440-44, 481-82 (1989) (using positive political theory to show that, to be effective, Congress must control administrative decision making ex ante and illustrating this argument by reference to the Clean Air Act, 42 U.S.C. §§ 7401-7671q (2000)).

legislative rhetoric? We show that these three overlapping aspects of the modern legislative process are necessary to understand the meaning of legislation.

In Part II, we analyze a set of critical events in the legislative history of the Civil Rights Act of 1964. We provide a reevaluation of that history focusing on the problematic issues in interpreting the Act given the fact that the assent of pivotal legislators was critical in securing passage of the Act. We also reanalyze the fight to end the filibuster, demonstrating, first, the pivotal nature of Senate Republicans; second, the nontrivial price they exacted for their support; and, third, the strategic logic underlying both the Democrats' legislative rhetoric in claiming credit for the Act and the Republicans' legislative rhetoric in downplaying their own role.

We next consider, in Part III, how courts, in pursuing expansionary constructions in the early years following the Act's passage, relied on the legislative history produced by ardent supporters of the Act. The ardent supporters' strategic rhetoric insisted that the Senate amendments did not materially change the Act and, therefore, that the broad reach of the Act portended by the House version was maintained in the final version of the legislation. Both contentions are challenged in Part III. We focus on a few cases to illustrate this point and discuss how the courts have confused notions of legislative intent and statutory purpose.

Lastly, in Part IV, we suggest how our approach to interpreting legislative history helps shed light on the politics of civil rights, on theories of legislation and statutory interpretation, and on the patterns of modern American politics and social policy. Our objective, in the end, is to draw from our approach, and from a revisionist view of the Civil Rights Act, lessons of general applicability for the interpretation of the legislative history of statutes. This project, then, presages further analytical work on the puzzles of legislation and its interpretation.

I. LAWMAKING PROCESSES, STATUTORY DESIGN, AND THE THEORY OF LEGISLATIVE RHETORIC

Understanding how to extract the meaning of legislation through the process of interpretation requires a clear understanding of how legislators construct legislation and how they communicate both separate and collective views about what the legislation means. To provide this understanding, we draw on positive political theory and its implications for a preliminary theory of legislative rhetoric. From this the-

ory, we derive a positive theory of legislative intent and statutory purpose.

A. *Principles of Positive Political Theory*[34]

The positive political theory of legislative decision making[35] describes the statute-making process as a collection of purposive, strategic decisions made by rational decision makers within the structure of legislative institutions. These legislative institutions are themselves the creation of legislators acting to maximize their own varied interests through collective choice mechanisms.[36] The "industrial organization of Congress" represents the constructed environment within which legislators bargain with one another in order to facilitate their indi-

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[34] The ideas developed in this Section build specifically upon a recent positive political theory literature that includes Eskridge & Ferejohn, *supra* note 33; John Ferejohn & Barry Weingast, *Limitation of Statutes: Strategic Statutory Interpretation*, 80 GEO. L.J. 565 (1992) [hereinafter Ferejohn & Weingast, *Limitation of Statutes*]; John A. Ferejohn & Barry R. Weingast, *A Positive Theory of Statutory Interpretation*, 12 INT'L REV. L. & ECON. 263 (1992) [hereinafter Ferejohn & Weingast, *Statutory Interpretation*]; McNollgast, *Legislative Intent*, *supra* note 11; McNollgast, *Positive Canons*, *supra* note 11; McNollgast, *The Theory of Interpretive Canon and Legislative Behavior*, 12 INT'L REV. L. & ECON. 235 (1992); Terry M. Moe, *Political Institutions: The Neglected Side of the Story*, 6 J.L. ECON. & ORG. 213 (1990); Edward P. Schwartz et al., *A Positive Theory of Legislative Intent*, LAW & CONTEMP. PROBS., Winter/Spring 1994, at 51; Pablo T. Spiller & Rafael Gely, *Congressional Control or Judicial Independence: The Determinants of U.S. Supreme Court Labor-Relations Decisions, 1949-1988*, 23 RAND J. ECON. 463 (1992). The ideas build more generally on the positive political theory of legislative decision making as described in, for example, Daniel B. Rodriguez, *The Positive Political Dimensions of Regulatory Reform*, 72 WASH. U. L.Q. 1, 52-80 (1994).

[35] At various junctures, we use "legislative decision making" as a synonym for statutory enactment. This is a convention of convenience, for we recognize, of course, that legislatures do much more than enact statutes. *See, e.g.*, MICHAEL W. KIRST, GOVERNMENT WITHOUT PASSING LAWS 1-11 (1969) (focusing on the impact of nonstatutory means of congressional action, such as appropriations proceedings, hearings, and the adjustment of funding levels). Since we confine our inquiry to statute making, we do not engage the extensive literature that considers positive theories of legislative action in addition to, or separate from, the enactment of statutes.

[36] *See, e.g.*, MORRIS P. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT 37-47 (2d ed. 1989) (criticizing Congress for establishing a legislative system advantageous to members seeking to remain career politicians); D. RODERICK KIEWIET & MATHEW D. MCCUBBINS, THE LOGIC OF DELEGATION: CONGRESSIONAL PARTIES AND THE APPROPRIATIONS PROCESS 231-37 (1991) (claiming that congressional parties have successfully managed the delegation of policymaking authority to their members serving on committees); KEITH KREHBIEL, INFORMATION AND LEGISLATIVE ORGANIZATION 247-58 (1991) (examining the role of internal legislative organization on public policy); KREHBIEL, *supra* note 9, at 20-48 (creating a new theory to identify pivotal players in political decision making).

vidual and collective goals.[37] Statutes—including both the text of the enacted law and the legislative "history" encoded into the public record of the statute—reflect not only legislative specialization and expertise, but the vitally important object of trade and negotiation. The legislators' statements that make up the legislative history that attaches to the statute also reflect these important objects.[38] Critically, the statute's implementation will be influenced by the meaning given to it by interpretations.[39]

To accomplish their aims within this dynamic process of legislative decision making, legislators act within coalitions. A legislature is, after all, a "they" not an "it"; decisions—statutes included—are made only by collections of legislators acting in concert.[40] The basic democratic principle of majority rule, established in Article I of the U.S. Constitution, ensures that legislators must create a coalition at least as large as a majority of the legislators in each house in order to enact legislation.[41] The process of legislation, then, is shaped by the decisions made by legislators to form and maintain coalitions within the institutional structure of the legislature and within the structure of those nonlegislative institutions (the presidency, the judiciary, and the bu-

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[37] On the general "industrial organization of Congress," of which there are multiple theories, see Kenneth A. Shepsle & Barry R. Weingast, *Positive Theories of Congressional Institutions*, 19 LEGIS. STUD. Q. 149 (1994). *See generally* GARY W. COX & MATHEW D. MCCUBBINS, LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE 1-15 (1993) (viewing political parties as "legislative cartels" that usurp rulemaking power for the legislative process); RICHARD F. FENNO, JR., CONGRESSMEN IN COMMITTEES 94-114 (1974) (exploring the decision-making importance of congressional committees); KREHBIEL, *supra* note 36, at 30-42, 66-67 (offering distributive and informational theories of congressional organization); DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 1-9 (1974) (focusing on reelection as the driving force behind congressional decision making and organization); Barry R. Weingast & William J. Marshall, *The Industrial Organization of Congress; or, Why Legislatures, like Firms, Are Not Organized as Markets*, 96 J. POL. ECON. 132, 132-37 (1988) (providing a theory of legislators based on the theory of firms and contractual institutions).

[38] *See, e.g.*, Daniel B. Rodriguez, *Statutory Interpretation and Political Advantage*, 12 INT'L REV. L. & ECON. 217, 220-25 (1992) (considering how Congress uses legislative history to influence statutory interpretation).

[39] *See, e.g.*, R. SHEP MELNICK, BETWEEN THE LINES: INTERPRETING WELFARE RIGHTS 3-22 (1994) (giving examples of how judicial interpretation of statutes can change the meaning of legislative provisions).

[40] *See* David P. Baron & John A. Ferejohn, *Bargaining in Legislatures*, 83 AM. POL. SCI. REV. 1181, 1181-86 (1989) (modeling legislative equilibria based on theories of bargaining); Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 239-42 (1992) (arguing that collections of individuals cannot have intent, and thus judges, lawyers, and legislators misplace their reliance on legislative intent).

[41] U.S. CONST. art. I, § 7.

reaucracy) upon which legislators rely to facilitate their legislative aims.[42]

As far as legislative purposes are concerned, we need not imagine that legislators share some collective meta-intent.[43] Indeed, it is often clear that different members of Congress support a piece of legislation for very different reasons. Bruce Ackerman and William Hassler's study of the Clean Air Act Amendments of 1977 provides a good illustration: when environmentalists sought to amend the Clean Air Act, they found they did not have sufficient support to pass their legislation.[44] To pass their bill, pro-environment legislators in Congress negotiated with representatives of unionized coal miners.[45] This coalition produced an act that compromised some of the environmentalists' principles, thereby addressing environmental problems less efficiently.[46] Yet, faced with the choice between a compromise bill and no bill, the environmentalists chose the compromise bill.

The positive political theory of legislative decision making emphasizes that legislatures act through collections of coalitions; it is in the understanding of the formation, maintenance, and actions of these

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[42] *See, e.g.*, McCubbins et al., *supra* note 33, at 466-68 (illustrating how an acceptable bill can emerge from three distinct stances by the Senate, House, and President).

[43] We would volunteer, though, that one is probably on safe ground in assuming that coalitions of legislators are made up of a variety of individuals with different goals, dreams, personalities, and such. *See, e.g.*, John A. Ferejohn & Morris P. Fiorina, *Purposive Models of Legislative Behavior*, 65 AM. ECON. REV. 407, 412 (1975) (presenting a political scientist's view that legislators "desire[] reelection, good public policy, and institutional influence—different mixes for different Representatives").

[44] BRUCE A. ACKERMAN & WILLIAM T. HASSLER, CLEAN COAL/DIRTY AIR 29 (1981); *cf.* B. Peter Pashigian, *Environmental Regulation: Whose Self-Interests Are Being Protected?*, 23 ECON. INQUIRY 551 (1985) (considering the 1976 amendments to the Clean Air Act as a function of self-interest, geography, and regional growth).

[45] ACKERMAN & HASSLER, *supra* note 44, at 31.

[46] *See id.* at 42-56 (describing the diminished standards of the final bill). Gilligan, Marshall, and Weingast's study of the formation of the Interstate Commerce Commission provides another illustration. They argue that the Interstate Commerce Act did not serve a single purpose, such as allowing the railroad industry to create a cartel. Instead, it was a compromise between railroads, seeking a cartel, and one type of shipper (so-called "short-haul" shippers) against another type of shipper (so-called "long-haul" shippers). *See* Thomas W. Gilligan et al., *Regulation and the Theory of Legislative Choice: The Interstate Commerce Act of 1887*, 32 J.L. & ECON. 35, 48-51 (1989) (stating that the compromise bill made both railroads and short-haul shippers better off, but neither was as well off individually as would have been the case under pending legislative alternatives).

coalitions that the general theory of legislative decision making must be grounded.[47]

The fact that legislators must collect themselves into coalitions in order to pass statutory proposals raises a number of difficulties for the statutory enactment process.[48] In the tackling and surmounting of these difficulties, the contours of the positive theory of legislative decision making come into relief.

Consider, first, the set of impediments to bargaining faced by legislators.[49] In order to facilitate their purposes, legislators must negotiate with one another over the design of a proposal. What is the appropriate scope of the statute? What is the optimal enforcement regime? Should there be exemptions for certain individuals or groups? Even supposing they can agree among themselves, this proposal must nonetheless run a daunting gauntlet of legislative procedures including, most significantly, consideration on the chamber floor.[50] Once on the floor, the problems of chaotic decision making forecasted by social choice theory—including cycling, agenda manipulation, strategic amendments, and other maneuvers—can turn proposals into recreations that bear little resemblance to the bargains struck by coalition members.[51] Given the potential for uncontrollable

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[47] *See* sources cited *supra* note 11 (arguing for a method of interpreting legislation that accounts for legislative bargaining); *see also* Baron & Ferejohn, *supra* note 40, at 1183-201 (explaining how a bill is passed and how its political benefits are distributed among individual legislators or coalitions of legislators depending on the legislature's amendment rules and session frequency).

[48] *See generally* R. DOUGLAS ARNOLD, THE LOGIC OF CONGRESSIONAL ACTION 88-118 (1990) (discussing strategies for assembling coalitions with which to support or oppose legislation).

[49] *See* Baron & Ferejohn, *supra* note 40, at 1200 (contrasting coalition-based form with "the noncooperative bargaining theory of legislatures"); Weingast & Marshall, *supra* note 37, at 138-39 (explaining that bargaining is hampered by the "uncertainty over the future status of today's bargain").

[50] The Senate filibuster is one of the key procedural obstacles that legislation may face. Recognizing this, the pivotal politics model describes the filibuster pivot as one of the "key" pivots in enacting legislation. BRADY & VOLDEN, *supra* note 9, at 17; KREHBIEL, *supra* note 9, at 23-24; *see also* Weingast & Marshall, *supra* note 37, at 138 (describing problems with the legislative exchange).

[51] *See, e.g.*, Richard D. McKelvey, *Intransitivities in Multidimensional Voting Models and Some Implications for Agenda Control*, 12 J. ECON. THEORY 472, 479-81 (1976) (describing manipulation of voting agendas); Charles R. Plott, *A Notion of Equilibrium and Its Possibility Under Majority Rule*, 57 AM. ECON. REV. 787, 796 (1967) ("The exchange of information associated with any decision process may serve actually to change the utility function."); William H. Riker, *Implications from the Disequilibrium of Majority Rule for the Study of Institutions*, 74 AM. POL. SCI. REV. 432, 445 (1980) ("[O]utcomes are the consequence not only of institutions and tastes, but also of the political skill and artistry of those who . . . exploit the disequilibrium of tastes for their own advantage.").

and even chaotic amendments on the floor, and thus wasted legislative effort, why bother?

The answer concerns institutions: The structure of legislative rules, party organization, processes, and mechanisms are designed in part to facilitate legislative bargaining and statutory enactment by ensuring that decisions will be respected—or, perhaps more aptly, protected—by the body.[52] Self-interested legislators create institutions to facilitate bargaining and control.[53] When successfully constructed and maintained, these institutions guard against chaotic, unpredictable decision making; they insure the maintenance of what has been called a *structure-induced equilibrium*, which undergirds the industrial organization of Congress.[54]

For our purposes, the most important institutional details of Congress concern the complex set of institutions granting individuals or groups special powers.[55] Not only must legislation command majori-

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For a summary of, and introduction to, these results, see MELVIN J. HINICH & MICHAEL MUNGER, ANALYTICAL POLITICS (1997); KENNETH A. SHEPSLE & MARK S. BONCHEK, ANALYZING POLITICS: RATIONALITY, BEHAVIOR AND INSTITUTIONS (1997).

[52] *See, e.g.*, Kenneth A. Shepsle, *Institutional Arrangements and Equilibrium in Multidimensional Voting Models*, 23 AM. J. POL. SCI. 27, 35-37 (1979) (explaining mathematically how institutional arrangements allow legislatures to reach equilibrium); Kenneth A. Shepsle & Barry R. Weingast, *Structure-Induced Equilibrium and Legislative Choice*, 37 PUB. CHOICE 503, 507-11 (1981) (showing that "institutional restrictions on the domain of exchange induce stability"); *cf.* Gordon Tullock, *Why So Much Stability*, 37 PUB. CHOICE 189, 193-200 (1981) (documenting the influence of committees and formula allocation of funds in getting legislation passed easily).

[53] *See* FENNO, *supra* note 37, at xv (illustrating how member goals and environmental constraints interact within legislative committees to shape decision-making processes and, finally, decisions); FIORINA, *supra* note 36, at 121-22 (explaining how subcommittees help promote bargaining despite "[h]eterogeneity of interests across districts and states"); KREHBIEL, *supra* note 36, at 264 (observing that congressional institutions lead to specialization, sharing policy expertise, harnessing self-interest, and "aligning . . . individual incentives with collective goals"); MAYHEW, *supra* note 37, at 110-25 (explaining how legislators manipulate office structure, committees, and parties in order to win passage for a bill).

[54] *See* sources cited *supra* note 52 (describing the stabilizing effect of institutional structures on legislatures); *see also* JOHN H. ALDRICH, WHY PARTIES? THE ORIGIN AND TRANSFORMATION OF PARTY POLITICS IN AMERICA 221-26 (1995) (evaluating the "homogeneity of preferences" and "status quo policy" of Congress); COX & MCCUBBINS, *supra* note 37, at 79-82 (suggesting that most House committees reflect the preferences of the House as a whole, with "draft legislation reflecting the diversity of interests in the chamber"); DAVID W. ROHDE, PARTIES AND LEADERS IN THE POSTREFORM HOUSE 162-92 (1991) (explaining how partisanship can lead to an emphasis on party politics at the expense of institutional arrangements); Shepsle & Weingast, *supra* note 52, at 511-14 (explaining how institutions induce stability).

[55] The recent literature on congressional institutions is reviewed in Shepsle & Weingast, *supra* note 6. Other contributions to the volume *Positive Theories of Congres-*

ties, it must also gain the approval of committees in each house, the majority party, and the Rules Committee in the House,[56] and succeed against any attempt at filibuster in the Senate. The majority party also retains numerous controls in each chamber to make sure that legislation serves its interests; for example, in the House, the majority party caucus serves this function.[57] Legislation must also be approved by the President, subject to the veto-override provisions of the Constitution.[58]

These details are all well known. What are frequently ignored are their implications for statutory interpretation.[59] The fact that there are many specific sites of power within Congress not only means that legislation is difficult to pass; it also means that the pivots will differ across legislation, where the political pivot is defined as that legislator whose support at the margin is needed to ensure the legislation's passage.[60] Thus, for some bills, a member of the relevant House commit-

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sional Institutions, *supra* note 6, suggest the range of approaches in contemporary scholarship on congressional institutions. Other important works include ALDRICH, *supra* note 54; COX & MCCUBBINS, *supra* note 37; KREHBIEL, *supra* note 36; ROHDE, *supra* note 54; ERIC SCHICKLER, DISJOINTED PLURALISM: INSTITUTIONAL INNOVATION AND THE DEVELOPMENT OF THE U.S. CONGRESS (2001).

[56] *See, e.g.*, STEWART, *supra* note 7, at 274-335 (detailing the formation and function of committees).

[57] Scholars, including Aldrich, Cox, and McCubbins, have focused on the role of parties in legislative decision making. *E.g.*, ALDRICH, *supra* note 54; COX & MCCUBBINS, *supra* note 37.

[58] U.S. CONST. art. I, § 7; *see also* Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, LAW & CONTEMP. PROBS., Spring 1994, at 1, 22 ("[G]overning structures are designed subject to presidential veto, and thus with sensitivity to presidential concerns.").

[59] *But see* Eskridge & Ferejohn, *supra* note 33, at 533-64 (outlining how statutory interpretation has shifted to accommodate bicameralism, presentment to the President, and, most notably, the emergence of lawmaking by agencies dominated by the President); Ferejohn & Weingast, *Limitation of Statutes*, *supra* note 34, at 580-82 (suggesting a method through which Congress can consciously protect its interpretation of a newly enacted statute against possible judicial review); McNollgast, *Legislative Intent*, *supra* note 11, at 36 (arguing that congressional institutions and processes allow one to find the pivotal moments leading to a bill's passage and thereby identify the intent of pivotal legislators); McNollgast, *Positive Canons*, *supra* note 11, at 718-27 (identifying the main issues of proper statutory interpretation as figuring out which coalitions enabled the bill to pass, identifying the legislators in those coalitions, deciding whether the President was aligned with those coalitions, and identifying the interpretation understood by the pivotal members of those coalitions). An important recent critique of the relevance of positive political theory to theories of statutory interpretation is JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE THEORY TO IMPROVE PUBLIC LAW 81-105 (1997).

[60] *See* McNollgast, *Legislative Intent*, *supra* note 11, at 21 (identifying the following issues in determining pivotal legislators: a member's preferences for, and knowledge of, a bill's effects, which members ensure the bill is veto-proof, and centrists' knowl-

tee will be the pivot; for others, the senator required to break a filibuster will play that role; and, for other bills, the pivotal actor will be the President.[61]

These institutions imply that the process of building a legislative coalition is not simple, nor is there a general pattern, at least in the American context, that holds across all bills.[62] What remains to be explored is how coalitions are formed, what legislators expect from the bargains struck within these coalitions, and, further, what our expectations are as readers of the statute. On this latter point, we are brought back to the central question of this project, namely, what does this theory of legislative decision making tell us about the proper approach to interpreting legislation?

B. *A Typology of Statutory Coalitions*

A central, often unstated, presumption in the standard approach to statutory interpretation based on legislative history is that there are two relevant groups in the enactment process, the supporters and the opponents. These two sides present their arguments, compete for political support, and then one wins. Of course, after enactment these groups become the "winners" and the "losers." In its simple form, this description functions both as a basic principle underlying how legislation is successfully enacted and as a data point in competing normative theories of statutory interpretation. These theories quite naturally credit the arguments of winners in this process. To interpret the legislation, we inquire what the winners said it meant. The losers' history is correspondingly not referred to by courts seeking to understand legislative intent.[63]

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edge of, and stake in, a bill); McNollgast, *Positive Canons*, *supra* note 11, at 724 (focusing on the intent of pivotal coalition members—those members who "hold key veto gates in the legislative process").

[61] For analyses that identify the congressional "pivot" in different political settings, see BRADY & VOLDEN, *supra* note 9; KREHBIEL, *supra* note 9.

[62] *See* MASHAW, *supra* note 59, at 98 (discussing the intentions of "enacting coalition[s]").

[63] *See, e.g.*, BankAmerica Corp. v. United States, 462 U.S. 122, 145 (1983) (White, J., dissenting) ("[T]he characterization of a bill by one of its opponents has never been deemed persuasive evidence of legislative intent."); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 203 n.24 (1976) (classifying remarks "made in the course of legislative debate" as "entitled to little weight," especially so "with regard to the statements of legislative opponents"); NLRB v. Fruit & Vegetable Packers, Local 760, 377 U.S. 58, 66 (1964) ("[W]e have often cautioned against the danger, when interpreting a statute, of reliance upon the views of its legislative opponents. In their zeal to defeat a bill, they understandably tend to overstate its reach.").

On closer inspection, this dichotomous characterization fails to capture the complexity of statutory decision making. The simplifying presumption that there are just two relevant groups is fundamentally misleading, and traditional theories of interpretation that build upon this idea are therefore inadequate. To undergird a more complete theory of statutory interpretation, we need a more nuanced conception of legislative decision making that reflects the coalitional realities of drafting statutes.

To begin, we look at the legislative process as multifaceted. For major policy issues, legislators cannot be dichotomized into two simple supporter and opponent groups. Rather, multiple views are represented.[64] Furthermore, the contents of the bill itself are not set in granite but evolve over the legislative process. Although this is a truism, its implications are often ignored in the process of statutory interpretation. Put simply, the coalition structure supporting the bill and the bill's contents evolve simultaneously.[65] Supporters of the bill seek alliances with legislators in order to enact their version of the bill; opponents do likewise in efforts to kill or cripple the proposal. With these shifting alliances, some versions of a bill simply cannot pass for want of a majority; other, perhaps less extreme versions of the bill, may become more successful.[66]

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[64] Analysts of particular pieces of legislation commonly adopt this perspective. Nearly all analysts of the Act divide legislators into three groups with distinct interests: northern Democrats, southern Democrats, and Republicans. *See, e.g.*, ESKRIDGE ET AL., *supra* note 14, at 4-23 (recounting the interaction among these groups in the House and Senate); GRAHAM, *supra* note 20, at 125-29 (surveying the gauntlet of southern Democrats in essential committee positions that faced President Kennedy during the introduction of the bills that would become the 1964 Act); WHALEN & WHALEN, *supra* note 15, at 100-23 (explaining the role of Republicans and northern Democrats in maneuvering H.R. 7152, 88th Cong. (1963), through debate on the House floor). For multifaceted analyses of the Clean Air Act, the Interstate Commerce Act, and the savings and loan bailout respectively, see ACKERMAN & HASSLER, *supra* note 44, at 42-54; Gilligan et al., *supra* note 46, at 53; John Romer & Barry R. Weingast, *Political Foundations of the Thrift Debacle*, *in* POLITICS AND ECONOMICS IN THE EIGHTIES 175, 175-204 (Alberto Alesina & Geoffrey Carliner eds., 1991). *See also* BRADY & VOLDEN, *supra* note 9, at 14 (using a continuum to illustrate legislator positions); KREHBIEL, *supra* note 9, at 51-75 (explaining how congressional diversity beyond the two parties' traditional interests helps alleviate gridlock).

[65] Indeed, the drama accompanying many accounts of the passage of particular acts often focuses on negotiations with pivotal legislators, simultaneously adjusting the legislation's contents and changing the set of legislators who support it. For an example of one of the classic "bill becomes a law" texts, see T.R. REID, CONGRESSIONAL ODYSSEY: THE SAGA OF A SENATE BILL (1980). As we show in Part II, the drama and suspense surrounding the passage of the Civil Rights Act of 1964 also exhibits this feature.

[66] *See, e.g.*, Daniel B. Rodriguez, *The Presumption of Reviewability: A Study in Canoni-*

To see the larger implications of how the problem of coalition structure is important for understanding legislative intent, let us suppose that a proposal is before a legislative chamber. We can break the legislators down into three groups.[67] First, the *ardent supporters* represent those legislators who enthusiastically support a strong version of the proposed legislation. Whether these supporters will support a weaker version to no version is uncertain; assessing this requires that we know more about their preferences and strategies. All that is critical to our analysis here is that their support is ardent with respect to alternative versions of a legislative proposal, where such versions can be arrayed along a continuum from weak to strong.

At the other extreme are the *ardent opponents*, that is, those legislators who not only oppose a strong legislative proposal but oppose any proposal to alter the status quo as favored by the ardent supporters, no matter how weakened it may become by subsequent amendment and revision. Of course, the reasons for their opposition may differ within this group; all that unites them is a preference for the status quo over all pertinent policy proposals.

Finally, and critical to our picture of legislative decision making, there is an intermediate collection of legislators, those whom we call *moderates* or the *pivotal legislators*. In this group are legislators who are willing to support moderate versions of the ardent supporters' proposal but not strong versions. This group may be more or less heterogeneous with respect to the general or particular views of the legislators within the group's purview. What defines the members of this group as pivotal is that the fate of the legislation is in their hands: if they support it, it will pass; if they oppose it, it will fail. For most major legislation, we cannot reliably forecast ex ante whether pivotal legislators will support or oppose the proposal on the table.[68] Support of the pivotal legislators depends in part on the compromises ardent sup-

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cal Construction and Its Consequences, 45 VAND. L. REV. 743, 768-76 (1992) (discussing the difficulties of forming a majority to approve a bill and then maintaining that majority to add an amendment precluding judicial review).

[67] We use three subsets of legislators for convenience. Nothing about this argument requires that there be but three groups of legislators. Indeed, a generalization of this argument holds when every legislator feels differently about the policy in question. *See* McNollgast, *Legislative Intent*, *supra* note 11, at 19 (noting that "[t]he number of legislators does not change the basic dynamic of policymaking"); McNollgast, *Positive Canons*, *supra* note 11, at 741 (explaining that a multidimensional issue can generate a majority coalition).

[68] For a preliminary discussion of this typology, see Ferejohn & Weingast, *Limitation of Statutes*, *supra* note 34, at 575-76; McNollgast, *Legislative Intent*, *supra* note 11, at 16-21; McNollgast, *Positive Canons*, *supra* note 11, at 718-27.

porters are willing to make in adjusting the content of their proposed legislation from their ideal legislation in order to suit the demands of the pivotal legislators. Sometimes no compromise desired by the moderates is acceptable to the ardent supporters, in which case the legislation typically fails. Yet many times the ardent supporters and the moderates find a mutually beneficial compromise that members of both groups prefer to the status quo. This brief description illustrates the principle noted above: the coalition supporting the legislation and the legislation's contents—and hence its meaning—evolve in tandem.[69]

Before we proceed to consider these three subsets of legislators in action, allow us to describe more thoroughly this third category of pivotal legislators. We have said that this group may be quite diverse within itself—there may be liberals and conservatives, those inclined to support the bill and those inclined to oppose it. Moreover, we will concede that this group is dynamic; that is, as the contents of the proposed legislation change, members may shift so that those inclined to support may, in the end, oppose the legislation.

These parallel changes respond to the evolution over time of two interrelated processes: the legislation's textual contents and how the legislation is perceived among constituents. Either change can alter a legislator's position. We focus on the first process, noting that which members belong to which coalitions is not static but rather endogenous, depending on the contents of the legislation. Thus, there is nothing settled or predetermined about our typology of legislative coalitions. Yet, this typology permits us to see how the preferences of individual legislators forming themselves into coalitions interface with versions of legislative proposals, which can be arrayed from weak to strong.[70]

A particular methodological step is critical to our analysis. Legislative preferences are often regarded as revealed preferences, that is, a legislator reveals her preferences through her votes on particular bills. The dichotomous structure of legislative decision making makes sense when one sees legislators acting only through their votes on bilateral options, that is, "yes" or "no" on specific legislative proposals. This dichotomy further makes sense to the extent that scholars usually evalu-

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[69] *Cf.* MOORE, *supra* note 15, at 15-17 (discussing the relationship between policy bargaining and "the actual substance of the bill for which advocates are attempting to build support").

[70] *See id.* at 15-19 (discussing bargaining and policy compromise by advocates who initially sought a stronger bill).

ate either the prediction that a certain legislator will vote "yea" or "nay" on a proposal, or the statutory result itself. In neither case is it necessary to get at a description of the legislator's preference any richer than that revealed by her vote.[71]

However, this characterization misses the texture of legislative decision making prior to a final vote on a version of the proposal. To the extent that positive political theory contributes the insight that legislative bargaining is ubiquitous, occurring not only during floor consideration but throughout the period prior to the bill's floor consideration, we need to explore more thoroughly how legislators shape legislation in the enactment process. We need to understand the ways in which coalitions take form and how they operate in combination and competition with one another with the objective of bargaining toward a final version of the proposal to be considered by the entire body.[72] The methodological question, then, is how to characterize legislators' preferences in a way other than by looking at their final votes. We offer a preliminary answer to this question through our analysis of the Civil Rights Act of 1964, as described more systematically in Part II.[73]

The basic methodological answer lies in the examination of legislators' preferences by looking at their propensity to support or oppose versions of legislation of this type. We do this in two ways. First, by studying the legislative record, including the early legislative and committee statements, to see the patterns in the types of legislators

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[71] There is an extensive literature on the formation of legislator preferences from the perspective of representation, that is, how (and whether) legislators incorporate into their decision-making matrices the preferences, wishes, and agendas of their constituents. This is not so much about preferences as it is about the elements that go into legislator decisions about how to act; however, certain theories of representation surely reengage the question of how legislator preferences do or should intersect with constituent preferences. *See, e.g.*, HANNAH FENIEHEL PITKIN, THE CONCEPT OF REPRESENTATION 144-67 (1967) (considering the "mandate-independence" controversy regarding whether a representative should do what her constituents would want or what the representative herself believes is best for her constituents). Modern congressional analyses of this topic draw on RICHARD F. FENNO, JR., HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS (1978); MORRIS P. FIORINA, REPRESENTATIVES, ROLL CALLS AND CONSTITUENCIES (1974).

[72] *See* ARNOLD, *supra* note 48, at 88-118 (analyzing how congressional coalition leaders employ persuasive and procedural strategies to build support for their chosen positions).

[73] Moreover, this type of analysis is standard in studies applying the pivotal politics model. *See* BRADY & VOLDEN, *supra* note 9, at 14-15 (using the pivotal politics theory to argue that there is a "'gridlock region' within which no policy change can occur"); KREHBIEL, *supra* note 9, at 20-48 (proposing the theory of pivotal politics to describe how policy change is brought about by breaking legislative gridlock).

supporting all forms of legislation, those opposing all forms of legislation, and those who seem willing to support some forms of legislation but not others. Second, we use various types of statistical methods to associate members of Congress with the propensity to support certain types of legislation.[74]

In this view, whether legislation is enacted depends on whether the ardent supporters and the pivotal legislators negotiate an effective compromise. If the moderates seek only modest compromises in the ardent proponents' ideal legislation, compromise is likely. When the pivot demands drastic changes to the legislation in order to support it, the ardent supporters may deem this sacrifice too great, preferring the legislation to die instead of supporting a bill they deem as too weak or merely symbolic.[75]

C. *Strategic Elements in Communicating Legislative Intent*

Insofar as the issue of statutory interpretation fundamentally concerns how to understand the final bill, we need a better understanding of the strategies of legislators bargaining with one another over the language and history of a statute.

Legislative communication is, in part, an exercise in spin control. The meaning of legislation is a product of the statutory "history" as explicated in the documents upon which courts rely in interpreting the statute.[76] Because legislators know that courts often turn to legisla-

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[74] These methods fall into two categories. First, political scientists rank or score legislators according to some criterion, often on a scale of 0 to 100. These scores typically reflect interest group rankings (the most well-known of which are ADA scores created by the Americans for Democratic Action). Second, political scientists also use statistical methods, such as logit and probit analysis, to study the determinants of congressional voting. The most well-known of these methods is associated with Professors Poole and Rosenthal. *See* KEITH T. POOLE & HOWARD ROSENTHAL, CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL CALL VOTING (1997) (using statistical analysis to study the dynamics of roll call voting).

[75] Although we discuss persuasion here only in the context of intralegislative negotiation, we are aware that ardent supporters will be engaged in the process of persuading the public as well. *See* ARNOLD, *supra* note 48, at 92-99 ("At times coalition leaders mount large-scale campaigns to shift elite and mass opinion toward a major programmatic initiative . . . .").

[76] *See, e.g.*, ESKRIDGE ET AL., *supra* note 14, at 937-1039 (defining legislative history as "the entire circumstances of a statute's creation and evolution"); Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1357-60 (1990) (criticizing "[t]he Court's present mode of analyzing history" because it fails to explain such questions of legislative process as the ways in which legislative history is produced, and arguing that the Court should adopt a fact-finding model to better understand legislative histories).

tive indicia to resolve ambiguities in the legislation, legislators have an incentive to influence—and even manipulate—the record to serve their ends rather than those of others.[77]

Legislators' propensities to manipulate and manufacture legislative histories confound efforts to recover accurate indicia of legislative intent.[78] The confusion is not insoluble, however. We can do better than the contemporary literature suggests in discovering probative evidence of the purposes shared by pivotal legislators. This involves an attempt to distinguish the various types of strategic descriptions of legislative intent offered by legislators positioned to encode their preferences into accessible legislative histories.[79] The quest for a more accurate rendition of legislative intent is in essence a quest for a coherent theory of legislative rhetoric.

We start by considering the dimensions of legislators' incentives. All legislators seek to advance their particular interpretation of the legislation, in part to claim credit with their constituents and in part to influence future interpreters of the legislation. Because legislators have different views of the legislation and its purposes, they seek to advance different interpretations. Ardent supporters share a common interest in characterizing a piece of legislation strategically in order to implement their particular vision of sound policy. When the bill is being considered in the legislature, ardent supporters face crosscutting incentives: In order to garner and maintain the support of pivotal legislators, they have an incentive to accommodate pivotal legislators by characterizing the bill in a moderate, ameliorative fashion. Describing the proposal as narrow, limited, and, where appropriate, purposively opaque or ambiguous, moreover, can serve the function of reassuring pivotal legislators who are concerned with the scope of the proposal. The other incentive faced by ardent supporters cuts in precisely the opposite direction. In many circumstances (to be detailed

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[77] *See, e.g.*, James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 26-32 (1994) (noting the "windows of opportunity" that exist in the creation of legislative history).

[78] *See supra* text accompanying notes 9-11 (looking beyond the rhetoric of ardent supporters, who may create a record with an eye toward expansive future interpretations of the ensuing statute). Congress may also engage in more direct strategies of regulating the process of interpretation. *Cf.* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2090-92 (2002) (suggesting that Congress has "at least some constitutional power over interpretive methodology").

[79] *See* McNollgast, *Positive Canons*, *supra* note 11, at 718-27 ("The question to be answered by an interpretive method, then, is what agreement the coalition thought it might be making that is not explicit in the language of the statute.").

below), ardent supporters will also seek to push interpreters in the direction of a strong, clear version of the bill, that is, away from the limiting compromises necessary to gain the support of pivotal legislators. Accordingly, as any lawyer knows, legislative history is often rife with bold statements purporting to reveal the clear, unalloyed meaning of a law.[80] Because of these countervailing incentives, ardent supporters often make contradictory statements about the legislation, sometimes providing expansive readings and sometimes providing moderate and temperate ones.

By contrast, ardent opponents often seek to temper their extreme descriptions of legislation in order to encourage courts to interpret legislation narrowly. Thus we see legislative histories in which ardent opponents describe a bill as having far-reaching effects in one context and, in another, a relatively narrow scope.[81] Although ardent opponents may well find themselves on the losing end of the battle over a legislative proposal, they will predictably fight hard to spin the meaning of the legislation in a way favorable to their interests.

Pivotal legislators face strong incentives to articulate the compromise necessary to garner their support of the act. They will thus attempt to engage the ardent supporters in colloquies on the floor that make explicit this understanding. Of particular importance are provisions added to the legislation that temper the ardent supporters' vision of the act, perhaps by limiting its scope; redefining its coverage or including exemptions; or devising arduous procedures that limit an implementing agency's ability to move quickly—or at all.[82]

A good example of this latter strategy was the Toxic Substances Control Act (TSCA), in which Congress passed into law a series of extraordinarily cumbersome procedures that set an unrealistic timeframe within which the Environmental Protection Agency was expected to act to regulate toxic substances.[83] The result of this

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[80] Consider, for example, the Court's holding in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000), that "Congress has directly spoken to the issue here," in that case precluding the FDA from regulating tobacco products.

[81] For examples of cases illustrating the selective use of legislative history to reach particular outcomes, see Kosak v. United States, 465 U.S. 848 (1984); Church of the Holy Trinity v. United States, 143 U.S. 457 (1892).

[82] *See* McCubbins et al., *supra* note 33, at 431 (analyzing the 1977 amendments to the Clean Air Act as an example of provisions added to legislation that impose limiting procedures on an agency).

[83] Pub. L. No. 94-469 § 6(c), 90 Stat. 2003, 2022-24 (1976) (codified as amended at 15 U.S.C. § 2605 (2000)) (describing the procedures to be followed by the EPA in promulgating testing rules for regulated chemicals).

procedural mechanism was that no substances were regulated under the scope of the TSCA for the first twenty-five years of its existence.[84] The legislative history of this Act suggests that these mechanisms were introduced by key legislators as a necessary condition for securing sufficient support to enact the bill.[85]

Pivotal legislators may also seek to replace ambiguous phrases in the bill with more detailed language. Often the latter merely reflects the shared meaning—among the chamber's members—of the ambiguous phrase. Because a later reader of the act, such as a court, may not share this meaning, the pivotal legislators sometimes seek to replace such phrases when multiple interpretations can be foreseen. As we discuss in more detail below, this device was an important element in the strategy of pivotal legislators in the 1964 Civil Rights Act.[86]

Let us take stock. Thus far we have argued that ardent supporters have countervailing incentives to express multiple and contradictory views of an act. So, too, do the ardent opponents, though their visions will differ from the ardent supporters. Finally, the pivotal legislators articulate yet another vision.

To make sense of this, we draw on recent developments in the positive political theory of statutory interpretation to provide a new theory of legislative rhetoric. A critical distinction for understanding legislative rhetoric is that between *cheap talk* and *costly signaling*.[87] The distinction hinges on whether the legislator making the statement incurs a cost, such as diminishing the likelihood legislation will pass, for a misinterpretation or misrepresentation. For example, consider an ardent supporter who engages in a colloquy on the chamber floor with a pivotal legislator over the nature of their compromise. The ardent supporter's propounding of an ideal and expansive interpretation—one that deviates from the understanding of the compromise necessary for the pivotal legislator to support the legislation—jeopard-

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[84] *See* Mathew D. McCubbins & Talbot Page, *The Congressional Foundations of Agency Performance*, 51 PUB. CHOICE 173, 184-86 (1986) (explaining the effect of the TSCA's procedural requirements in particular regulatory efforts).

[85] *See id.* at 183 (describing the conflict in Congress and among governmental agencies surrounding the passage of the TSCA).

[86] *See infra* Part III (considering the effect of legislative history in the implementation of a statute, and explaining the incentives for strategic manipulation of the historical record).

[87] *See* McNollgast, *Legislative Intent*, *supra* note 11, at 21-29 (discussing the economics of signaling); *cf.* Arthur Lupia & Mathew D. McCubbins, *Designing Bureaucratic Accountability*, LAW & CONTEMP. PROBS., Winter/Spring 1994, at 91, 94-95 (explaining what can be learned from legislative signaling).

izes the pivot's support and hence the bill's passage. Such statements are thus costly signals about the bill's meaning because the speaker bears a real cost for misinterpretation. In contrast, an ardent supporter writing his memoirs after the legislation has become law is engaged in cheap talk—he bears no penalty, in terms of the act's passage, for misinterpretation.[88] Similarly, legislators' statements inserted in the *Congressional Record* or made in press conferences are typically cheap talk.[89] Alternatively, interpretations provided by a committee report are costly since misrepresentations potentially jeopardize an act's passage. Legislators, in their remarks opening committee and floor consideration of legislation, typically engage in grandstanding—statements offered more to their constituents than to each other. These statements are therefore typically cheap talk.[90] An ardent supporter, acting on the floor as bill manager, represents the quintessential costly signaler; an ardent supporter outside the legislature, particularly after the legislation has passed, represents the quintessential cheap talker.[91]

Another important distinction concerns the timing of remarks. Remarks made at the beginning of the legislative process are often prior to the critical compromises necessary to produce a bill that can pass. As such, we must be wary of taking them as representations of an act's meaning since, typically, they reflect a version of the legislation that could not pass.

Our theory of legislative rhetoric implies that multiple interpretations of an act exist simultaneously in the legislative record. Those who criticize constructing original intent from legislative indicia are clearly correct in claiming that legislative history in and of itself fails to

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[88] On the application of signaling models to political science, see JEFFREY S. BANKS, SIGNALING GAMES IN POLITICAL SCIENCE 57 (1991); JAMES D. MORROW, GAME THEORY FOR POLITICAL SCIENTISTS 219-57 (1994); Randall L. Calvert, *The Value of Biased Information: A Rational Choice Model of Political Advice*, 47 J. POL. 530, 552 (1985); Arthur Lupia, *Busy Voters, Agenda Control, and the Power of Information*, 86 AM. POL. SCI. REV. 390, 395-96 (1992). *See also* Lupia & McCubbins, *supra* note 87, at 94-95 (discussing the difference between truthful and untruthful signals).

[89] *See* McNollgast, *Legislative Intent*, *supra* note 11, at 28-29 (asserting that, because of the incentives to act strategically, "a statement by a member acting as an individual, and minority views and reports, should carry no weight in statutory interpretation").

[90] *See id.* at 26-29 (describing the behavioral norms that produce such statements).

[91] On the role of presidential-signing statements, see William D. Popkin, *Judicial Use of Presidential Legislative History: A Critique*, 66 IND. L.J. 699, 713-14 (1991); Rodriguez, *supra* note 38, at 226-28.

provide a unique and unproblematic indication of an act's meaning.[92] Our theory demonstrates why. Legislators have incentives to provide multiple interpretations and, in some cases, to obscure the meaning of the compromise reflected in the legislation.[93] The advantage of a theory of legislative rhetoric, however, is that it allows us to pull apart these various and seemingly contradictory strands of interpretation. It thus gives us a basis to rescue legislative history from the criticism that it is hopelessly incoherent and unhelpful.[94]

Cheap talk by ardent supporters is especially likely at the beginning of the legislative process. This follows because the early legislative stages typically occur prior to the critical negotiations necessary to gain the pivotal legislators' support.[95] Put simply, ardent supporters at this stage typically do not yet know the types of compromises necessary to pass the act, so they cannot be expected to articulate them even if they wanted to do so. Under other circumstances—such as floor debate over the critical amendments about the compromises necessary to gain the moderates' support—ardent supporters have an incentive to articulate the nature of the compromise, including limitations necessary to gain the moderates' support.

Our theory of legislative rhetoric has three separate dimensions. First, because legislators of different types face incentives to characterize an act in different ways, we must determine which type of legislator made a given statement, that is, whether the given legislator is an ardent supporter, ardent opponent, or pivotal legislator. Second, we must assess whether statements are costly signals or cheap talk. To the extent that such a distinction is not made in practice, legislators have strong incentives to propound multiple interpretations of the act, hoping that a sympathetic judge will subscribe to their point of view. Third, we must assess when particular statements were made, in particular, whether they were made before or after critical compromises affecting the act.

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[92] *See supra* note 76 and accompanying text (discussing the creation of legislative history as a product, in part, of manipulation by individual legislators).

[93] *See, e.g.*, Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 627, 641 (2002) ("Ambiguity . . . allows legislators to claim short-term victory, and to shift accountability for a potential eventual defeat to the courts." (footnote omitted)).

[94] *Cf. supra* text accompanying notes 76-77 (considering the unreliability of legislative history and the factors that explain it).

[95] On the stages of legislative enactment in the modern Congress, see generally BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS (2d ed. 2000).

The strategic components of legislative rhetoric provide guidelines for choosing among multiple and conflicting statements about an act's meaning. Because ardent supporters have an incentive to bias the interpretation of an act in their favor and away from the final compromise needed to ensure passage, we must give greater weight to their costly signals than to their cheap talk.[96] Pivotal legislators, in contrast, have strong incentives to provide a clear understanding of the compromise, and thus their statements and understandings tend to be the least problematic. In parallel with traditional theories, our approach gives the least weight to statements by the act's opponents.[97] We focus on the statements by pivots in part because they have the strongest incentives to communicate reliably the act's meaning, whereas ardent supporters have countervening incentives and opportunities for cheap talk, causing many of their statements to be misleading.

If the theory of legislative rhetoric conjures up an image of congressional speech, then the modern legislature is a veritable marketplace of ideas in which legislators pitch their positions and make their histories for the purpose of shaping and implementing statutory policy. As we will see in our examination of the Civil Rights Act of 1964, strategic legislators will characterize and recharacterize a legislative proposal at various junctures for various purposes throughout the legislative process.

D. *Lessons for Statutory Interpretation*

The theory of legislative rhetoric demonstrates why a more complete method of constructing legislative history must be based on a theory of legislative decision making. The theory of legislative rhetoric explains why the process of statute enactment necessarily implies that multiple and conflicting interpretations of an act exist simultaneously in the record. Without an objective means of choosing among these competing views—that is, without a means that does not rely on the interpreter's own preferences and prejudices—statutory interpretation based on legislative indicia is hopelessly arbitrary.[98] Courts fre-

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[96] *See* McNollgast, *Legislative Intent*, *supra* note 11, at 26 ("Observing costly actions can help judges exclude some alternative interpretations.").

[97] *See supra* note 63 (outlining cases in which the Supreme Court expressly rejected any reliance on opponents' statements).

[98] *Cf. supra* notes 76-78 and accompanying text (discussing the problem of strategic legislator behavior in anticipation of judicial reliance on the legislative record).

quently select from disparate sources of legislative history to support one or another result.[99]

The late Judge Harold Leventhal captured this phenomenon of random selection of historical evidence nicely when he described the process of interpreting legislative history as akin to looking over a crowded room and picking out your friends.[100] This image fits well with patterns of judicial practice. Our theory of legislative rhetoric shows that multiple and conflicting statements necessarily exist simultaneously in the record. Accordingly, a judge interested in expanding the scope of a statute can frequently find support for her view in the legislative record; likewise, a judge determined to read the statute narrowly will grasp onto other information in the record. Without any basis to evaluate these multiple and conflicting statements, we are in no position to criticize one judge or the other. She is, after all, merely selecting her friends from the crowd.

The lesson that many scholars and judges draw from this predicament is that all interpretations based upon legislative history are equally plausible; therefore, there can be no basis to assess a judge's use of such history.[101] We believe that this is the wrong lesson. A more consistent, and ultimately more defensible, rendering of the legislative history will emerge if judges focus deliberately on the process and theory of statutory enactment. Specifically, judges should focus on statements by pivotal legislators and on statements by ardent supporters that are costly signals, rather than on such supporters' cheap talk. Once we understand the processes of legislative decision making and of legislative rhetoric, we are in a position to evaluate more sensibly the proper uses of legislative history. In the remainder of this Section,

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[99] For a general survey of the reports, bills, and hearings from which a court recreates legislative history, see Jorge L. Carro & Andrew R. Brann, *The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis*, 22 JURIMETRICS J. 294, 298-306 (1982). *See generally* ESKRIDGE ET AL., *supra* note 14, at 937-1012 (examining judicial use of legislative statements made in committee reports, during hearings and floor debates, and by bill sponsors).

[100] *See* sources cited *supra* note 10 (recounting Judge Leventhal's aphorism).

[101] *See* Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1120 (1998) ("[T]he judicial branch serves best by enforcing enacted words rather than unenacted (more likely, imagined) intents, purposes, and wills. An interpreter who bypasses or downplays the text becomes a lawmaker without obeying the constitutional rules for making law."); Alex Kozinski, *Should Reading Legislative History Be an Impeachable Offense?*, 31 SUFFOLK U. L. REV. 807, 812 (1998) (recognizing the "widespread misuse of legislative history to achieve substantive ends" and the corresponding refusal of many judges to rely on it).

we trace out some ideas about how we ought to think about legislative history in light of the preceding positive political analysis.

To the extent that interpretation in hard cases is about the unraveling of legislative intent, positive political theory suggests that we are not interested in just *any* legislator's intent; instead, we are interested particularly in the intentions of those in a critical position to forge a final legislative compromise and whose assent is critical to the act's enactment.[102] As we have emphasized, these views are important, not because the pivot signs on last, but because they are the most reliable indicators of the compromises necessary to produce a bill that can pass. Without the pivot's assent and the compromises necessary to gain it, there would be no legislation. These legislative compromises are therefore central to an act's meaning. Further, as we argue in Part IV, courts that ignore this process of bargaining and compromise hinder the legislative process—moderates are far less likely to help pass legislation if they believe that courts will set aside the compromises necessary to gain their support.

In one sense it can be said that every legislator who voted for a bill was equally critical; who is to say ex ante whether one or another vote was expendable with regard to the final legislative outcome? In a more fundamental sense, however, this seemingly intuitive claim is false. Positive political theory emphasizes: (a) the structure of legislative decision making; (b) the building of legislative coalitions; and (c) the strategies of legislative communication of statutory meaning.[103] Using this approach, we can better sort out the strands of legislative decision making.

As we have noted, positive political theory emphasizes that coalitions and the legislation's contents evolve simultaneously: as leaders adjust the legislative contents, who favors and opposes the bill also

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[102] In criticizing the relevance of positive political theory to statutory interpretation, Professor Mark Movsesian challenges the use of analogies to contract law noting, quite plausibly, that there are too many salient differences between the legislative process and the multilateral contracting process to justify this analogy. *See* Mark L. Movsesian, *Are Statutes Really "Legislative Bargains"? The Failure of the Contract Analogy in Statutory Interpretation*, 76 N.C. L. REV. 1145, 1167-90 (1998) (highlighting differences in contracting and statutory interpretation, especially focusing on third-party effects and the problematic concept of legislative intent). In the main, we agree with his critique. The structure of the legislative process is fundamentally distinct from the private ordering that occurs in contractual negotiations and drafting. *See id.* at 1167-90 (describing why the contract analogy fails). However, the connection Movsesian draws between this critique and the generally "problematic concept of legislative intent," *id.* at 1181, is more controversial. *Infra* Part III.B.

[103] *See infra* Part IV (applying these key tenets of positive political theory).

shifts. This observation has striking implications for understanding legislation. The ardent supporters who typically initiate the legislative process often cannot pass legislation to suit their ends. Put simply, most proposals devised by the ardent supporters cannot pass the United States Congress and become public law. For legislation to succeed, the ardent supporters are typically forced to adjust the legislation's contents to attract pivotal legislators on whose support the legislation's future depends. We observe this process again and again with respect to major national legislation.[104] Because the adjustment of legislative content is both fundamental and necessary to garner the support of the pivotal legislators, the bargains associated with these adjustments are essential to understand the meaning of the laws that Congress does pass.[105]

The positive political theory of legislative rhetoric arms an interpreter with the tools to understand what legislators were attempting to communicate—not merely sincerely, but also strategically. Which legislators were communicating which message? Was this communication cheap talk by legislators who were predisposed to support or to oppose the proposal? Worse yet, was it a message of legislators aiming to spin the proposal in a direction inconsistent with the understanding of the majority whose assent is necessary to its passage? Or was this communication indicative of an understanding of legislators whose support was crucial to constructing the bargain which is the object of the interpretation? What is centrally at stake is the ability of conscientious interpreters to separate useful from useless legislative history.[106]

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[104] Professor Moore describes this situation well:

> [P]olicy compromise typically entails concession(s) on the part of advocates, such that what is offered in return for support is a weakening of the policy provisions initially sought by supporters. The proposal is scaled back in one respect or another. . . . [S]uch concessions typically affect the scope and enforcement provisions of a proposed bill, more so than the proclamation portions of the bill.

MOORE, *supra* note 15, at 17.

[105] *See* Movsesian, *supra* note 102, at 1150-53 (discussing the contract theory of statutory interpretation expounded by McNollgast, which would require a court to "search the statute's legislative history for 'implicit bargains,' relating to interpretation and other matters, that do not appear in the statutory text" in order to "capture the complete agreement").

[106] Ultimately, this analysis requires a normative basis. That is, the lessons for interpretation provided by our positive account of legislative decision making and rhetoric turn squarely on what one regards as the essential project of statutory interpretation. For reasons that are mostly beyond the scope of this Article, we insist that the project must be about the determination of legislative meaning recovered from the

II. THE POLITICS OF THE CIVIL RIGHTS ACT OF 1964 RECONSIDERED

Our aim in this Part is to use the above approach to understand the political compromises necessary to assure passage of the landmark Civil Rights Act of 1964. We study the strategic dilemmas faced by the relevant coalition leaders in constructing sufficient support to break the Senate filibuster and hence to pass the Act.

As we have emphasized, political officials' rhetoric is strategic in the sense that officials try to place themselves and the legislation in the best possible light, given their electoral and political goals. Because rhetoric often serves nonobvious ends, we must take care in how we use the statements of participants.

Because this Part is the Article's longest, we provide a roadmap so the reader may follow the logic as it unfolds. In Section A, we detail the legislative predicaments precluding easy passage of a major new civil rights act in late 1963 and early 1964. Section B studies the coalition structure in Congress, focusing on the central strategic dilemma of creating a support coalition sufficiently large to overcome the southern Democrats' filibuster. Section C recounts the history of the Act's passage, with an emphasis on the Senate. Section D presents the heart of our new analysis, including the political compromises necessary to gain the pivotal Republicans support; a detailed analysis of the architecture of the compromise emphasizing the price extracted by the Republicans to go along; and the rhetorical incentives of Democrats and Republicans in their strategic presentations of their actions to the public and, later, to analysts and the courts. We end, in Section E, by summarizing the central elements in our new account of this historic legislation.

A. *The Central Legislative Obstacles Preventing Passage*

The essential dilemma faced by those who advocated expansion of the federal government's role in the protection of Americans' civil rights was that Congress consisted of a large group of legislators who were adamant in their opposition to national civil rights legislation.

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expressed and, where appropriate, unexpressed intent of the framers of the statute. We hope to be able to defend this normative premise more systematically in future attempts to work out the implications of this positive theory. Meanwhile, the core lessons of the theory of legislative decision making and rhetoric traced out in this Article relate to how a reconstructed understanding of legislative history can be used by interpreters who pay fidelity to the intent of the statute's makers.

By far, the most important opposition group of legislators was from the South.[107]

Various institutional details of the Congress aided opposition legislators. The seniority system assured that southern representatives would occupy key gatekeeping roles in both the House and the Senate, including chairs of major committees. Thus, civil rights legislation often faced insurmountable obstacles.[108] The judiciary committees of both houses, in particular, were notorious "graveyard[s] of civil rights legislation."[109] The situation in the Senate was, if anything, worse than the House, given the fact that a filibuster allowed thirty-four senators to defeat a proposed bill.[110] The distribution of representation in the Senate assured that the southern bloc of senators, nearly all of whom were dead set against civil rights legislation, could combine easily with a small number of conservative Republicans to defeat efforts at cloture.[111]

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[107] *See* KLINKNER & SMITH, *supra* note 13, at 242-87 (discussing the role of "Operation Dixie"—a Republican effort to build a new conservative majority to take an increasingly conservative line on civil rights issues—and how this plan resulted in white southern opinion turning sharply against the Democratic party); SUNDQUIST, *supra* note 13, at 221-86 (discussing minorities, equal rights, and southern resistance to civil rights initiatives).

[108] *See, e.g.*, KLINKNER & SMITH, *supra* note 13, at 242-87 (reporting instances of earlier civil rights legislation defeated in either the House or Senate by strong southern resistance).

[109] WHALEN & WHALEN, *supra* note 15, at 4; *see also* ROBERT MANN, THE WALLS OF JERICHO: LYNDON JOHNSON, HUBERT HUMPHREY, RICHARD RUSSELL, AND THE STRUGGLE FOR CIVIL RIGHTS 388 (1996) (chronicling President Johnson's frustration with House resistance to civil rights legislation).

[110] For recent works analyzing the political implications of the filibuster, see, for example, BRADY & VOLDEN, *supra* note 9, at 14-20; KREHBIEL, *supra* note 9, at 93-97; STEWART, *supra* note 7, at 363-66.

[111] The Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634, and the Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86, were the first successful efforts in nearly a century to enact federal civil rights legislation. That said, these bills were substantially weakened during the enactment process. Southern Democrats successfully used the filibuster to substantially limit the ability of northern liberals to enact broad legislation. In particular, no fair employment law could be enacted; moreover, southerners effectively blocked efforts to regulate discrimination in the area of public accommodations. In the end, the two laws dealt rather weakly with voting rights. And, even in that regard, they did little to dismantle the Jim Crow structure of the South. Professor Moore reports that

> [i]n the end, neither the Civil Rights Act of 1957 nor the Civil Rights Act of 1960 proved to be terribly significant pieces of legislation in terms of actually improving the sociopolitical progress of blacks. The 1957 act, as one senator remarked, did not bring the vote to one person.

Because the number of northern Democrats was far too small to defeat the filibuster, passing a major new civil rights bill required support of a large Republican bloc, including many quite conservative ones who generally opposed new initiatives proposing government intervention.[112]

The central strategic dilemma for the pro-civil rights coalition was therefore to design a compromise that would attract sufficient Republican votes to defeat the filibuster. The main uncertainty concerned whether a compromise could be fashioned strong enough to satisfy liberal Democrats yet be sufficiently attractive to Republicans. Ex ante, it was not clear that such a compromise existed. The striking compromises necessary to pass the 1957 and 1960 Civil Rights Acts demonstrate this difficulty.[113]

In addition, supporting the 1964 Act presented the Republicans with a series of related strategic dilemmas. First, many were against increasing the role of the federal government in economic and social affairs, and supporting strong civil rights legislation might have created electoral difficulties for those from conservative districts.[114] Second, how could they tailor the bill to suit their needs, inevitably weakening it in important respects, without being easily accused in the upcoming elections of weakening the Act and, thus, of being soft on

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The 1960 act had an equally insignificant impact.

MOORE, *supra* note 15, at 49-50; *see also* JOHN B. GILMOUR, STRATEGIC DISAGREEMENT: STALEMATE IN AMERICAN POLITICS 20-23 (1995) (discussing President Johnson, the 1957 Civil Rights Act, and the compromises that "emptied the . . . bill of nearly all but symbolic meaning").

The best treatment of the 1957 and 1960 legislation in the context of the civil rights movement as a whole remains SUNDQUIST, *supra* note 13, at 222-59. A quite lively and detailed treatment of the debate surrounding the Civil Rights Act of 1957 is contained in CARO, *supra* note 16, at 685-1012. On the 1960 debate, see DANIEL M. BERMAN, A BILL BECOMES A LAW: THE CIVIL RIGHTS ACT OF 1960 (1962).

[112] *See* FRANCINE SANDERS ROMERO, CIVIL RIGHTS POLICYMAKING IN THE UNITED STATES: AN INSTITUTIONAL PERSPECTIVE 46 (2002) (citing Senate minority leader Everett Dirksen's observation that "on both sides of the aisle, you had a very substantial element who still believed that the states must be predominant, that you mustn't intrude too deeply into their affairs").

[113] *See* KLINKNER & SMITH, *supra* note 13, at 242-54 (surveying both the racial violence and discrimination that precipitated the passage of these statutes and the political constraints that resulted in very limited legislative responses).

[114] *See* SUNDQUIST, *supra* note 13, at 259-71 (contrasting Republican acknowledgment that further legislation was necessary to secure the equality and rights promised by the Fourteenth and Fifteenth Amendments with the party's concurrent fear that such legislation would increase the power of the federal government and upset conservative voters).

civil rights?[115] Third, could the Republicans trust the Democrats?[116] With the aid of hindsight, we know that, except at the initial House stage, the northern Democratic coalition held firm for the moderate compromise fashioned by the administration and the Republicans.[117] Yet the coalition's ability to hold to a compromise was not obvious in advance, and this posed a dilemma for the Republicans. Suppose that the Republicans were to support civil rights and help move it down the legislative path toward passage. Suppose, further, that, at a very visible legislative phase just before passage, the liberal Democrats decided to defect from the compromise and systematically strengthen the bill. This defection would present Republicans with three bad choices: accept a stronger bill than they wanted; be forced to publicly weaken the legislation, making them vulnerable in many northern, moderate swing districts in the upcoming elections to the charge that they weakened civil rights; or kill the measure altogether, again making them electorally vulnerable in the North. This vulnerability implied the need for Republican caution in their negotiations with the Democrats.[118]

In short, passage of the Act not only required breaking a seemingly insurmountable filibuster, but unprecedented cooperation between the parties. The 1964 elections, looming just months ahead, implied that the two parties would oppose one another. The parties' positioning for these elections served as a potential barrier to their legislative cooperation.[119]

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[115] *Cf.* CARMINES & STIMSON, *supra* note 18, at 52-55 (discussing the Republican transition to a more racially conservative policy after 1964).

[116] This is a major question investigated by David Filvaroff and Raymond Wolfinger. *See* Filvaroff & Wolfinger, *supra* note 22, at 18 (analyzing Republican concern about the consequences of the bill and their fear that "removing barriers to black voting would disproportionately benefit the Democratic party").

[117] In Subcommittee Number Five of the House Judiciary Committee, ardent liberals, with the help of southern Democrats, defected from the compromise by strengthening the bill. See *infra* Part II.C.1 for a discussion of the passage of the bill in the House and the Subcommittee's proceedings.

[118] *See* Filvaroff & Wolfinger, *supra* note 22, at 17-19 (voicing Republican concern over the effects the bill might have had on voters, and observing the party's tendency to remain "skittish" during the negotiation process).

[119] *See* CARMINES & STIMSON, *supra* note 18, at 48-55 (examining the positions of the Republicans and Democrats during this period and concluding that the Democrats continued to focus on racial liberalism while the Republicans, though not embracing racial conservatism to the extent associated with Arizona Senator Barry Goldwater, remained more conservative than Democrats).

B. *The Civil Rights Coalitions Within Congress*

To understand the Act's passage, we need to study the structure, incentives, and interaction of the three types of legislators noted above. The ardent supporters of civil rights consisted of a group of northern liberal legislators, who were mostly, though not exclusively, Democrats. The ardent opponents consisted mainly of southern Democrats. As well, a number of northern and western Republicans predictably opposed civil rights legislation. Moderate legislators were more distributed geographically. They included Republican legislators from the Midwest, the Northeast and, albeit more rarely, the West.

1. Republican Opportunities and Dilemmas

All accounts agree on the underlying motivations and, at least broadly speaking, strategies of the ardent supporters and ardent opponents. What is much more controversial is the role of the pivotal Republican legislators in the House and in the Senate. The interpretation that reigns supreme in academic studies makes it appear as if civil rights legislation was all but certain by 1963.[120] Leaders, such as Martin Luther King, Jr., and events, such as those at Selma and Birmingham, had greatly increased awareness of the problem among northerners whose support for new civil rights legislation was stronger in late 1963 than at any time in recent decades.[121]

Such legislation was supported by a substantial majority in the House and by a majority in the Senate. Critically, the Kennedy and, following President Kennedy's assassination, Johnson administrations threw their weight behind the effort to enact landmark civil rights legislation in the Eighty-eighth Congress.[122]

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[120] Another valuable perspective is provided by those scholars who consider the significance of domestic civil rights legislation in terms of its connection to an increasingly tense foreign policy, such as MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: EQUALITY AS COLD WAR POLICY 1946-1968 (1998); KLINKNER & SMITH, *supra* note 13, at 263-67.

[121] *See generally* TAYLOR BRANCH, PILLAR OF FIRE: AMERICA IN THE KING YEARS 1963-65, at 131-69 (1998) (discussing the political climate and potential for civil rights legislation in late 1963).

[122] *See* GRAHAM, *supra* note 20, at 74-79, 125-52 (detailing both Kennedy's and Johnson's emphasis on America's need to unite all races and focusing on the foreign policy implications of this domestic agenda); KLINKNER & SMITH, *supra* note 13, at 268-74 (tracing Kennedy's and Johnson's support of civil rights in their administrations); *cf.* MARK STERN, CALCULATING VISIONS: KENNEDY, JOHNSON AND CIVIL RIGHTS 63-112,

Faced with this situation, Republicans, so the argument goes, could not afford to be seen as opposing civil rights and thus were in a weak bargaining position. Indeed, many analysts appear to argue that the Republicans had little choice other than to accede to the wishes of the ardent supporters of the bill, supporters that included the President.[123] William Eskridge, Philip Frickey, and Elizabeth Garrett, for example, note that Senator Dirksen sought President Johnson's help in amending the bill but that Johnson refused, explaining that "there would be no compromise."[124] Charles and Barbara Whalen make the same point: "There was to be no deal on H.R. 7152. . . . The plain truth was that Dirksen had been outmaneuvered by Hubert Humphrey."[125] From this, they, like most analysts, form the view that Republican support could be expected.[126]

Unfortunately, we could find no evidence for this story aside from cheap talk comments made after the fact by ardent supporters, especially Hubert Humphrey and Lyndon Johnson, both of whom wanted to claim credit for this historic Act and minimize the importance of the Republicans. As analysts, we must be wary of taking the participants' accounts after the fact at face value. As evidence for their account, Eskridge, Frickey, and Garrett cite the Whalens.[127] The Whalens' principal citations are to newspaper accounts that, on inspection, contain no evidence of this assertion. For example, the *Washington Post* article cited by the Whalens reports: "[Dirksen] told reporters later that they barely touched on civil rights. But he told a visiting church group that he had told the President that the bill sent

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161-85 (1992) (examining Kennedy's somewhat hesitant support for civil rights and Johnson's firmer commitment).

[123] *See* MANN, *supra* note 109, at 367-69 (considering the political response by House and Senate Republicans during a time in which, in President Kennedy's words, "[t]he whole world [was] changing, and the whole nation [was] changing"). *But cf.* HARVARD SITKOFF, THE STRUGGLE FOR BLACK EQUALITY: 1954-1992, at 32-33 (rev. ed. 1993) ("[T]he popularity of Republicanism among African-Americans in 1956 frightened Northern Democrats. They were determined to win back the black votes the GOP had gained [and] believed that . . . civil-rights legislation was the only way to do it.").

[124] ESKRIDGE ET AL., *supra* note 14, at 19; *see also* MANN, *supra* note 109, at 391 (describing Johnson's refusal to "compromise with southerners and conservative Republicans").

[125] WHALEN & WHALEN, *supra* note 15, at 171-72; *cf. id.* at 29-70 (describing the attempt to pass H.R. 7152 prior to President Kennedy's assassination).

[126] *See id.* at 155 ("Everett Dirksen did not have too many options open to him."); *see also* Filvaroff & Wolfinger, *supra* note 22, at 17-21 (describing the Republicans' decision to "be as united as possible" in their position on the civil rights bill).

[127] ESKRIDGE ET AL., *supra* note 14, at 19.

over from the House would have to be amended."[128] The article makes no mention of any response from Johnson. In short, we could find no evidence to support the thesis that Johnson and Humphrey outmaneuvered Dirksen.

In our view, this account misrepresents both the history of the Act and the strategic dilemma involved in its passage. We find little evidence to conclude that Humphrey and Johnson manipulated Dirksen. This is not surprising given the pivotal nature of the Republicans. Indeed, there is a strong basis for believing that Republican support for the 1964 Act was not foreordained but precarious. First, although it is true that, since President Lincoln, the Republicans had been the party supporting the rights of African Americans,[129] this historical association changed to a degree with Franklin Roosevelt and the New Deal.[130] This shift continued into the 1950s,[131] by which time President Eisenhower was a reluctant supporter of civil rights.[132]

Second, in the late 1950s and early 1960s, Democrats, not Republicans, had become the main advocates of civil rights. It was then-candidate Kennedy, not Nixon, who advocated new civil rights legislation in the 1960 presidential campaign;[133] and it was the Democrats who pushed this legislation in 1957 and 1960.[134] In contrast, the Re-

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[128] Richard L. Lyons, *Plans for Cloture Vote on Jury Clause Pressed*, WASH. POST, Apr. 30, 1964, at A6.

[129] *See* BLACK & BLACK, *supra* note 25, at 42-57 (describing the association of Republicans with the North and Democrats with southern white supremacy); NANCY J. WEISS, FAREWELL TO THE PARTY OF LINCOLN 3 (1983) ("The Grand Old [Republican] Party was the party of Lincoln—a party that had held black allegiance for more than half a century.").

[130] *See* THERNSTROM & THERNSTROM, *supra* note 15, at 62-65 (describing the Roosevelt administration's more liberal views on civil rights and the migration of black support to the Democratic party in the 1930s despite the harmful effects of New Deal legislation on black workers).

[131] *See id.* at 88-93 (explaining the increasing role of liberal northern Democrats in promoting civil rights beginning in the 1940s).

[132] *See* SUNDQUIST, *supra* note 13, at 225-30 (describing Eisenhower's initial desire to "keep[] the civil rights issue quiet" and his ultimate endorsement of the civil rights legislation).

[133] *See* MOORE, *supra* note 15, at 59 ("Generally Nixon's campaign was considered weak and unspecific in the area of civil rights. Democratic nominee Kennedy, on the other hand, offered a candidacy strongly supportive of civil rights."); THERNSTROM & THERNSTROM, *supra* note 15, at 122-25 (discussing Kennedy's attempts to address civil rights issues in his 1960 presidential campaign). *But cf.* GRAHAM, *supra* note 20, at 30 ("[I]n 1960 *both* presidential parties had positioned themselves considerably to the left of their congressional counterparts in civil rights matters." (emphasis added)).

[134] *See* CARO, *supra* note 16, at 831-85 (describing President Johnson's support of civil rights); SUNDQUIST, *supra* note 13, at 230-59 (describing the Democrats' efforts to

publicans required that these acts be weakened as the price of their support.[135] Although demand for a stronger civil rights act had grown in the North, Democrats also sought a much more ambitious agenda.[136] Republican support for civil rights legislation in 1963 and 1964 could not be taken for granted.

Third, the primary imperative for the Republicans, we argue, was to avoid being seen as standing in the way of civil rights. This meant that they could not overtly collude with southern Democrats to defeat the bill. However, this did not imply that they had to roll over and let the Democrats pass any legislation they desired. As in 1957 and 1960, the Republicans were in a position to ask for serious dilution of the legislation.[137]

Finally, under one scenario Republicans had little reason to fear being blamed by civil rights leaders and by African American citizens if civil rights failed. That scenario involved ardent supporters insisting upon a broad civil rights bill, knowing that this insistence could blow up in their faces. This, of course, was the risk supporters faced in 1957 and in 1960; this prospect is what then-Senate majority leader, and later President, Johnson protested so vehemently.[138] By all accounts, the civil rights community was, by 1963, becoming very impatient with Congress;[139] it was imperative, for the Democratic party nationally, that Congress pass a civil rights bill—and a significant one—in the Eighty-eighth Congress.[140] And, from the vantage point of the

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pass civil rights legislation).

[135] *See* sources cited *supra* note 126 (discussing the Republican response to the civil rights bills); *cf.* KLINKNER & SMITH, *supra* note 13, at 248 (describing the Civil Rights Act of 1957 as "weak").

[136] *See* CARMINES & STIMSON, *supra* note 18, at 37-44 ("Whereas the civil rights plank in the 1956 Democratic platform was written in compromise language so as not to offend southern Democrats, the 1960 plank contained strong and specific support for civil rights."); THERNSTROM & THERNSTROM, *supra* note 15, at 138-48 (describing changing white public opinion in support of civil rights legislation and President Kennedy's bold civil rights bill).

[137] *See* SUNDQUIST, *supra* note 13, at 222-59 (describing how the Republicans acted to put limits on civil rights legislation).

[138] *See* CARO, *supra* note 16, at 533-39, 948-59 (describing Johnson's actions and attitude regarding the civil rights bill).

[139] As one commentator put it, "Impatience, tactics, and demands escalated, moreover, because the civil-rights leadership recognized that the new mood in black America would not be long sustained." HARVARD SITKOFF, THE STRUGGLE FOR BLACK EQUALITY 1954-1980, at 148 (1981).

[140] *See* JOHN FREDERICK MARTIN, CIVIL RIGHTS AND THE CRISIS OF LIBERALISM: THE DEMOCRATIC PARTY 1945-1976, at 171-76 (1979) (describing the escalating violence in the South and Kennedy's recognition that racial discrimination was "a 'moral issue,' one that would be settled in the streets if Congress did not act").

liberal wing of the party, the risk was considerably more than zero that they would be defeated in their efforts and that they would be blamed for this defeat.[141]

By contrast, Republicans were in an ideal political position to influence the fate of the Civil Rights Act. As one observer noted, "Republicans held the key to the bill's passage, and many of them sincerely wanted to play a meaningful role in the process."[142] They were pivotal legislators necessary for the legislation's passage—pivotal precisely because their support could not be counted on without concessions. In significant respects, these pivotal legislators were in the driver's seat with regard to controlling the bill's agenda. What gave them this power and influence was the omnipresent risk that they would walk away from the bargaining table. To be sure, such a decision would not be costless, especially in the 1964 elections. Yet it is important to remember that parties do not control their members in Congress; and those Republicans from the West and from conservative districts throughout the North faced their own individual electoral imperatives in their states, not the nation.[143] The electoral fortunes of a large and pivotal group of Republicans simply did not depend on passing a civil rights bill.[144] This placed Republicans in a strategic position to resist supporting Democratic initiatives, and Democratic leaders could not count on Republican support.

All these factors added up to a strategic opportunity for Republicans.

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[141] *See* DONALD R. KINDER & LYNN M. SANDERS, DIVIDED BY COLOR: RACIAL POLITICS AS DEMOCRATIC IDEALS 208 (1996) ("[T]he riots that swept through American cities in the middle and late 1960s, and the apparent failure of liberal policies that the violence seemed to signal, were reviving the Goldwater [Republican and conservative] racial strategy.").

[142] MANN, *supra* note 109, at 369.

[143] Although political scientists disagree about how strong parties are in controlling their members, nearly all agree that American parties have less control than do parties in most western European parliaments, such as the British Parliament. For a general discussion of the American party system, see ALDRICH, *supra* note 54, at 3-27; COX & MCCUBBINS, *supra* note 37, at 1; ROHDE, *supra* note 54, at 3.

[144] *See* POOLE & ROSENTHAL, *supra* note 74, at 44-45 (describing how the essentially three-party system in the mid-twentieth century allowed Republicans to join conservative southern Democrats in voting against northern Democrats on a "wide variety of non-race-related matters").

2. A Closer Look at the Coalitions

As we have noted, the Senate filibuster presented the most significant hurdle facing any civil rights bill. Because the vote for cloture required two-thirds of the Senate, liberal and moderate Democrats alone could not succeed in passing a civil rights bill; they needed a large group of Republicans to assist them. There were sixty-seven Democrats in the Senate, twenty-one from states of the old Confederacy, twenty of whom opposed any form of civil rights. (Senator Ralph Yarborough of Texas was the one southern Democrat who was not an ardent opponent.)[145] This left a maximum of forty-seven Democrats to support the bill (not all of whom did so in fact), far short of the sixty-seven senators needed for cloture.

This arithmetic logic had a number of consequences for passing civil rights legislation. First, it implied that at least twenty of the thirty-three Republicans were needed for support, and more if some of the northern Democrats failed to vote to end the filibuster. Second, this in turn cast Republican leader Everett Dirksen in the role of pivotal player throughout the entire Senate drama. If he and his supporters chose to support the bill, it would pass; if they decided not to, it would fail. His decision depended in part upon the changes to be made in the bill. The problem for the supporters was to bring Dirksen and his allies on board without gutting the bill.

The following Table displays the 1964 Senate on a spectrum of liberal to conservative using the measuring rod of scores produced by the Americans for Democratic Action (ADA) using each senator's voting behavior.[146] Statistical studies show that ADA scores are a good predictor of Senate voting on civil rights: the higher the ADA score, the more likely a senator will support the bill.

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[145] Senator Yarborough's colleague, Republican Senator John Tower of Texas, was to feature prominently in the debate surrounding the civil rights bill's employment discrimination provisions. *See infra* Part III.A.1.b (describing Tower's attempts to amend the Civil Rights Act to secure employer rights to administer employee aptitude tests).

[146] *See generally* Steven D. Levitt, *How Do Senators Vote? Disentangling the Role of Voter Preferences, Party Affiliation, and Senator Ideology*, 86 AM. ECON. REV. 425, 426 (1996) (describing methodology for estimating the various weights senators place on different considerations in voting); James Snyder & Timothy Groseclose, *Estimating Party Influence in Congressional Roll-Call Voting*, 44 AM. J. POL. SCI. 193, 193-94 (2000) (describing methodology to estimate how partisan considerations affect roll call voting).

Table 1: 1964 Senate Voting Record, by Party and Region

ADA Score	Republicans	Northern Democrats	Southern Democrats
100	-	NN	-
–	-	N	-
–	-	NNNN	-
–	-	N	-
–	-	NNNNN	-
90	-	NNN	-
–	R	NN	-
–	-	NNNNN*N	-
–	-	-	-
–	-	N	-
80	R	NNN	-
–	R	NN	-
–	-	N	-
–	-	NNNN	-
–	R	-	-
70	-	N	-
–	-	-	S^
–	R	NN	S
–	-	N	-
–	-	-	-
60	R	-	-
–	-	-	-
–	-	-	-
–	-	-	-
–	RR	N	-
50	R	N	-
–	-	-	-
–	-	-	-
–	-	-	-
–	-	NN	-
40	-	-	S
–	R	N	-
–	RRR	-	S
–	-	-	-
–	R	-	-
30	-	-	-
–	RR	-	-
–	-	N	-
–	R*	-	SSS
–	RR	-	-
20	-	-	-
–	-	-	-
–	R^RR	-	SSSS*
–	-	-	SS
–	R	-	-
10	R	-	SS
–	R	-	-
–	R	-	S
–	RR	-	SSS
–	R	-	SS
0	RRRR	-	-

R represents the median Republican, with an ADA score of 24. N* represents the median northern Democrat, with a score of 87. S* represents the median southern Democrat, with a score of 17, and S^ represents the score of Texas Senator Yarborough, who was not an ardent opponent of the Civil Rights Act of 1964. R^ represents the Republican senator who is the filibuster pivot, with a score of 17. This Table is based on the ADA's voting record scores for 1963, which are on file with the authors.*

ADA Scores range from 100 to 0, and are listed in the Table's first column on the left. Each symbol represents a senator: *R* for Republican; *N* for northern Democrat; and *S* for southern Democrat. Each senator is placed at his ADA score. Thus, reading down the Republican column, the Republican senator with the highest ADA score has a score of 89, while the Republican with the lowest score has an ADA score of 0. Similarly, ADA scores of northern Democrats range from a high of 100 to a low of 26, while those for southern Democrats range from a high of 69 to a low of 2.

The Table demonstrates just how conservative the pivotal Republican in 1964 was. Although some accounts appear to suggest that breaking the filibuster could have been accomplished with the support of liberal and moderate Republicans,[147] this is false. There were simply too few liberal and moderate Republicans; most were conservative. In the Whalens' judgment, "of the 33 Republicans, 21 (including Dirksen) could be classified as conservatives, only 5 as moderates, and 7 (including [California Senator Thomas] Kuchel) as liberals."[148]

Our statistical classification reveals the same conclusion. Assuming that all northern Democrats supported the legislation and all southern Democrats opposed it, twenty Republicans were needed to pass a motion on cloture. Assuming that the more liberal (higher ADA) Republicans were more likely to support than conservative ones, this required nearly two-thirds of the Republicans to favor the bill. Given our assumptions about voting behavior, the Table shows that the filibuster pivot, that Senator whose support is needed to break the filibuster,[149] had an ADA score of 17. (The dashed line in the Table marks this fact.) As 100 is the most liberal and 0 the most conservative, the Table shows that the pivotal Republican in 1964 was thus quite conservative. By way of comparison, the median southern Democrat also had an ADA score of 17. In contrast, the median northern Democrat had an ADA score of about 87. Senators with ADA scores of 87 usually support intervention by the national government, while those with ADA scores of 17 usually do not.

In short, in 1964 nothing assured support by pivotal Republicans for a strong civil rights bill.

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[147] *See supra* note 15 and accompanying text (explaining the difficulty of overcoming the filibuster).

[148] WHALEN & WHALEN, *supra* note 15, at 160.

[149] *See* BRADY & VOLDEN, *supra* note 9, at 17-20 (explaining the role of a pivotal senator in relation to veto and filibuster obstacles to legislation); KREHBIEL, *supra* note 9, at 23-26 (describing how pivots function).

C. *The Enactment Process*

Several important studies have examined in detail the process by which H.R. 7152 became law. For the most part, these accounts tell a similar story. In what follows, we focus on the Senate, in part because we agree with the consensus about House passage and in part because we believe that the necessary compromise in the Senate has been misunderstood.

We begin with the basic framework of congressional consideration. The bill was first introduced in the House of Representatives and, when passed by the House, considered and passed by the Senate. In both cases, supermajority support was needed in order to get around staunch opposition at key stages prior to the bill being allowed a floor vote. Supermajority support in the House, though not strictly required, was necessary as a practical matter to overcome the opposition of the Rules Committee;[150] in the Senate, it was necessary to overcome a filibuster.[151]

The relative sizes of the various groups combined with the ardent opposition of the southern Democrats to imply that assembling the necessary supermajority required a strong and durable bipartisan coalition. It further implied that the marginal supporter in both houses was a Republican. House and Senate passage are now considered in turn.

1. Passage in the House

We discuss in detail only one aspect of the House's passage of the bill because it illuminates a strategic problem also faced in the Senate. This event concerns the initial consideration of the bill by the Judiciary Committee. In the beginning, it was not obvious that the committee would pass the bill. Indeed, many previous civil rights bills had failed to garner sufficient support within this committee. Supporters carefully steered the bill to the epononymously named Subcommittee Number Five, a panel under the leadership of a very strong civil rights proponent, Representative Emanuel Celler, a Democrat from New

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[150] *See* LOEVY, *supra* note 15, at 90-95 (surveying Republican tactics in the House to place the bill before the Rules Committee); WHALEN & WHALEN, *supra* note 15, at 69 (describing the "fast parliamentary maneuvering" that was required to get the bill out of the Rules Committee).

[151] *See* John G. Stewart, *The Senate and Civil Rights*, *in* THE CIVIL RIGHTS ACT OF 1964: THE PASSAGE OF THE LAW THAT ENDED RACIAL SEGREGATION 149, 150-54 (Robert D. Loevy ed., 1997) (considering the alternatives available to the bill's opponents to defeat or compromise with the senators orchestrating the filibuster).

York and Chair of the full committee.[152] Although this subcommittee normally considered antitrust matters, Celler assigned the bill to this subcommittee because of its favorable composition.[153] The bill appeared to have sufficient support on this subcommittee to pass this stage of the long process. But obstacles loomed ahead.

Democratic proponents of the bill in the administration and Congress had worked out a compromise with the Republicans that had a chance of passing. The basic tactic was to organize enough moderate Republicans to collect a majority sufficient to overcome institutional hurdles within the House and to provide a suitable majority on the floor.[154] This bipartisan coalition was necessary not only for smooth sailing in the House, but also to protect the final House bill from being stopped in the Senate.[155] Proponents believed a bill with substantial bipartisan support would be more resistant to the sort of conservative attacks and strategic compromises that doomed previous civil rights legislation.[156] Thus, the bill sent to Subcommittee Number Five asked for less than the ardent supporters wanted.[157]

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[152] *See* LOEVY, *supra* note 15, at 46-49 (describing the "favorable forum for a civil rights bill" that existed in Subcommittee Number Five); WHALEN & WHALEN, *supra* note 15, at 3-11 (describing the introduction of the bill by Representative Celler); *see also* Nicole L. Guéron, Note, *An Idea Whose Time Has Come: A Comparative Procedural History of the Civil Rights Acts of 1960, 1964, and 1991*, 104 YALE L.J. 1201, 1215-18 (providing a thorough summary of the bill's transition from the subcommittee to the full committee).

[153] *See* ESKRIDGE ET AL., *supra* note 14, at 7-8 (observing that the subcommittee was "dominated by civil rights advocates").

[154] *See generally* Filvaroff & Wolfinger, *supra* note 22, at 14 (explaining that "[t]he need for Republican support [for a civil rights bill] was obvious").

[155] Key to this strategy was Representative William McCulloch of Ohio. *See* ESKRIDGE ET AL., *supra* note 14, at 7-10 (discussing McCulloch's essential role in passing civil rights legislation in the House); WHALEN & WHALEN, *supra* note 15, at 9-13 (discussing Democrats' negotiations with McCulloch to obtain his support for the bill); Filvaroff & Wolfinger, *supra* note 22, at 16-22 (describing McCulloch's "critical" role in shepherding the bill through the House).

[156] *See* GRAHAM, *supra* note 20, at 87-88 (recounting the Kennedy administration's efforts to persuade Republicans to support a compromise bill); WHALEN & WHALEN, *supra* note 15, at 11-13 (noting the need for Republican support in both the House and the Senate); Filvaroff & Wolfinger, *supra* note 22, at 16 ("Recognizing the need for substantial Republican help . . . the [Kennedy] administration aimed to develop strong but reasonable bipartisan provisions . . . to defeat the inevitable southern filibuster in the Senate.").

[157] For example, the original bill did not include any provision concerning "fair employment practices." For a good description of the process for including prohibitions against employment discrimination into legislative proposals, see GRAHAM, *supra* note 20, at 82-87.

The surprise event of the subcommittee process was the defection from the compromise by ardent liberals. Title by title, proponents of the compromise watched helplessly as liberals, with the aid of southern Democrats, strengthened the bill, potentially dooming prospects for a compromise that could pass both chambers.[158] The bill reported from the subcommittee therefore was stronger than the compromise agreed to by moderate Republicans like William McCulloch and Charles Halleck.[159]

Proponents of compromise in the full Judiciary Committee attempted to restore some semblance of the original bill. Their strategy was to introduce various amendments—each fashioned by moderate legislators under the direction of the White House and Representative McCulloch—designed to ameliorate the effects of the subcommittee's revisions to H.R. 7152.[160] Under Representative McCulloch's leadership, a coalition of ardent supporters and moderates emerged to steer the bill through the committee.

At this juncture, pivotal Republicans proved instrumental in the progress of the legislation and in determining the compromise itself.[161] All accounts of the episode agree that McCulloch was a central player in the negotiations over H.R. 7152.[162] His support was essential

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[158] *See* ESKRIDGE ET AL., *supra* note 14, at 9 (referring to McCulloch's disbelief in the changes made by liberal Democrats to strengthen the bill); WHALEN & WHALEN, *supra* note 15, at 34-40 (discussing numerous amendments that "put more muscle" into the bill).

[159] Filvaroff and Wolfinger suggest the following account of what took place: "Skeptical of both [the administration's] bipartisan strategy and the strength of [its] commitment, egged on by interest groups that shared this skepticism, and resentful at being excluded, the subcommittee's liberal Democratic majority seized the initiative in spectacular fashion." Filvaroff & Wolfinger, *supra* note 22, at 18. There are no reported descriptions of these Democrats' strategy, and this explanation seems the most plausible account. Another possible explanation is that these ardent supporters had reason to believe that the subcommittee bill would be refashioned after being reported by the subcommittee—otherwise it would die on the floor.

[160] This strategy initially failed because Illinois Representative Roland Libonati, a Democrat from Illinois who originally agreed to participate in the compromise's restoration, backed down from weakening the bill. Not only did this retreat backfire in the face of moderate civil rights supporters, it also contributed to Representative Libonati's defeat in the 1966 election. *See* WHALEN & WHALEN, *supra* note 15, at 65-67 (reporting that "Libonati's disloyalty to the president" caused him to lose the support of the "Cook County machine" in subsequent elections).

[161] The Whalens, for example, title their chapter on this episode, "Republicans to the Rescue." *Id.* at 29.

[162] *See* ESKRIDGE ET AL., *supra* note 14, at 7-8 ("McCulloch's support, and the Republican votes he might bring with him, were essential to success in the House."); GRAHAM, *supra* note 20, at 87-88 (asserting that McCulloch became the "crucial Republican dealer" in the Judiciary Committee); MANN, *supra* note 109, at 373-74 (consider-

in saving the bill from ruin in the Judiciary Committee and, later, in shepherding the compromise through the House.

Per our "Republican pivot" hypothesis, it was the Republicans who forced a compromise on the moderate version of the bill, rather than the Democrats compelling Republicans to acquiesce in a stronger bill than they wanted. This episode also illustrates that there was nothing at all inevitable about these legislative maneuvers. McCulloch was, after all, from a very safe district;[163] he had few national ambitions, and there was little likelihood that he would be penalized by his constituents if the civil rights bill died in committee. In short, McCulloch's threat to walk away from the table was entirely credible.[164] He was thus well positioned to steer a compromise through the House precisely because his support could not be taken for granted by the ardent supporters.

The version of the bill that emerged from this round of negotiations bore a fair resemblance to the original bill that had first been sent to Subcommittee Number Five.[165] The most important change was the addition of a fair employment practices provision, which would become Title VII.[166] The inclusion of Title VII was, as previously suggested, a significant price of the compromise among moderate Republicans like McCulloch, the Kennedy administration, and ardent congressional supporters.[167] With this price tag, the reformed

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ing McCulloch's support of the bill "crucial"); WHALEN & WHALEN, *supra* note 15, at 43-66 (detailing McCulloch's negotiations with Judiciary Committee Democrats to pass a compromise bill); *see also* 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: THE PASSAGE OF THE LAW THAT ENDED RACIAL SEGREGATION, *supra* note 151, at 49, 58-60 (explaining the moves that left McCulloch "tied" to the bill); Stewart, *supra* note 151, at 158 (considering the role McCulloch played as a target of the administration's strategy).

[163] *See* WHALEN & WHALEN, *supra* note 15, at 9-10 (noting that "McCulloch enjoyed wide popularity and respect at home, regularly winning reelection by a comfortable margin of 65 to 70 percent").

[164] *See* sources cited *supra* note 155 (discussing how McCulloch threatened on several occasions to withdraw his crucial support).

[165] *See* WHALEN & WHALEN, *supra* note 15, at 58-59 (describing the changes made in the subcommittee). *But cf.* LOEVY, *supra* note 15, at 65 ("From the Kennedy administration's point of view, the subcommittee was completely out of control. . . . Chairman Emanuel Celler himself, who ordinarily was loyal to the Kennedy people, . . . joined the subcommittee majority in supporting [the Fair Employment Practices section].").

[166] *See* GRAHAM, *supra* note 20, at 97-99 (discussing the subcommittee's treatment of legislative proposals regarding job discrimination).

[167] *See* WHALEN & WHALEN, *supra* note 15, at 63-64 (discussing the Kennedy administration's and ardent supporters' agreement to incorporate the Republicans' fair

bill was carried on the shoulders of a growing bipartisan coalition toward success in the House.

The two final hurdles to the bill's passage, both of which involved considerable drama, were the House Rules Committee and consideration by the House floor.[168] Although the bill's opponents offered a number of floor amendments, nearly all of them failed. Interestingly, an important opposition amendment was adopted, though it did not ultimately affect the bill's chance of passage: Judge Howard Smith of Virginia, an ardent opponent, offered an amendment to extend Title VII's provisions against discrimination to sex.[169] This was not only accepted as an amendment, but survived to become law.[170] The House passed the amended bill by a wide margin, 290 to 130.[171]

2. Passage in the Senate

Passage in the Senate required surmounting two significant hurdles. The first was avoiding referral to the Judiciary Committee, chaired by Senator James Eastland, a southern Democrat from Mississippi. Senator Eastland was sure to use his powers to hold up the bill if possible—his committee was known as "the graveyard of civil rights legislation."[172] The successful strategy was built around a fairly complicated legal argument developed by the administration with the aid

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employment proposals); Filvaroff & Wolfinger, *supra* note 22, at 21 ("The version of Title VII in the final compromise was taken from a bill introduced previously by moderate and liberal Republicans.").

[168] *See* WHALEN & WHALEN, *supra* note 15, at 84 ("Howard Smith, the 80-year-old segregationist chairman of the Rules Committee . . . [,] planned to do everything in his power to keep [H.R. 7152] captive."); *id.* at 101-23 (recounting the vigorous floor debate on the bill); *see also* ESKRIDGE ET AL., *supra* note 14, at 11-12 (describing the bill's survival, unamended, in front of the Rules Committee).

[169] *See* LOEVY, *supra* note 15, at 120-22 (recounting the unexpected support for the amendment within the house).

[170] *See* 42 U.S.C. § 2000e-2(a) (2000) ("It shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual's . . . sex . . . ."); *see also* GRAHAM, *supra* note 20, at 134-39 (reporting that the Smith amendment was adopted by a vote of 168 to 133). For a more detailed discussion of the adoption of the Smith amendment, see Carl M. Brauer, *Women Activists, Southern Conservatives, and the Prohibition of Sex Discrimination in Title VII of the 1964 Civil Rights Act*, 49 J.S. HIST. 37 (1983).

[171] WHALEN & WHALEN, *supra* note 15, at 121. In the end, thirty-four Republicans and ten nonsouthern Democrats voted against the bill. *Id.* As Robert Loevy notes, "[t]he South had not even been able to keep its own coalition completely together; 11 Southern Democrats, 4 of them from President Lyndon Johnson's home state of Texas, voted for the bill." LOEVY, *supra* note 15, at 123-24.

[172] WHALEN & WHALEN, *supra* note 15, at 4.

of Harvard Law School Professor Paul Freund.[173] Civil rights opponents had insisted for years that the federal government lacked the constitutional authority to enact legislation that proscribed discrimination in, among other respects, public accommodations and employment.[174] The image of "Mrs. Murphy's boarding house," an enclave of autonomy free from the heavy hand of the federal government, undergirded southerners' constitutional arguments against the bill.[175] The most obvious source of constitutional authority was Section 5 of the Fourteenth Amendment, which provides that "Congress shall have power to enforce, by appropriate legislation," the substantive provisions of the Amendment.[176] To anchor the bill in Section 5, however, would mean that, as a matter of congressional practice, the bill would be referred to that civil rights graveyard, the Judiciary Committee. To circumvent this problem, the administration described the bill as grounded in Congress's power to regulate interstate commerce.[177] As such, the bill was steered clear of the Judiciary Committee, clearing this first hurdle.[178] In fact, Senate leaders suc-

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[173] *See* GRAHAM, *supra* note 20, at 91-93 ("Freund cited overwhelming Supreme Court support for congressional authority to regulate private enterprise, stretching back a half-century to the white slave laws. . . . [This long regulatory tradition] also included legislating against various forms of discrimination . . . ."). *See generally Hearing Before the S. Comm. on Commerce*, 88th Cong. 1183-90 (1963) (brief of Paul A. Freund).

[174] *See, e.g.*, GRAHAM, *supra* note 20, at 94-95 (referring to North Carolina Senator Sam Ervin's opposition to the bill as outside Congress's power); LOEVY, *supra* note 15, at 302 ("While explicitly recognizing the responsibility of the United States Government in the area of civil rights, [Senator] Goldwater asserted that there was absolutely no constitutional basis for either the public accommodations or equal employment sections of the bill.").

[175] *See* LOEVY, *supra* note 15, at 51-52 (tracing the origin and implications of the "Mrs. Murphy" image as either "the average American whose rights were to be destroyed by the bill," or as revealing "the absurd lengths to which the opponents of the bill would go in order to seek a basis for attacking the bill"); Rauh, *supra* note 162, at 55 (expanding on the apparent simplicity of this image).

[176] U.S. CONST. amend. XIV, § 5.

[177] *See* STEWART, *supra* note 7, at 343 ("To overcome Eastland's opposition to the measure, the Civil Rights Bill was drafted so that it invoked the 'commerce clause' of the U.S. Constitution. Therefore the bill also fell under the jurisdiction of the Senate Commerce Committee whose chairman . . . was a strong, liberal supporter of civil rights.").

[178] This procedural device would, in the succeeding years, raise enormous difficulties for the constitutionality of the Act and the structure of American constitutional law generally. In a series of early decisions, the Supreme Court put its imprimatur on Congress's decision to ground this legislation in the Article I, Section 8 power of Congress to regulate interstate commerce. *See, e.g.*, Heart of Atlanta Motel v. United States, 379 U.S. 241, 253-58 (1964) (holding that Congress had power under the Commerce Clause to prohibit racial discrimination in public accommodations); *id.* at 291 (Goldberg, J., concurring) ("I agree 'that the action of the Congress in the adoption of the

ceeded in avoiding committee consideration altogether, taking the extraordinary step of bringing the bill directly to the Senate floor.

The second hurdle was the vote on cloture to end the southern Democrats' filibuster.[179] This predicament proved the most significant hurdle in the entire bill's passage. As noted above, achieving cloture required that the proponents solve two separate problems simultaneously. First, they had to get the moderate Republicans, led by Senator Everett Dirksen of Illinois, to join the coalition. Without Republican support, the southern Democrats' filibuster could not be stopped. Second, they had to gain Senator Dirksen's support in a way that did not jeopardize the House's acceptance of the Senate version. The two

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Act . . . is within the power granted it by the Commerce Clause of the Constitution.'"); Katzenbach v. McClung, 379 U.S. 294, 299 (1964) (holding that Title II of the Civil Rights Act was a valid exercise of congressional power under the Commerce Clause). The Court declined to decide whether and to what extent Section 5 of the Fourteenth Amendment also authorized this legislation. *See Heart of Atlanta Motel*, 379 U.S. at 292 (Goldberg, J., concurring) (noting that the majority did not "consider whether [the Act was] additionally supportable by Congress' exertion of its power under [Section] 5 of the Fourteenth Amendment"); *see also* RICHARD C. CORTNER, CIVIL RIGHTS AND PUBLIC ACCOMMODATIONS: THE *HEART OF ATLANTA MOTEL* AND *MCCLUNG* CASES, at ix-x (2001) (noting that the Court's opinion in *Heart of Atlanta Motel* was primarily based on the Commerce Clause, not the Fourteenth Amendment). *But see Heart of Atlanta Motel*, 379 U.S. at 279-80 (Douglas, J., concurring) (concluding that Congress had power to pass the Act under Section 5 of the Fourteenth Amendment as well as the Commerce Clause). When the Court consistently read the Commerce Clause broadly, the state of the law agreed with the legislature's strategic choice. However, the Supreme Court took a decisive turn away from these uniformly broad constructions of the Commerce Clause in *United States v. Lopez*, 514 U.S. 549, 561 (1995), holding that a law prohibiting concealed weapons within a "Gun-Free School Zone" exceeded Congress's power under the Commerce Clause because the statute in question had "nothing to do with 'commerce' or any sort of economic enterprise." *See also* United States v. Morrison, 529 U.S. 598, 619 (2000) (ruling that Congress lacked power under the Commerce Clause to enact legislation that created a civil remedy for gender-motivated violence); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 78-80 (2000) (holding that Congress cannot waive a state's sovereign immunity through legislation passed under its Commerce Clause power). Although the Court has not cast doubt on the continuing vitality of *McClung* and *Heart of Atlanta Motel* or other key civil rights/Commerce Clause cases, the strategic choice of the bill's ardent supporters does appear, from the vantage point of the current state of federalism jurisprudence, more risky than it might have appeared at the time. *See* Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation after* Morrison *and* Kimel, 110 YALE L.J. 441, 450 (2000) (arguing that *Lopez* and *Morrison* "illustrate[] how the Court's revived limitations on the commerce power . . . materially constrict the effective scope of federal antidiscrimination legislation").

[179] *See supra* text accompanying notes 15-18 (discussing the need for the bill's proponents to attract substantial bipartisan support to overcome the southern filibuster); *see also* MOORE, *supra* note 15, at 11 ("The single most powerful tool Senate policy advocates have at their disposal to defeat an obstructionist coalition is cloture.").

houses usually pass major legislation in different forms, requiring that the differing versions be reconciled through a conference committee. This procedure provides a routinized forum for negotiation between the two houses.[180] In the case of civil rights, however, resorting to a conference committee risked enfranchising Senator Eastland of the Judiciary Committee, thus jeopardizing the bill. Therefore, the strategy of the bill's supporters was to limit the changes made by the Senate to those that would be acceptable to the House, thereby avoiding a conference committee.[181] The problem for the bill's supporters was to bring Dirksen and his allies on board without gutting the bill.

The sequence of events in the Senate between February and June of 1964 is recounted in detail in various accounts of the civil rights battle.[182] The full Senate began debate on H.R. 7152 in late March. Through April and May of 1964, Senator Dirksen offered dozens of amendments, some major and some minor, to Title VII of the bill.[183] At the end of May, Dirksen joined with Senator Mike Mansfield to introduce an amendment in the nature of a substitute, labeled the Mansfield-Dirksen Amendment.[184]

We study these amendments in detail below. For the present analysis, a summary is useful. Although these amendments left the structure of the Act intact, their primary force was to blunt the impact of the bill on the North. Dirksen dramatically limited the enforcement powers of the Equal Employment Opportunity Commission, which H.R. 7152 had given National Labor Relations Board-like powers.[185] Dirksen also deleted the authority of a nongovernmental

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[180] On the strategic role of conference committees, see Kenneth A. Shepsle & Barry R. Weingast, *The Institutional Foundations of Committee Power*, 81 AM. POL. SCI. REV. 85, 94-97 (1987).

[181] Filvaroff and Wolfinger raise a third problem that is not generally discussed in the literature, yet was undoubtedly a serious constraint—constructing a compromise bill acceptable to the Senate's moderate Republicans without having the liberals defect by attempting to strengthen the bill as they had in the first stage of the House consideration by Subcommittee Number Five. *See* Filvaroff & Wolfinger, *supra* note 22, at 18 (describing McCulloch's frustration at liberal members of the subcommittee whose aggressive amendments would, he feared, result in a bill certain to fail on the House floor).

[182] For a complete chronology of the introduction and passage of the Act, see, for example, Robert D. Loevy, *A Chronology of the Civil Rights Act of 1964*, *in* THE CIVIL RIGHTS ACT OF 1964: THE PASSAGE OF THE LAW THAT ENDED RACIAL SEGREGATION, *supra* note 151, at 353.

[183] *See infra* Part II.D.3 (discussing Dirksen's amendments).

[184] 110 CONG. REC. 11,926-35 (1964).

[185] *See id.* at 11,932 (reprinting the amendment provision relating to the EEOC); GRAHAM, *supra* note 20, at 131-32 (describing how H.R. 7152 based the EEOC on a

group, such as the National Association for the Advancement of Colored People, to sue on behalf of a protected worker;[186] several other procedural rules were added that would make it more difficult to enforce the antidiscrimination prohibitions of the Act.[187] Moreover, the requirement that the enforcement agency establish a "pattern or practice" of discrimination was designed to focus federal suits on officially sanctioned discrimination, and thus away from more de facto discrimination in the North.[188] Other provisions of the Act, which would become the subject of vigorous litigation in later years, were reformulated in the amendments offered by Senator Mansfield, both on his own behalf and on behalf of his Senate colleague. Among some of the more contentious of these provisions were those involving seniority systems and affirmative action.[189]

The efforts of Senator Dirksen, as we describe in detail below, were intended to refashion the bill in order to make it more palatable to pivotal Republicans and their constituents. Consequently, the

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quasi-judicial model like the NLRB). Dirksen's changes, says Hugh Davis Graham, "further reduce[d] the authority of the EEOC, which he regarded as a potential bureaucratic monster, like the early and runaway NLRB. For the new EEOC, Dirksen would mandate deference to state and local [fair employment practices] agencies where they existed, and, more important, strip the EEOC of its prosecutorial role." *Id.* at 147.

[186] *See* 110 CONG. REC. 11,932-33 (permitting the EEOC to address alleged unlawful employment practices only when charged by the person claiming to be aggrieved or by a member of the EEOC). The impact of this change on the scope of EEOC enforcement is described by Professor Graham:

> By preventing third-party suits filed by groups like the NAACP, such an arrangement could avoid a sea of unnecessary litigation against businesses while still providing for some certain measure of enforcement by federal authorities. On the other hand, Dirksen well knew that the Justice Department was a relatively small, elite cabinet agency, in comparison with the more typical and large program-running departments like HEW, and so prided itself on enforcement through key case selection rather than through massive litigation. As a result the Justice Department posed a smaller threat of potential harassment to employers than would a new mission agency like the EEOC . . . .

GRAHAM, *supra* note 20, at 146.

[187] *See* 110 CONG. REC. 11,932-34 (providing certain time frames within which a charge must be filed).

[188] *See* LOEVY, *supra* note 15, at 258-59 ("[T]his 'pattern or practice' formula broke the impasse with Senator Dirksen that had existed ever since President Kennedy made his initial civil rights proposals to Congress almost a year earlier."); John G. Stewart, *The Civil Rights Act of 1964: Tactics I*, *in* THE CIVIL RIGHTS ACT OF 1964: THE PASSAGE OF THE LAW THAT ENDED RACIAL SEGREGATION, *supra* note 151, at 211, 257-59 (describing this provision as a "critical breakthrough").

[189] *See infra* Part III.A (describing judicial interpretations of these provisions).

thrust of the amendments was in the direction of ameliorating its impact on American businesses.

The reaction to this onslaught of amendments was predictably mixed. Ardent supporters of the bill objected to some of the amendments, and many were defeated; other amendments were accepted, ostensibly on the grounds that they did not change substantially the structure or purpose of the bill.[190] As Joseph Rauh would later put it, "What a genius Hubert Humphrey was in letting Dirksen think he was writing the final draft of the bill. Dirksen was only switching 'ands' and 'buts.' Humphrey pulled the greatest charade of all time. Dirksen sold out cheap."[191]

The final salvo by Senator Dirksen on behalf of the coalition of pivotal legislators was the co-introduction of the Mansfield-Dirksen substitute bill for H.R. 7152. This substitute attracted sufficient support among Senate Republicans to pass the motion for cloture. With cloture assured, he introduced a second substitute amendment, an amendment which finally attracted seventy-six votes in its favor.[192] The final act in the Senate drama occurred on June 19, 1964, with the Senate voting 73 to 27 in favor of Senator Dirksen's substitute bill.[193]

3. Reconciling the House and Senate Versions

After passing the Senate, the bill went back to the House. In order to avoid a conference committee,[194] the proponents sent an official message requesting that the House concur with the Senate's changes to the House Bill. For major bills, concurrence is a rare form of reconciliation.[195]

Yet the leaders of the bipartisan House coalition, Representatives Cellar and McCulloch, knew that if they were to make even one change to obtain House passage, this would force a conference com-

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[190] *See* Hubert H. Humphrey, *Memorandum on Senate Consideration of the Civil Rights Act of 1964*, *in* THE CIVIL RIGHTS ACT OF 1964: THE PASSAGE OF THE LAW THAT ENDED RACIAL SEGREGATION, *supra* note 151, at 77, 87-88 ("Actually, Dirksen gave a great deal of ground. The bill which he finally supported, the substitute, in my mind is as good or better a bill than the House bill."); Rauh, *supra* note 162, at 70-71 ("[C]oncessions had been made to Senator Dirksen in language, and on occasion in substance, but the basic structure of the House-passed bill remained intact.").

[191] LOEVY, *supra* note 15, at 266-67.

[192] ESKRIDGE ET AL., *supra* note 14, at 22.

[193] WHALEN & WHALEN, *supra* note 15, at 215.

[194] On the role of conference committees in resolving interchamber differences on major legislation, see SINCLAIR, *supra* note 95, at 59-68.

[195] *See id.* at 57-59 (describing nonconference reconciliation procedures).

mittee. Because this risked allowing Senator Eastland to participate in the selection of Senate conferees, making changes risked defeating the bill. Hence, the Celler-McCulloch strategy was to concur in the Senate's actions on the bill without revision.

Concurring did not mean that the House members would accept just any Senate changes at any cost. Senators knew that, to gain House concurrence, their changes could not be too large. They were therefore constrained in the changes they could make. Because holding a conference would jeopardize the bill, the House bill's supporters—ardent and moderate alike—faced the following choice: accept the Senate's version or retain the status quo. As a consequence, they accepted the Senate's version, voting 289 in favor, 126 opposed.[196]

D. *The Pivotal Role of Senator Dirksen and the Republicans*

The central question of this Section is whether Dirksen and the Republicans materially altered the Act as the price of their cooperation to break the filibuster. Thus, what is at stake is not merely giving various leaders their "proper due," but how we understand both how the Act was passed and the Act's meaning.

Most histories of the Act minimize Dirksen's role in securing agreement within the Senate on the bill that would eventually become law.[197] This view follows the expressed opinions of the bill's ardent supporters—from President Johnson through Senator Humphrey. In their accounts, they fashioned elaborate schemes to snare Dirksen and, since Dirksen eventually joined the coalition, many claimed success in their schemes. Merle Miller recounts Senator Humphrey's description of his personal strategy for wooing the "wizard of ooze":

> I don't think a day went by when I didn't say, "Everett, we can't pass this bill without you. We need your leadership in this fight, Everett." And I'd say, "With you in the lead, Everett, this bill will pass, and we will get cloture." And I'd say, "This will go down in history, Everett," and that meant, of course, that *he* would go down in history, which interested him a great deal.
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> Oh, I was shameless. But as I say he liked hearing it all, and I didn't mind saying it.[198]

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[196] ESKRIDGE ET AL., *supra* note 14, at 23.

[197] *See* sources cited *supra* note 15 (providing such accounts of the Act's passage).

[198] MERLE MILLER, LYNDON: AN ORAL BIOGRAPHY 370 (1980).

In these explanations, the ardent supporters manipulated Dirksen into supporting their strong version of the bill.[199]

The central problem for understanding the 1964 Civil Rights Act turns on how one interprets Dirksen's actions and the import of his seventy or so amendments proposed in the form of the Mansfield-Dirksen substitute bill. The competing interpretations of Dirksen's actions noted above lead to markedly different conclusions on this issue. From one perspective, Dirksen was virtually hoodwinked into making only minor, "clarifying," or cosmetic changes. From another, Dirksen was the pivotal player, skillfully garnering the necessary support for cloture by careful revisions of the bill. We call these, respectively, the "innocuous Dirksen thesis" and the "indispensable Dirksen thesis."

To frame our discussion of Senator Dirksen's contributions to shaping the Civil Rights Act, we consider the incentives facing the minority leader. We highlight two mutually reinforcing set of incentives, the first concerning electoral incentives, the second concerning incentives within Congress.

As a major leader of the Republican party in Congress, Dirksen acted to protect the Republicans against the charge that they sold out on civil rights.[200] Recall the situation in 1963: The Republicans had lost both the White House three years earlier and substantial support from the African American community to Democratic president John F. Kennedy.[201] Once Johnson ascended to the presidency in November of 1963, matters with respect to black support looked even more problematic.[202] Although President Eisenhower had signed civil rights

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[199] This "manipulation" theme runs through many of the scholarly accounts of the enactment process. *See, e.g.*, LOEVY, *supra* note 15, at 229 (noting that Humphrey said he had been "shameless" in his effort to win Dirksen's agreement and support for the pro-civil rights position); MANN, *supra* note 109, at 395 (quoting President Johnson's advice to Humphrey on how to get Dirksen's support: "You've got to let him have a piece of the action. He's got to look good all the time."); WHALEN & WHALEN, *supra* note 15, at 155 (discussing a memorandum from Humphrey to President Johnson, dated March 18, 1964, in which he suggested an approach that would appeal to Senator Dirksen's desire to secure his place in history); Filvaroff & Wolfinger, *supra* note 22, at 23 (discussing Democratic strategy in getting Dirksen to support the bill); Rauh, *supra* note 162, at 69-72 (describing phone calls and personal visits to both Humphrey and Dirksen urging a strong bill).

[200] *See* MACNEIL, *supra* note 20, at 229-38 (describing Dirksen's efforts to create a bill that both Democratic and Republican senators could support).

[201] *See supra* Part II.B.1 (noting that, in the late 1950s and early 1960s, Democrats were the strong advocates of civil rights).

[202] *See* KLINKNER & SMITH, *supra* note 13, at 272-73 (describing Johnson's emphasis on civil rights and rights for African Americans after becoming President). *See generally*

legislation into law in 1957, the perception that the Republicans were reluctant draftees into the war for federal protection was persistent, and certainly Lyndon Johnson, Democratic President and party leader, worked hard to cement that perception.[203]

Beyond the desire to position the Republican Party for the 1964 elections, Dirksen faced an enduring incentive to solidify the Republicans' power within Congress and particularly within the Senate. There was a strong political imperative to put the Republicans—and especially the Republican congressional leadership—as a co-participant in the civil rights drama as a means of countering the perception that the Republicans had not supported civil rights legislation in the 1950s and early 1960s.[204] The Republicans thus had a political incentive to be *perceived* as favoring civil rights.[205]

Perhaps most importantly, the Republican leadership likely considered the intriguing possibilities posed by the intra-Democratic battle between North and South. Senator Richard Russell of Georgia had approached President Johnson and warned him that vigorous advocacy of civil rights legislation would cost him southern Democratic support and, therefore, risk losing the party's long-term hold on the South.[206]

The flip side of Russell's warning, though, is equally important. Just as Democratic leaders understood that pursuing civil rights risked losing the South, so too Republican leaders understood that they

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BRANCH, *supra* note 121, at 173-340 (describing tensions between the civil rights movement and the White House in the first few months of Johnson's presidency).

[203] Indeed, the two presidential candidates in 1964 presented stark contrasts, and the 1964 election helped cement the image of the Democrats as the progressive, pro-civil rights party. As Kinder and Sanders observed: "A more important and enduring legacy of the 1964 campaign was a transformation in the public's perceptions of the political parties. Thanks in large part to Goldwater and Johnson, Americans came to see the Democratic and Republican parties in a completely different way." KINDER & SANDERS, *supra* note 141, at 206; *see also* SUNDQUIST, *supra* note 13, at 247 (noting that Democrats alleged that the Republicans were holding back in their support of the Civil Rights Act); Philip E. Converse et al., *Electoral Myth and Reality: The 1964 Election*, 59 AM. POL. SCI. REV. 321, 329 (1965) (explaining that there was near consensus of opinion that Johnson was associated with a pro-civil rights position and Republican Senator Goldwater with a "go-slow" approach).

[204] For discussions of the political maneuvering by the Democratic and Republican parties on civil rights issues, see CARO, *supra* note 16; MACNEIL, *supra* note 20.

[205] *See* LOEVY, *supra* note 15, at 278-81, 316-21 (suggesting that House members knew that Dirksen's participation was crucial to the passage of the civil rights bill in the Senate and would not support the bill in the House until they were convinced Dirksen would support the bill in the Senate).

[206] Michael Oreskes, *Civil Rights Act Leaves Deep Mark on the American Political Landscape*, N.Y. TIMES, July 2, 1989, § 1, at 16.

might gain support in the South for the first time in a century.[207] Indeed, by the early 1960s the Republicans had already formulated their "Southern Strategy."[208] Philip Converse, Robert Steamer, and Donald Strong, writing in 1963 prior to the Civil Rights Act, all discuss the Republican electoral advances in the South that began in the late 1950s, and, to varying degrees, they each saw the coming of the two-party competition in the South.[209] In a remarkably prescient article about the future of the Republican party in the South, Converse observed that,

> [a]s various southern constituencies drift more nearly within the reach of the opposition, Republican politicians begin to run candidates where interparty contests have been rare in the past. In the deeper Confederate South, for example, the number of national House seats contested in 1962 was almost three times as great as the number contested in 1958 . . . .[210]

Strong, in his title, forecasts "[d]urable Republicanism in the South."[211] Black and Black, Klinkner and Smith, Phillips, and Sund-

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[207] *See id.* (reporting Johnson's remark that, with the Civil Rights Act, he had "delivered the South to the Republican Party for a long time to come"). Earl and Merle Black show that the Republicans began to contest elections in the South in the years prior to the Civil Rights Act. BLACK & BLACK, *supra* note 25, at 40-71. Similarly, Philip Klinkner and Rogers Smith observe that "Republican efforts to cultivate the South began in the mid-1950s." KLINKNER & SMITH, *supra* note 13, at 261.

[208] *See* KLINKNER & SMITH, *supra* note 13, at 262 (discussing the Republican meetings in the early 1960s to debate and map out their Southern Strategy).

[209] *See* Philip E. Converse, *A Major Political Realignment in the South?*, *in* CHANGE IN THE CONTEMPORARY SOUTH 195, 196 (Allan P. Sindler ed., 1963) ("[I]t has not been unreasonable to look for the development of a South as solidly Republican as it once was Democratic, thereby joining the rural and small-town conservatism of the South to that so clearly represented by Republicanism in much of the rest of the nation."); Robert J. Steamer, *Southern Disaffection with the National Democratic Party*, *in* CHANGE IN THE CONTEMPORARY SOUTH, *supra*, at 150, 152 (considering the causes of "the disaffection of Southern voters from . . . their traditional allegiance [to the Democratic party]"); Donald S. Strong, *Durable Republicanism in the South*, *in* CHANGE IN THE CONTEMPORARY SOUTH, *supra*, at 174, 186-87 (speculating on the connection between the "presidential two-partyism" revealed by southern support for Republican presidential candidates in 1952, 1956, and 1960, and the possibility of a "full two-party system" in which Republican candidates would compete at every level of southern politics).

[210] Converse, *supra* note 209, at 220.

[211] Strong, *supra* note 209, at 174. Strong's logic is as follows: "The historic Solid South was an artificial device designed to assure white supremacy." *Id.* When the national Democratic party became committed to civil rights, party solidarity disappeared. "[The Solid South] was held together by the tradition of the Democratic party being the party of white supremacy. When it became apparent that the Democratic party had abandoned its historic role, many Southerners began to vote what they regarded as their economic interest." *Id.* at 192.

quist analyze these trends after the fact.[212] Black and Black, for example, provide data from the 1950s onward, showing that Republican inroads in the South began in the late 1950s and continued for over three decades.[213] Phillips writes that the "idea was to join the South and West in a conservative coalition."[214] Finally, it is worth noting that, at the presidential level, Eisenhower received forty-eight percent of the southern vote in 1960, while Nixon received forty-six percent.[215] The South was nearly uniform in supporting Goldwater's nomination at the 1964 Republican convention; Goldwater, focusing much of his electoral effort at winning southern votes, "articulated a forceful defence of states' rights, reminding his audiences that he had stood against the Civil Rights Act of 1964."[216]

In the spring of 1964, Senator Dirksen would thus have foreseen the civil rights bill as part of the larger project of weakening the Democratic party's control of national politics. Beyond the immediate electoral benefits of supporting civil rights, then, the Republicans had a long-term incentive to support this bill so as to help the Democrats dislodge the southern wing of their party.[217]

Senator Dirksen also faced a set of internal incentives and constraints in Congress. Most important, as we have noted, was the problem of avoiding a conference committee to reconcile different versions passed by the House and Senate.[218] This strong incentive

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[212] *See* BLACK & BLACK, *supra* note 25, at 57-71 (analyzing the House elections in the mid-1950s and the Republican expansion into southern metropolitan areas); KLINKNER & SMITH, *supra* note 13, at 261-63 (addressing Republican efforts to gain support in the South); KEVIN P. PHILLIPS, THE EMERGING REPUBLICAN MAJORITY 204 (1969) (discussing Republican victories in the deep South (South Carolina, Georgia, Alabama, Mississippi, and Louisiana) and losses in the outer South (Tennessee, Virginia, Florida, Texas, and North Carolina)); SUNDQUIST, *supra* note 25, at 252 figs.12-1C to 1D (mapping the areas of greatest Republican gains in presidential voting from 1948 to 1952 and 1960 to 1964).

[213] *See* BLACK & BLACK, *supra* note 25, at 61 fig.2.2 (plotting the southern Republican campaign effort from the 1930s to the 1990s).

[214] PHILLIPS, *supra* note 212, at 204.

[215] *Id.* at 27.

[216] KINDER & SANDERS, *supra* note 141, at 202.

[217] *See* PHILLIPS, *supra* note 212, at 286-89 (summarizing Republican party strength in the South from 1932 to 1968). James Sundquist has examined the transformation of American politics following the civil rights era. *See* SUNDQUIST, *supra* note 25, at 332-54 (analyzing trends in party strength and demonstrating the loosening of party attachment); SUNDQUIST, *supra* note 13, at 523-37 (discussing party realignment after passage of the Civil Rights Act and its consequences). We note that this argument does not require that Dirksen mastermind the Republican southern strategy, but rather that he be sufficiently aware to take advantage of it.

[218] *See supra* text accompanying notes 180-82, 194-96 (discussing the risks of the

constrained the Republicans. Were they to gut Title VII, for example, a conference committee would have almost assuredly been required, risking the bill's failure. Further, once the Republicans decided to support the legislation, they wanted to avoid conference for this same reason.

In sum, these manifold forces all worked together to create a critical imperative for Senator Dirksen and other Republican legislators. They had to construct an acceptable (that is, moderate) bill while downplaying the fact that it was, in important respects, different from the bill sent by the House to the Senate in February of 1964.

1. The Innocuous Dirksen Thesis

In order to consider the two views of Dirksen's role, we begin with those scholars who conclude that his role was innocuous. Eskridge, Frickey, and Garrett, echoing the views of the Whalens, draw the following conclusion:

> As April stretched on and Dirksen found himself unable to muster sufficient bipartisan support for [weakening the bill], he decided to approach the President in an effort to bluff his way to a compromise. . . . Forewarned (by Humphrey) of this approach and the inevitability of Dirksen's support in any event, Johnson refused to take the bait. There would be no compromise. On May 4, Dirksen met with Mansfield, Humphrey, and Attorney General, Kennedy, to hammer out acceptable but minor amendments to H.R. 7152.
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> Although the Democrats had allowed Dirksen to make changes in the bill's language, so that he could claim to have significantly rewritten the bill, virtually all of the changes were cosmetic, giving greater symbolic recognition to local and state enforcement of civil rights but not weakening the substantive protections. Dirksen characteristically termed his bill "infinitely better than what came to us from the House" but Humphrey had little trouble concluding that he had kept his promise to Bill McCulloch not to support a weakened bill.[219]

Joseph Rauh, a member of the Americans for Democratic Action during this period and an ardent supporter of civil rights, provides an even more striking statement of this view. According to Rauh, Senator Dirksen really did not change the bill very much at all. "(Humphrey) would have paid a higher price if Dirksen had really demanded it . . . .

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bill's failure if a conference committee was called and the methods adopted by the proponents of the bill to avoid a conference committee).

[219] ESKRIDGE ET AL., *supra* note 14, at 19-20 (citations omitted).

Dirksen wanted the credit; Humphrey wanted the bill."[220] James Sundquist concludes that "[t]he 'compromise,' introduced jointly by Mansfield and Dirksen, made seventy other changes in the House bill, but most were technical and minor. The House bill remained basically intact."[221] Raymond Wolfinger and David Filvaroff, whose account is especially significant given that they were there at the creation of the Act and interviewed the major participants in the bill's enactment, declare that

> Dirksen filed over one hundred amendments [ranging] from proposals to eviscerate each of the major titles to completely trivial changes. . . . In the end, [Dirksen] demanded comparatively few significant alterations. Most of the differences between the House bill and what was labeled the Dirksen-Mansfield Compromise were largely cosmetic, even broad redrafting of major sections worked little, if any, substantive change. Once he decided to cooperate, Dirksen apparently was concerned mainly with being able to point to the many marks he had left on the bill. Their limited impact notwithstanding, the number and seeming importance of the concessions he had won were enough to justify the support of his more conservative Republican colleagues.[222]

In sum, according to this interpretation, Dirksen's role in shaping the bill was relatively minor. His rhetorical flourishes about having produced a much better bill are seen by various scholarly commentators and legislator contemporaries as mere credit claiming and self-serving ego boosting.

Some of the evidence supports this interpretation. Although Dirksen at times talked about gutting the Act—he never favored the public accommodations or the fair employment provisions—in the end he chose not to do so.[223] A standard phrase, repeated by many accounts, is that Dirksen's seventy amendments were technical and minor because they left the bill "intact."[224]

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[220] LOEVY, *supra* note 15, at 319; *see also supra* text accompanying note 191 (reporting Rauh's assessment that "Humphrey pulled the greatest charade of all time. Dirksen sold out cheap.").

[221] SUNDQUIST, *supra* note 13, at 269.

[222] Filvaroff & Wolfinger, *supra* note 22, at 25-26.

[223] *See* MILLER, *supra* note 198, at 368-70 (describing the Democratic bill sponsors' efforts to court Dirksen for the cloture vote—primarily by complimenting his "reasonableness" as a person).

[224] SUNDQUIST, *supra* note 13, at 269; *see* LOEVY, *supra* note 15, at 318-21 ("King, Katzenbach, Mitchell, and Rauh, McCulloch, and Humphrey were fortunate that, in the end, Dirksen did not demand as much as he might have for delivering the key votes for cloture."); MANN, *supra* note 109, at 411 ("Dirksen proposed only minor modifications to the bill."); Stewart, *supra* note 188, at 259-64 ("[T]he leaders had no

In one sense, the phrase is accurate: Dirksen's amendments left the structure of the Act intact without gutting any of the major sections. Nonetheless, this is not the only type of change Dirksen could have made. We cannot conclude, therefore, that Dirksen's failure to gut the Act implies that he did not alter the Act. As we will see, his amendments significantly altered the Act in other ways.

2. The Indispensable Dirksen Thesis

To be understood as indispensable, two things must be true about Dirksen: first, that he could have credibly declined to support the civil rights bill and thus held substantial bargaining leverage over the Democrats; second, that his proposed changes to the bill were significant and, therefore, that his role in shaping the civil rights bill materially altered the resulting Act. There are strong reasons for believing that both of these claims are true. We consider both in turn, discussing in this Subsection the evidence for and against the Democrats outmaneuvering Dirksen and, in the next Subsection, evidence of whether the amendments can be considered truly cosmetic.

Much of the evidence for the innocuous Dirksen thesis consists of statements of the major principals, including Senator Humphrey and President Johnson. Both of these Democratic leaders wanted to take their place in history as being responsible for the Act and, after the fact, attempted to minimize the role of Dirksen and the Republicans. Not surprisingly, they dismissed Dirksen's statements that he had produced a completely new bill as a mere display of ego.[225] To be sure, Dirksen's blustery statement that he had entirely rewritten the bill was exaggerated. He, like any legislator, had an incentive to spin his role in a decidedly slanted way.[226] And, as we discussed earlier, there were

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problem with Dirksen leaving his mark on the bill so long as this did not jeopardize any essential aspects of the legislation . . . .").

[225] *See, e.g.*, Humphrey, *supra* note 190, at 88 ("Dirksen had to be out in front. Dirksen is a leader, he is a great dramatist, and a fine legislator. He had the right to be out in front, and I gave him every opportunity to be so.").

[226] It is interesting to note that Dirksen's biographer, focusing on the Senator's materials rather than those of the Act's ardent supporters, uses exactly the same logic as that quoted above in support of the innocuous Dirksen thesis, only this time to support Dirksen as a central player in the legislation's drafting:

> Attorney General Kennedy in particular tried to resist Dirksen's proposals on public accommodations and fair employment practices, but Dirksen was insistent. He had the compelling argument that he could not deliver the Republican votes for cloture unless he had a "salable" package. Even when the administration officials reluctantly gave way to Dirksen, some of the Republican senators balked at the final bill.

some interesting strategic reasons for Dirksen, as leader of his party, to highlight his role.[227]

Just as there is reason to question the face value of Dirksen's remarks, there is reason to question the face value of the remarks of the ardent supporters. In assessing legislative statements that purport to shed light on the history of a bill, we must ask in what context were these statements issued and, more precisely, for what purposes were legislators aiming their statements. Our theory of legislative rhetoric, discussed above in Part I, implies that legislators have strategic interests in propounding self-serving views about what a legislative provision or amendment means.

Because the ardent supporters' statements characterizing Dirksen's role as minor were written after the legislative episode, they are cheap talk.[228] After the Act's passage, Dirksen's support could not be withdrawn; the episode was over. Hence, ardent supporters could attempt to minimize his role in order to emphasize their own. By way of contrast, none of the protagonists in the drama (e.g., Humphrey, Johnson, Celler) declared at the time the Mansfield-Dirksen amendments were being debated that Dirksen's role was inconsequential or that all the proposals were merely cosmetic, leaving the House's compromise bill completely intact. Indeed, much of the ardent supporters' rhetoric during their efforts (many of which were successful) to defeat various amendments highlighted the point that these amendments would potentially ruin the bill.[229]

Of course, statements exalting Dirksen's role during the time in which his support was critical would also be suspicious. In an important sense, any contemporaneous description of a particular proposal's relative significance or insignificance with respect to the entirety of the bill proper is cheap talk.[230] This cheap talk is designed to

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MACNEIL, *supra* note 20, at 234.

[227] *See supra* text accompanying notes 142-46 (addressing the pivotal role Republicans played in the drafting and passage of the bill).

[228] *See supra* text accompanying notes 87-91 (discussing, and questioning the value of, "cheap talk").

[229] For example, the Whalens' report documents the dialogue that occurred during the Humphrey-Kuchel team meeting: "'Let's not kid ourselves,' retorted the perennially angry Joe Clark (D, PA), 'This has become the Dirksen bill! I deplore it but that's it.' 'I've said this since the beginning,' Humphrey pointed out." WHALEN & WHALEN, *supra* note 15, at 171.

[230] This is not to say, however, that all contemporaneous legislative statements (for example, remarks during a floor debate) are cheap talk. The task of reconstructing legislative history, after all, is to distinguish cheap talk from more probative evidence of statutory meaning and legislative purpose. *Cf.* McNollgast, *Legislative Intent*, *supra*

reassure constituents and allies, and legislators pay little or no price for such statements. For example, why ought not Senator Humphrey and his allies trivialize Dirksen's changes, and why should Dirksen not cast himself in the role of main deal maker and architect of the "new and improved" civil rights law?

An important event in many of the accounts of an innocuous Dirksen is the meeting between Dirksen and Johnson in which Dirksen allegedly attempted to bluff Johnson into concessions in exchange for Dirksen's support.[231] According to this account, Johnson successfully stonewalled Dirksen.[232]

As we noted above, there are several problems with this story. First, there were no witnesses to the meeting, other than Dirksen and Johnson.[233] Second, the evidence to support this account lies in the memoirs of ardent supporters attempting to cast themselves in the leading role. This evidence is cheap talk. To be sure, we are in no better position than earlier scholars of this episode to know exactly what was said between Dirksen and Johnson or what this conversation meant for the outcome of the civil rights battle.[234]

Our point, rather, is that this is not about what Dirksen—or anyone else—said. It is instead that the strategic situation dictated that Dirksen was in the driver's seat. In accord with the lessons of positive political theory, Senator Dirksen was simply in a better position to bargain successfully for what he wanted. Standard positive political theory models show that, in a conflict between the views of two bar-

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note 11, at 23-24 (noting that a legislator who is subject to sanctions and "loss of reputation" is less likely to engage in "cheap talk").

[231] *See* ESKRIDGE ET AL., *supra* note 14, at 19-20 ("[Dirksen] met with Johnson on April 29 and offered to deliver 22 to 25 Republican votes for cloture if the Administration would go along with weakening the bill."); WHALEN & WHALEN, *supra* note 15, at 171-72 (discussing Dirksen's strategic attempt to get Johnson to change the bill).

[232] *See* ESKRIDGE ET AL., *supra* note 14, at 19 ("Johnson refused to take [Dirksen's] bait. There would be no compromise."); WHALEN & WHALEN, *supra* note 15, at 171-72 (stating that Johnson would not compromise with Dirksen).

[233] The newspaper articles cited in the Whalens' account does not provide any evidence supporting this claim from the only individuals who could have known what was discussed in this private meeting. Indeed, Senator Dirksen commented to reporters that the two men "had barely touched on the subject of civil rights." WHALEN & WHALEN, *supra* note 15, at 172.

[234] Although we do have the benefit of primary sources that imply a more complex interaction between Johnson and Dirksen. *See* BESCHLOSS, *supra* note 22, at 332-33 (reporting a transcripted conversation between President Johnson and Senator Mansfield in which Johnson suggested he would use the upcoming conversation between himself and Dirksen to shift Dirksen's focus to the Senate leadership and Attorney General Kennedy).

gainers, the pivotal bargainer wins the most.[235] The Democrats desperately needed the votes of Dirksen's Republican allies for passage. The Democrats, acting unilaterally, had no hope of passing this bill, even if all northern Democrats assented. Many Republicans were from districts where they would pay little price for opposing civil rights;[236] the Republicans, as pivots, were in the driver's seat and should have been able to write the terms of the bargain.[237]

The final flaw of the innocuous Dirksen thesis is its failure to consider the incentives among all participants to minimize the impact of the Republican changes. We have already emphasized the ardent supporters' incentives to claim the most credit for themselves. Moreover, despite needing Dirksen, Democrats also had an incentive to paint his changes as small, to help get their Democratic colleagues—and the House—to accept the changes.[238]

Our analysis of Dirksen's incentives implies that he too had strong reasons to downplay his role and that of his amendments. First, once behind the legislation, Dirksen had to avoid forcing a conference committee. Therefore, all supporters of the Act—House and Senate, Democrats and Republicans—had reason to deemphasize Dirksen's changes regardless of their true beliefs about the magnitude of these changes. Second, Republicans had to worry about how their actions and amendments would play in the upcoming 1964 elections. If Democrats could paint Dirksen's amendments as undermining civil rights, they would rob Republicans of the value of their legislative partnership.[239] Finally, as we have noted, Republicans had a long-term incentive to let Democrats claim the lion's share of the credit: if Democrats' advocacy of civil rights lost them the South, it would be

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[235] For standard accounts of the median-voter theorem, see STEWART, *supra* note 7, at 20-22.

[236] *See supra* text accompanying notes 142-44 (noting that many Republicans represented congressional districts less supportive of civil rights legislation).

[237] This conclusion is subject, of course, to the significant qualification that ardent supporters must perceive the bargain as more favorable from their perspective than the status quo. *Cf.* GILMOUR, *supra* note 111, at 22 (observing that, "[t]o many civil rights activists, a strong bill that failed because of a southern filibuster might very well have been preferred to a neutered bill that passed").

[238] *See* GRAHAM, *supra* note 20, at 147 ("As Humphrey and the Senate leadership took great pains to reiterate in floor debate, the amendments of the compromise package only clarified and codified the original intention of the administration and the congressional leadership.").

[239] *See supra* text accompanying note 26 (discussing the Republican political gains from the Civil Rights Act).

the Republicans gain.[240] For these reasons, the rhetoric of the participants—ardent supporters and pivotal Republicans alike—should not be taken at face value. All had incentives to minimize the perceived impact of Dirksen's amendments.

We now raise one additional, if subtle, point, the claim that Dirksen's amendments were simply clarifying can be considered accurate without implying that they were also innocuous. The reason gets to the heart of a fundamental strategic problem for legislators passing laws that must later be interpreted by courts: the dilemma of how legislators can communicate with a court reading the legislative record long after the fact and not party to the shared meanings of terms and provisions that were common knowledge among all legislators.

Suppose that, among a set of legislators, the purpose of a specific provision is common knowledge even though the provision's specific language is not clear. In one sense, making the provision clearer and more explicit is merely "clarifying" since all *legislators* already know the meaning. Such knowledge among the legislators is usually based on informal communication conducted off the floor and outside of official committee hearings.[241]

Our judgment about whether this type of alteration merely clarifies, and is hence innocuous, differs considerably when we turn from the perspective of an insider-participant (e.g., a member of Congress or congressional staffer) to an outsider (e.g., a court, historian, or legal scholar) trying to assess the provision's meaning years after its enactment. Outsiders, looking at the text long after the fact, are typically not party to many of the shared meanings held by insiders who passed the legislation; being understood by all, many of these shared meanings are never discussed, thereby leaving no evidence in the legislative record. To outsiders, therefore, amendments that make explicit in legislative text what all legislators understood are often not mere clarification, but may make all the difference in the world.

Legislator-participants will therefore regard the project of clarifying legislative language differently than will a court charged with de-

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[240] *Supra* text accompanying notes 206-08.

[241] Although this is where much of the real work of legislative coalition building and bill drafting occurs, this environment remains rather inaccessible to most outsiders. *See supra* text accompanying notes 40-42 (discussing the coalition-building requirements for successful legislative action). *See generally* Nelson W. Polsby, *The Institutionalization of the U.S. House of Representatives*, *in* CONGRESS: STRUCTURE AND POLICY 91 (Mathew McCubbins & Thomas Sullivan eds., 1987) (describing the specialization and complexity accompanying institutionalization within the House).

termining the Act's meaning.[242] To the extent that vague language is consistent with a wider range of interpretations, the breadth of possible judicial opinions is larger.[243] Judges are thus less likely to infer—or be bound by—shared, common meanings among legislators at the time of enactment.[244] A systematic set of clarifications of this sort may markedly affect how outsiders judge the meaning of an act.

This argument suggests why we should not equate statements by ardent supporters that the Dirksen amendments were clarifications with the idea that Dirksen's role was minor and that the final bill adopted by Congress was essentially identical to H.R. 7152. Even viewed as mere clarifications that make explicit what congressional participants already knew, the changes may be still significant.

A final issue in our assessment of the innocuous versus the indispensable Dirksen theses involves Republican preferences. An implicit assumption of the innocuous thesis is that most Republicans favored—or at least felt compelled to support—H.R. 7152 and that Dirksen had trouble talking them into withdrawing that support. This argument looms large in the innocuous view.[245] Republicans, so this argument goes, were determined all along to support the strong version of the bill.[246] Thus, Dirksen had no role to play in preserving this coalition; the group was, for all intents and purposes, just another collection of ardent supporters.

This view is deeply misleading. As we have noted, the situation was just the opposite. H.R. 7152 did not have sufficient support to pass in its pure form, and Dirksen and many of his conservative Re-

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[242] *See* WALDRON, *supra* note 4, at 144 (arguing that "the elementary circumstances of modern politics is *plurality* and that the form of legislation . . . [is] collective decision-making").

[243] *See generally* Frederick Schauer, *Statutory Construction and the Coordinative Function of Plain Meaning*, 1990 SUP. CT. REV. 232 (explaining how the Court has grown to rely on the "plain meaning" of statutes as a way to coordinate different judicial perspectives).

[244] *See* LARRY ALEXANDER & EMILY SHERWIN, THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW 119 (2001) (arguing that in a "decision-making body with multiple members . . . intent-based interpretation may fail because there is no reliable evidence" to help determine the legislators' meaning).

[245] *See supra* text accompanying note 219 (describing how ardent supporters viewed the Republicans' changes to H.R. 7152 as not substantially weakening the bill).

[246] *See, e.g.*, GRAHAM, *supra* note 20, at 142 ("Johnson's consistent public and private refusal to bargain away major elements of the civil rights bill, and his deference to the strategic leadership of his Attorney General, narrowed the maneuvering room that was available to Dirksen.").

publican colleagues were needed for its passage.[247] Although some Republicans would have supported this version, not enough would have done so to ensure cloture.[248] Given the ardent opposition of twenty-one southern Democrats and a few Republicans, the bulk of the Republicans would have to agree to support a compromise. This required the support of relatively conservative Republicans, traditionally not inclined to support a bill like H.R. 7152.

Although the Republicans wanted to avoid looking like they had blocked civil rights, they were not obliged to pass any bill; had that been true, there would have been no drama or uncertainty about the Senate passage. Indeed, the whole uncertainty about whether the Act's supporters would succeed reflects exactly this uncertainty. Although Republicans from urban districts in the North felt pressure of both conscience and constituency to favor civil rights, many Republicans from the West and the more conservative districts elsewhere in the North had few incentives pushing them to favor civil rights.[249] They could have easily avoided supporting the Act without any electoral repercussions. In short, Dirksen's problem was not so much to *dissuade* pivotal Republicans from opposing H.R. 7152 as it was to actively *persuade* them to provide support.

3. The Architecture of Compromise: Analyzing the Amendments

Thus far, we have focused on the role of Senator Dirksen in negotiating the compromise, concentrating primarily on congressional and electoral politics. We now analyze the substance of Dirksen's amendments to demonstrate that they materially changed the Act. We conclude that, although Dirksen's amendments neither emasculated the bill nor changed its basic framework, his changes added up to more than mere technical and clarifying alterations. Taken as a whole, these amendments were designed to blunt the impact of the bill on the North and to lower the perceived costs of the Act to Republican constituents.

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[247] *See supra* text accompanying note 16 (explaining the legislative arithmetic that at least twenty-one Republican votes were necessary to overcome the eventual filibuster by southern Democrats).

[248] *See, e.g.*, ESKRIDGE ET AL., *supra* note 14, at 18 (claiming that there were twelve liberal Republicans). *But see* WHALEN & WHALEN, *supra* note 15, at 160 (counting a *total* of twelve liberal and moderate Republicans).

[249] *See supra* text accompanying notes 142-44 (arguing that these legislators' political futures did not depend on voting in favor of civil rights legislation).

Like all moderates bargaining with ardent supporters, the Republicans sought to temper the legislation's impact on their constituents.[250] Yet, Dirksen's latitude to weaken the bill was limited by the twin problems of avoiding a conference committee and of avoiding being painted as weak on civil rights. Acting within these constraints, Dirksen skillfully created a noticeably different bill.

The strategy of the Republicans in offering amendments was threefold: (1) to weaken the overall impact of the bill; (2) to blunt its impact on the North by focusing the provisions on the South; and (3) to do so without being perceived as weakening the Act. In the House, Representative McCulloch ensured that de facto segregation or racial balance in the North was excluded from the bill's purview, thus excluding northern school districts from the Act's coverage.[251] The House bill also contained a number of explicit exemptions that were retained in the Mansfield-Dirksen substitute. For example, the provisions in Title VI applying to government programs contained an exemption for insurance and guarantee programs.[252]

Table 2: Republican Changes to Blunt the Impact of the Bill on the North

House of Representatives

(1) Exempted de facto school segregation (in the North) but not de jure segregation (in the South).[253]

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[250] *See* McNollgast, *Legislative Intent*, *supra* note 11, at 15 ("[I]f these actors are risk averse they, too, will prefer general decision making principles that avoid chaos and uncertainty, and that reach policy accommodation with other actors, including lawmakers."); McNollgast, *Positive Canons*, *supra* note 11, at 711 (viewing the legislative process as a compromise among ardent supporters, ardent opponents, and moderates).

[251] GRAHAM, *supra* note 20, at 148. Graham also notes that, "[t]he bill provided that racial voting statistics be kept only for areas recommended by the Civil Rights Commission, which was expected to confine its coverage largely to the South." *Id.* at 138. This strategy of targeting the South was central to the enactment of the Voting Rights Act of 1965. *See generally* ABIGAIL THERNSTROM, WHOSE VOTES COUNT? 79-136 (1987) (discussing the passage of the bill through the House and Senate as based on a strategy that restricted the legislation's application largely to the south).

[252] *See* Civil Rights Act of 1964, Pub. L. No. 88-352, § 605, 78 Stat. 241, 253 (codified at 42 U.S.C. § 2000d-4 (2000)) ("Nothing in this title shall add to or detract from any existing authority with respect to any program or activity under which Federal financial assistance is extended by way of a contract of insurance or guaranty."). At the time, these programs would have included Federal Housing Administration home loans, Veterans Administration loans, and crop insurance programs.

[253] *Id.* §§ 401-410, 78 Stat. at 246-49 (codified as amended at 42 U.S.C. §§ 2000c to 2000c-9).

(2) Exempted many insurance and guarantee programs, including crop insurance.[254]

Senate

The EEOC was granted NLRB-like powers in H.R. 7152, including rulemaking authority and significant enforcement authority so the agency could play an active role in governing civil rights and policing employment discrimination.[255] Senate Republicans weakened these provisions in several respects. The revised bill:

(1) granted only the Attorney General, rather than the EEOC, the power to initiate suits;[256]

(2) gave the EEOC only limited rulemaking authority;[257]

(3) deleted the authority for an outside group—such as the NAACP—to sue on behalf of a worker;[258]

(4) added a restriction that, before an individual could bring suit under the Act, she must first exhaust remedies allowed under state or local fair employment laws (twenty-eight states, all in the North, had fair employment practice laws and commissions);[259]

(5) exempted seniority systems, a common and significant provision of unions, which are highly concentrated in the North;[260]

(6) added a requirement that a suit brought by the Attorney General must establish a "pattern or practice" of discrimination,[261] language that sought, in part, to focus federal suits on official–sanctioned, de jure discrimination and away from the de facto discrimination in the North;[262]

(7) deleted a major portion of the broad, unqualified statement of purpose in the introduction to Title VII,[263] a change that would prove important over the coming twenty years given the Court's reliance on such language for expansionary readings of the Act;

(8) exempted employers whose employees worked less than twenty weeks per year, largely removing coverage of seasonal agricultural workers;[264]

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[254] *Id.* § 605, 78 Stat. at 253 (codified at 42 U.S.C. § 2000d-4).

[255] *Id.* § 705, 78 Stat. at 258-59 (codified as amended at 42 U.S.C. § 2000e-4).

[256] *Id.* § 707, 78 Stat. at 259 (codified as amended at 42 U.S.C. § 2000e-6). Subsequent amendments to Title VII of the Civil Rights Act transferred the power to sue to the EEOC effective March 24, 1972. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 5, 86 Stat. 103, 107 (codified at 42 U.S.C. § 2000e-6(c)).

[257] Civil Rights Act of 1964 § 713, 78 Stat. at 265 (codified at 42 U.S.C. § 2000e-12).

[258] *Id.* § 706(e), 78 Stat. at 260 (codified as amended at 42 U.S.C. § 2000e-5(f)).

[259] *Id.* § 706(b), 78 Stat. at 259-60 (codified as amended at 42 U.S.C. § 2000e-5(c)).

[260] *Id.* § 703(h), 78 Stat. at 257 (codified as amended at 42 U.S.C. § 2000e-2(h)).

[261] *Id.* § 707(a), 78 Stat. at 261 (codified as amended at 42 U.S.C. § 2000e-6(a)).

[262] *Cf.* sources cited *supra* note 251 (suggesting the de jure/de facto distinction created by the Act).

[263] *See* 110 CONG. REC. 12,811 (1964) ("[I]t is the national policy to protect the right of the individual to be free from . . . discrimination.").

[264] Civil Rights Act of 1964 § 701(b), 78 Stat. at 253 (codified as amended at 42 U.S.C. § 2000e(b)).

(9) required a finding that the defendant had intentionally discriminated before relief could be granted;[265] and

(10) clarified the prohibition on a requirement of quotas or preferential treatment.[266]

One exception

In one important respect, the Republicans strengthened the Act, defining union hiring halls as employment agencies for the purposes of the Act.[267] Unions at the time were typically supporters of Democrats, not Republicans.

a. *The contents of the amendments*

Senator Dirksen carried the process of blunting the Act's impact on the North considerably beyond the changes made by the House Republicans.[268] The Mansfield-Dirksen substitute bill contained an interesting pattern of changes to the House bill.[269]

First, consider the many changes to the EEOC,[270] changes that all accounts agree were fundamental.[271] In H.R. 7152, enforcement responsibilities for Title VII were lodged in a commission-form agency modeled on the National Labor Relations Board.[272] This agency had both rulemaking and significant enforcement authority, and was governed by the federal Administrative Procedure Act.[273] The impact of this agency model was significant.[274] Vesting this agency with rulemak-

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[265] *Id.* § 706(g), 78 Stat. at 261 (codified as amended at 42 U.S.C. § 2000e-5(g)(1)).

[266] *Id.* § 703(j), 78 Stat. at 257 (codified as amended at 42 U.S.C. § 2000e-2(j)).

[267] *Id.* § 701(e), 78 Stat. at 254 (codified as amended at 42 U.S.C. § 2000e(e)).

[268] By limiting the federal provisions, Dirksen's changes sought to let stand a range of civil rights and anti-employment discrimination laws on the books in the North.

[269] The principal source for the following comparisons is Dirksen's annotations to the text of H.R. 7152, showing deletions and insertions, inserted into the *Congressional Record* on June 5, 1964 at 110 CONG. REC. 12,788-91 (1964).

[270] *See* Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 450-52 (1966) (listing significant changes to section 705 of Title VII).

[271] *See* LOEVY, *supra* note 15, at 188-89 (admitting that changes were substantively small yet important to selling the bill); WHALEN & WHALEN, *supra* note 15, at 164 (finding that the EEOC amendments were dramatic yet consistent with McCulloch's commitment to basic constitutional principles); Eskridge, *supra* note 27, at 616 (stating that Congress changed the fundamental process by which the civil rights laws had been enforced since the 1960s).

[272] *See* 110 CONG. REC. 11,932 (describing the power and functions of the proposed agency, eventually the EEOC).

[273] Administrative Procedure Act §§ 1-12, 5 U.S.C. §§ 551-559, 701-706 (2000).

[274] *See* GRAHAM, *supra* note 20, at 130-31 ("[I]n practice, the federal appeals courts so rarely overturned the decisions of such administrative tribunals that the normal burden of proof was reversed . . . .").

ing authority assured that the agency would be able to implement federal policies in the civil rights area directly—that is, through substantive, legislative-type power.[275] Moreover, giving the EEOC enforcement authority would enable the agency to play an active role in setting enforcement priorities for policing violations of Title VII. This model represented a strong institutional mechanism for the implementation of national social policy.[276]

The substitute bill weakened the agency in several respects.[277] First, Dirksen dropped the NLRB-like independent, prosecutorial powers so that only the Attorney General, not the Commission, could sue on behalf of the United States.[278] These changes made the EEOC dependent on the priorities of the Attorney General and clearly went against the wishes of the ardent supporters of H.R. 7152.[279] Second, the EEOC was quite limited in its ability to pursue redress for violations of Title VII. The main Title VII enforcement mechanism became private lawsuits by individuals.[280] Third, the enforcement provisions were further restrained in that the substitute bill deleted from

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[275] The deletion of provisions granting the EEOC this authority was particularly ironic, since a coalition of Republicans led the charge for APA-type procedures in the 1940s. *See id.* at 130 ("The chief result under a Republican Congress was the [APA], which sought to 'judicialize' the procedures of the quasi-judicial regulatory agencies."); *see also* Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 452-54 (1986) (reviewing the origins of the APA in political bargaining, first between "Republicans and conservative Democrats on the one hand and New Deal Democrats on the other," and later among "New Dealers—between conservative and liberal Democrats").

[276] Indeed, since the 1930s this has represented the model of federal administrative power. *See* Administrative Procedure Act §§ 3-4, 5 U.S.C. §§ 553-554 (giving agencies both rulemaking and adjudicative authority); *see also* JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 47-88 (1938) (discussing the rise of the administrative process in a politically charged atmosphere).

[277] *See supra* 1488-90 Table 2 (listing changes designed to diminish the Act's impact on the North).

[278] Civil Rights Act of 1964 § 707, 78 Stat. at 261-62. As Terry Moe observes in the case of the Occupational Safety and Health Administration, making one agency dependent on a second greatly weakens the agency's ability to pursue its own goals. Dependence grants an outside organization a veto over the agency's actions. *See* Terry M. Moe, *The Politics of Bureaucratic Structure, in* CAN THE GOVERNMENT GOVERN? 267, 297-306 (John E. Chubb & Paul E. Peterson eds., 1989) (describing the placement of OSHA in the Department of Labor).

[279] This change "placed severe limitations on the bill's potential to restructure the racial status quo in the South and elsewhere." MOORE, *supra* note 15, at 79.

[280] *See* GRAHAM, *supra* note 20, at 89 (explaining that the EEOC had the responsibility of enforcing private rights of action "by responding administratively to individual complaints"). Indeed, it was not until 1972 that the EEOC was authorized to play an independent role in litigating certain employment discrimination lawsuits.

H.R. 7152 authority for an outside group—such as the NAACP—to sue on behalf of a worker.[281]

A second fundamental change was the requirement that a suit brought by the EEOC establish a "pattern or practice" of discrimination.[282] The evidence suggests that this language targeted government suits against the officially sanctioned and prevailing discrimination in the South and not the de facto discrimination in the North.[283]

A third restriction added by Dirksen concerned extant state Fair Employment Practices (FEP) offices. Section 706 of the Act required that, before an individual could bring suit under the Act, she first exhaust the remedies allowed under state or local fair employment laws.[284] An important set of time limits was added to this exception,[285] in part to prevent southern states from setting up sham FEP offices, allowing them to mire suits in lengthy procedures. Moreover, as Dirksen noted, the twenty-eight states that had such commissions were all in the North.[286] This change also blunted the power of the EEOC, since initial decisions about suits, the arguments under which they were brought, and the conditions under which they might settle were not under its authority.

Another potentially important change was Dirksen's deletion of the broad, unqualified statement of purpose in the introduction to Title VII. For example, section 701(a) of H.R. 7152 originally proclaimed:

> The Congress hereby declares that the opportunity for employment without discrimination of the types described in sections 704 and 705 is a right of all persons within the jurisdiction of the United States, and that it is the national policy to protect the right of the individual to be free from such discrimination.[287]

In light of what would become of civil rights policy in the first twenty years after the enactment of Title VII, it is important not to understate

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[281] § 706(e), 78 Stat. at 260; *see* GRAHAM, *supra* note 20, at 146 ("By preventing third-party suits filed by groups like the NAACP, such an arrangement could avoid a sea of unnecessary litigation against businesses while still providing for some certain measure of enforcement by federal authorities.").

[282] § 707(a), 78 Stat. at 261.

[283] *See* LOEVY, *supra* note 15, at 258-59 (citing the "pattern and practice" formula as a major breakthrough in negotiations over the bill's passage).

[284] § 706(b), 78 Stat. at 259-60.

[285] *Id.*

[286] *Supra* text accompanying note 259.

[287] 110 CONG. REC. 12,811 (1964).

the significance of this deletion.[288] Much of the thrust of courts' expansive readings of the civil rights laws in the 1960s and 1970s rested on views concerning the proper interpretive scope to be given to vague language in the legislation.[289] As we discuss in the next Part, in a series of important decisions courts used just such language to rationalize expansionary readings and to ignore specific limitations contained in the Act.[290] But Dirksen and his colleagues had no hindsight; they had the bill qua bill before them. To the extent that Dirksen rationally feared that the broad phrasing of section 701(a) would authorize courts to expand the scope of the Act, his intent in deleting the provision seems rather prescient.

Senator Dirksen also proposed a series of additional limitations. First, employers whose employees worked less than twenty weeks per year were exempted, largely removing coverage from seasonal agricultural workers.[291] Second, seniority systems were exempted, even if built on a history of past discrimination.[292] Unions have long relied on seniority systems, and such unions were highly concentrated in the North.[293] Third, the substitute bill required that courts find the defendant had intentionally discriminated before granting relief.[294] This provision, along with the "pattern or practice" qualification on lawsuits, had the effect of making it much more difficult to establish a claim of discriminatory treatment in federal court.[295] Fourth, the bill provided increased clarity of the prohibition on a requirement of quotas or preferential treatment.[296] For example, new language was added

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[288] *See supra* text accompanying notes 269-76 (considering changes to the EEOC).

[289] *See infra* text accompanying notes 318-20 (discussing how such expansive readings went beyond carefully negotiated legislative compromise).

[290] *See* Eskridge, *supra* note 27, at 618-25 (stating that the cooperative relationship between the Supreme Court and Congress began to erode as the Court's interpretations of civil rights statutes overrode legislative intent); *cf.* ALFRED W. BLUMROSEN, BLACK EMPLOYMENT AND THE LAW 69-74 (1971) (explaining the initial difficulties created by the text of the Act's employment provisions, and describing the interpretive moves made by the EEOC to invigorate Title VII enforcement).

[291] 110 CONG. REC. 11,930.

[292] *Id.* at 11,931.

[293] *Cf.* Vaas, *supra* note 270, at 453 (stating that the Senate provided a safeguard for employers in federal courts by amending the statute to require intentional discrimination).

[294] 110 CONG. REC. 11,933.

[295] *See* BLUMROSEN, *supra* note 290 (describing the challenges facing the nascent EEOC regarding the collection and synthesis of information from employers and the burdens of proof established by Title VII).

[296] 110 CONG. REC. 11,931. On the controversy over racial quotas, see GRAHAM, *supra* note 20, at 100-21.

declaring that "[n]othing contained in this title shall be interpreted to require any employer . . . subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group."[297] This language was designed to allay fears of a judicially mandated policy of affirmative action.[298] Fifth, Dirksen proposed modest changes in recordkeeping requirements, notably in states with FEPs; a duplicate set of records need not be kept, although the EEOC could require additional information.[299]

One notable exception to these weakening provisions must be acknowledged. In one particular instance, the substitute bill strengthened the coverage of the Act. In what became section 701(e), the bill defined a union hiring hall as an employment agency for the purpose of the Act.[300] Perhaps, though, even that move was strategically motivated. After all, unions, at the time, typically supported Democrats, not Republicans.[301] In any event, the amendment passed and was carried into the final bill.

b. *Evaluating these changes*

The literature has not ignored the transformative aspect of Dirksen's amendments. For example, historian Hugh Graham notes that the bill exempted de facto school desegregation in the North.[302] He draws similar conclusions about the weakening of the EEOC:

> The first change was designed to further isolate the North and West from the impact of the new law, although this was not acknowledged as its goal. The civil rights bill was, after all, targeted primarily against the intransigent South, as symbolized by Bull Connor. This alone made it politically possible in 1964 . . . .[303]

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[297] 110 CONG. REC. 11,931.

[298] This of course led to one of the most famous cases in statutory interpretation, *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979). The controversy was based on whether the word "require" meant "require or permit," or, by virtue of omitting the word "permit," the Act in fact permitted voluntary programs of preferential treatment. *Id.* at 205-08.

[299] 110 CONG. REC. 11,933-34.

[300] *Id.* at 11,931.

[301] *See, e.g.*, SUNDQUIST, *supra* note 13, at 263 (depicting the AFL-CIO's support of the Democrats).

[302] *See* GRAHAM, *supra* note 20, at 81 ("[T]here seemed to be little immediate cause for non-southern alarm over Kennedy's proposed title on school desegregation.").

[303] *Id.* at 147.

Graham further observes that "the bill's two job discrimination titles, VI and VII, might impinge heavily upon their non-southern congressional constituencies. Hence they must be carefully constrained."[304]

Robert Loevy makes the same point. He discusses a key solution to the negotiations between the Democratic leaders and Dirksen that occurred with the emergence of the language, "pattern or practice" of discrimination.

> The idea [underlying this language] was that the United States would initiate enforcement of the law only in those states where it could be shown that racial discrimination was a widespread and generally accepted practice. The practical effect of this agreement was that, in Northern states where racial discrimination was not widely practiced, the United States Government could not initiate enforcement but would have to wait for aggrieved individuals to file law suits to protect their civil rights. In Southern states, however, where there was a "pattern or practice" of racial discrimination that could be easily documented, the United States Government could initiate enforcement action without having to wait for the aggrieved individuals to file law suits first.[305]

The Whalens explain that, prior to consideration on the floor, Dirksen presented fellow Republicans with forty amendments to weaken Title VII. Many conservative Republicans "had long been grousing over what they considered the too-powerful role of the federal government in Title VII," and "Dirksen also had been unhappy, to some degree, because Illinois had strong laws in this area, and he was concerned that the bill might usurp the state's jurisdiction."[306]

Sundquist argues that "[a]ll of these provisions, taken together, enabled senators from northern states that had already enacted civil rights legislation to tell their constituents that the bill would not affect their states."[307]

Finally, several of the participants explicitly noted this aspect of the bill. Congressional Quarterly's *Almanac* reports Senator Sam Ervin's reaction to the Mansfield-Dirksen substitute:

> "The effect of the new bill was 'to lessen the impact on Northern states and increase the impact on Southern states.' The bill 'puts the stamp of approval on de facto school segregation in the North' by denying courts power to order their desegregation," Ervin said. (The compromise contained a section strengthening language declaring the bill

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[304] *Id.* at 148.
[305] LOEVY, *supra* note 15, at 258.
[306] WHALEN & WHALEN, *supra* note 15, at 159-60.
[307] SUNDQUIST, *supra* note 13, at 269.

> was not to be used to overcome "racial imbalances" not caused by official segregation policies.)[308]

Senator Richard Russell remarked that the bill "has been stripped of any pretense and stands as purely a sectional bill . . . . Provisions have been written into the bill which draw up a monumental wall . . . (protecting) the states that are north of the Mason-Dixon line."[309]

These conclusions directly contradict the same authors' assertions that Dirksen's changes were merely minor, technical, and clarifying. The fact that authors like Loevy, the Whalens, and Sundquist could claim that Dirksen simultaneously blunted the impact of the bill on the North but also that his changes were technical and minor is evidence that they judged the overall effect on the Act based on structure rather than impact. In parallel with the conclusions just quoted, our analysis shows that this narrow view ignores the import of Dirksen's carefully crafted changes.

As we have noted, both Democratic and Republican participants had strategic incentives to downplay the role of the Republicans and their changes. In many ways they were too successful. The authors just noted had the evidence before them of the Republicans' material changes in the bill. They nonetheless missed the larger implications of the evidence, in part because the participants' rhetoric so forcefully and nearly unanimously points in another direction.

E. *Lessons from the Senate Battle over Civil Rights*

Dirksen's changes clearly had a material effect on the Act by blunting the impact of the bill on the North. He carefully crafted a bill that differed from H.R. 7152 and yet had the appearance of remaining the same so as to satisfy multiple constraints: avoid a conference committee; avoid giving the Democrats an electoral issue by painting the Republicans as weak on civil rights; and allow Democratic leaders to harm the interests of southern whites so that the Republicans might make inroads in this region.[310]

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[308] *Senate Defeats Filibuster, Passes Civil Rights Act, 73-27*, *in* CONG. QUARTERLY, ALMANAC: 88TH CONGRESS, SECOND SESSION 354, 361 (1964).

[309] *Id.* at 365.

[310] *See supra* text accompanying notes 24-26 (describing Republicans' electoral strategies). *See generally* BLACK & BLACK, *supra* note 25, at 74-75 (discussing the political and social climate in the 1960s that helped to defeat the southern filibuster on civil rights).

To see the force of Dirksen's changes for Republican constituents, consider their effect on big business, located largely outside the South at the time.[311] The "pattern and practice" provision, combined with the requirement that courts find that the defendant had intentionally discriminated, focused the Act on the pervasive and explicit discrimination in the South while exempting de facto discrimination in the North.[312] Emasculating the EEOC's enforcement power also reduced the risk to businesses.[313] Statistical evidence indicates that Dirksen succeeded: the Act had a major effect on black income in the South but not in the North. For example, John Donohue and James Heckman show a declining black-white wage differential in the South after 1965 but not outside the South.[314] Further, the prohibition on quotas or preferential treatment prevented the Act from requiring major changes in big business employment practices. The provision requiring deference to the FEP commissions meant that businesses operating in states with commissions in place would experience much less of a transition under the Act.[315]

Did these changes constitute a "fundamental transformation" of the bill? Hardly. But does this imply these were merely cosmetic or technical? That too seems false. A third possibility instead seems closer to the truth, namely, that Dirksen's changes were systematic, meaningful, and limiting, but did not alter the basic framework of the Act. These amendments were apparently intended to reduce the impact of the Act, especially in the North, and particularly among Republican business and middle-class constituents.[316]

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[311] *See* GRAHAM, *supra* note 20, at 147-49 (discussing how Dirksen's changes reduced the authority of the EEOC).

[312] *See supra* text accompanying notes 294-95 (concluding that the dual requirement hindered the ability to successfully establish a discrimination case in federal court).

[313] *See* Vaas, *supra* note 270, at 450 ("[The amendment] will clearly restrain a 'crusading' EEOC or court from finding unfair employment practices in situations which Congress never intended to reach.").

[314] John J. Donohue, III & James Heckman, *Continuous Versus Episodic Change: The Impact of Civil Rights Policy on the Economic Status of Blacks*, 29 J. ECON. LIT. 1603, 1610 fig.6 (1991) (graphing "estimates of the racial differentials in hourly earnings for male workers").

[315] *See* GRAHAM, *supra* note 20, at 148-49 (addressing the effects of requiring EEOC deference to state FEP commissions); *cf.* MOORE, *supra* note 15, at 79-80 ("[T]he effect of the 1968 concessions was to virtually ensure that the elimination of housing discrimination would take place at a slow pace.").

[316] *See* GRAHAM, *supra* note 20, at 146 ("During the five weeks following the first of April, Dirksen floated dozens of trial amendments, most of which further refined,

Significantly, however, this purpose had to be covert. Advertising the true impact of the changes would have jeopardized Dirksen's goals and those of Democratic leaders. Both sets of leaders wanted to avoid a conference committee. Democrats wanted to claim the lion's share of the credit, and Dirksen wanted to collude with them so that the Republicans might make electoral inroads in the South.

In short, Republicans and Democrats had multiple, competing agendas. In strongly preferring civil rights legislation to the status quo, ardent supporters proved willing to go to considerable lengths to secure a reasonably strong proposal; in doing so, they avoided a replay of 1957 and 1960, years in which their proposals were scaled down to very slender final products. Republicans, who were more divided, and whose support was thus more precarious, were able to achieve a result favorable to their interests as well. However, such accommodations required careful leadership. Willing negotiators among the ranks of ardent supporters were key; also key—though regrettably overlooked in the histories of this period—were pivotal Republican legislators such as Everett Dirksen.

III. TRANSLATING LEGISLATIVE INTENT INTO PUBLIC POLICY: THE ROLE OF STATUTORY INTERPRETATION

After a statute's enactment, it must be implemented.[317] In the policy implementation phase, disputes over the meaning of legislation inevitably arise that end up before the courts, which are obliged to determine the meaning of contested or ambiguous statutory provisions. For legislation that was particularly contentious within Congress, these controversies over statutory meaning will be particularly acute.

With the benefit of hindsight, we know that the meaning of key elements of the Act raised considerable controversy. Litigation was frequent, and courts were instrumental in sorting out the disputes over the scope and coverage of Title VII and other critical parts of the Act.[318]

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moderated, clarified, or restricted the reach of federal enforcement power over private enterprises and citizens.").

[317] For a good, concise overview of statutory interpretation and policy implementation, see WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 211-374 (2000). *See also* CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 227-33 (1990) (suggesting regulatory reforms to further the aims of statutory programs and government while protecting constitutional values).

[318] *See* Eskridge, *supra* note 27, at 617-41 (discussing the political history of judicial,

In so doing, courts looked to the legislative history of the Act, and, as part of their interpretations, they drew inferences from particular aspects of the legislative history.[319] Frequently, these efforts served to support broad interpretations of the statute that went beyond the bargain to which the ardent supporters and pivotal legislators agreed. As we show below, the courts typically relied on the ardent supporters' statements to support their conclusions. The argument in Part II suggests, however, that selective use of legislative history to support a reading of the statute is common; indeed, the fact that legislative history has multiple, conflicting meanings facilitates such selective use of history. Our discussion in Part III shows that the legislative history of the Act fits this pattern.

What is problematic is not that judges interpreted the Act expansively, but that they did not do so primarily on the basis of normative principles favoring "civil rights," or on the basis that the plain meaning of the statute supported such a reading. Instead, they argued that the legislative history supported these results. In a number of rulings in the 1960s, 1970s, and 1980s, the courts read into the Act the perspectives of ardent supporters—including Senators Humphrey and Chase, and other prominent liberal legislators—and largely ignored the political context and the pertinent qualifications added to gain the support of pivotal moderate legislators.

A. *Reconstructing the Bargain Through Judicial Interpretation*

In the first few years following the enactment of the statute, the federal courts were called on to consider the meaning of Title VII of the Civil Rights Act.[320] The Court construed this title to expand the scope of the Act beyond the meaning agreed to by ardent supporters

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legislative, and executive interaction in civil rights issues); *see also* Drew S. Days, III, *Turning Back the Clock: The Reagan Administration and Civil Rights*, 19 HARV. C.R.-C.L. L. REV. 309, 313-19 (1984) (discussing the broad range of remedial measures used by courts to address employment discrimination).

[319] *Cf. supra* text accompanying notes 10-12 (suggesting that judges pick and choose aspects of the legislative history that support their predetermined interpretations of statutes). *See generally* THEODORE EISENBERG, CIVIL RIGHTS LEGISLATION: CASES AND MATERIALS 3-11 (4th ed. 1996) (providing an overview of civil rights legislation implemented to protect constitutional rights).

[320] *See* EISENBERG, *supra* note 319, at 909-1122 (discussing Title VII and cases involving employment discrimination); *see also* BLUMROSEN, *supra* note 290, at 4 (discussing how the individual right to sue in federal court, as opposed to proceeding in an administrative agency, was a sensible innovation that prevented civil rights interests from being ignored in low-visibility decisions by agencies).

and the pivotal legislators.[321] The expansive rulings of the 1960s and 1970s reflect an effort to give the statute a meaning beyond that negotiated by pivotal legislators—especially Senator Everett Dirksen—whose support was central to ending the filibuster and hence to passing the Act.

In several cases of expansive reading, judges relied on the so-called Clark-Case memorandum to illuminate the meaning of Title VII. Senators Joseph Clark and Clifford Case were ardent supporters of the Act.[322] They introduced a proposed bill on June 6, 1964, which was intended to substitute for both H.R. 7152 and the Mansfield-Dirksen version.[323] Although their proposal failed, they were able to enshrine much of their vision of Title VII indirectly, through the preparation of the Clark-Case memorandum.

In a number of important Title VII cases, the Supreme Court has suggested that the Clark-Case memorandum is generally reliable as a source of guidance for the interpretation of the Act in cases where the text is ambiguous. In contrast, our approach suggests that the utility of this memo—as with other sources of legislative history—depends on two factors: first, whether, and to what extent, these legislators were engaging in cheap talk or costly signals; and second, whether, because the memo focused on a version that failed to become law, the version it elucidated was sufficiently similar to the version that became law so as to be relevant for statutory interpretation. It is impossible to assess this or any other piece of legislative history without knowing more about its political context. What did these legislators have to gain or to lose from making these statements? To whom were they speaking, and how should we understand the veracity of their claims? The following cases provide good vehicles for the consideration of the role of context in understanding legislative history.

This memorandum, introduced on April 8, 1964, was intended to clarify the meaning of the Clark-Case legislative proposal. It was prepared *before* the introduction of the Mansfield-Dirksen substitute and, accordingly, cannot be considered a definitive illumination of the in-

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[321] *See* Eskridge, *supra* note 27, at 618-24 (describing the Court's shift on civil rights issues from left to right between 1962 and 1986, and stating that the initial shift to the left was reflected in the Court's dynamic interpretations that gave more liberal remedies for racial discrimination in the workplace than literally afforded by Title VII).

[322] Senator Clark had a perfect ADA score of 100, with an estimated probability of 1.00; Senator Case had an ADA score of 81, with an estimated probability of 1.00. *See supra* 1488-90 Table 2 (listing Republican efforts to blunt the bill's impact on the North).

[323] 110 CONG. REC. 12,863-70 (1964).

tent of the framers of the version of the bill that became the Act's Title VII.[324] The fact that the Clark-Case memorandum was written before the introduction of the Mansfield-Dirksen substitute, that it focused on their own substitute bill, and that they were ardent supporters hoping for a stronger bill than the administration-Humphrey-Dirksen compromise all suggest caution in using this memorandum as an authoritative explanation of the final bill's language.

1. Employment Testing and *Griggs*

a. *Disparate impact theory and historical justification*

Griggs v. Duke Power Co.[325] ushered in a major new construction of employer liability under Title VII.[326] With the imprimatur of the *Griggs* decision, employees could bring claims alleging that avowedly neutral employment practices—such as employment tests—had a disparate impact on the employment status of groups protected under Title VII.[327] The Supreme Court's creation of the so-called "disparate impact" cause of action in *Griggs* represents perhaps the single most important development in federal employment discrimination law since the enactment of the 1964 Act.[328]

The theory of disparate impact relies on the notion that one way in which discrimination manifests itself is by deleterious outcomes.[329] Under this view, a particular practice need not depend on evidence of an intent to discriminate. Rather, a claim of employment discrimination arises when the practice results in members of protected groups

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[324] *But see* EISENBERG, *supra* note 319, at 1009 ("While these statements were made before § 703(h) was added to Title VII, they are authoritative indicators of that section's purpose.").

[325] 401 U.S. 424 (1971).

[326] *See* Alfred W. Blumrosen, *Strangers in Paradise:* Griggs v. Duke Power Co. *and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 62 (1972) (stating that "*Griggs* redefine[d] discrimination," and that this "definition [was] new to the field of employment discrimination"). *See generally* EISENBERG, *supra* note 319, at 444-49 (examining how *Griggs* affected the substantive reach of Title VII).

[327] *See Griggs*, 401 U.S. at 430-32 (interpreting the Act to proscribe not only overt discrimination but also practices that are fair in form but discriminatory in practice).

[328] *See* Blumrosen, *supra* note 326, at 62 ("*Griggs* is in the tradition of the great cases of Constitutional and tort law which announce and apply fundamental legal principles.").

[329] *See* EISENBERG, *supra* note 319, at 943-49 (describing the theory of disparate impact).

being disadvantaged relative to unprotected groups in the relevant workplace, regardless of any intent to discriminate.[330]

According to the Court in *Griggs*, the basis of this theory is the Act's purpose and its legislative history. So far as the purpose is concerned, the Court declared that "[t]he objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."[331] From this view, the disparate impact theory of employment discrimination flows from the underlying purpose of the Act to eradicate impediments to equality of opportunity.

The Court applied the logic of this conclusion to the issue of employment as follows: The purpose of the Act was to "remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."[332] Many employment tests have a disparate impact on minority employees. They therefore diminish the equality of opportunity for these employees. This is true whether or not the tests were designed in order to disadvantage minority employees.[333] The issue thus framed, the legal result follows logically from the declared purpose of the statute.

In a fundamental sense, *Griggs* is best understood as a case in which the Court elided legislative history altogether.[334] As we discuss

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[330] *See, e.g.*, Mark Kelman, *Concepts of Discrimination in "General Ability" Job Testing*, 104 HARV. L. REV. 1158, 1159 (1991) (describing four conceptions of discrimination and exploring ways in which employment testing might be considered discriminatory under each); Robert Follett & Finis Welch, *Testing for Discrimination in Employment Practices*, LAW & CONTEMP. PROBS., Autumn 1983, at 171, 172 ("[T]he emphasis on fair employment litigation is on disparate effect of 'patterns of practice.'").

[331] 401 U.S. at 429-30.

[332] *Id.*

[333] A full treatment of the legal debate over disparate impact theory is given in the opinion of the Fourth Circuit in *Griggs*. *Compare* Griggs v. Duke Power Co., 420 F.2d 1225, 1235 (4th Cir. 1970) (Boreman, J.) (upholding the validity of tests because the "testing requirement is being applied to white and Negro employees alike"), *with id.* at 1238 (Sobeloff, J., dissenting in part) (dissenting from the court's upholding of tests because "the statute interdicts practices that are fair in form but discriminatory in substance").

[334] To Professors Eskridge, Frickey, and Garrett, *Griggs* is a "decision poorly reasoned and vulnerable to the charge that it was a significant leap from the expectations of the enacting Congress." ESKRIDGE ET AL., *supra* note 14, at 85. Professor Richard Epstein is even more critical, arguing:

> If in 1964 any sponsor of the Civil Rights Act had admitted Title VII on the ground that it adopted the disparate impact test read into it by the Supreme Court in *Griggs*, Title VII would have gone down to thundering defeat, and

in Section B below, there is a different way to read the Court's reasoning and rationale in *Griggs*. Yet, the Court's majority did work with the historical materials to paint a picture of a legislature in 1964 that was supportive of the disparate impact theory.

The Court acknowledged that the "[p]roponents of Title VII sought throughout the debate to assure the critics that the Act would have no effect on job-related tests."[335] Nonetheless it reasoned that the enacting legislature intended to forbid "giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance."[336] The Court looked to the Clark-Case memorandum as its principal source of legislative history. Yet, it drew a conclusion opposite from what a reasonable construction of the memo would seem to indicate. In their memorandum, the senators explained that Title VII "expressly protects the employer's right to insist that any prospective applicant, Negro or white, must meet the applicable job qualifications. Indeed, the very purpose of [T]itle VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color."[337]

As ardent supporters, Senators Clark and Case were in a very good position to provide reassurance to moderate and conservative legislators that the bill, as drafted, would not go too far. The acknowledgment that section 703(h) would not, in fact, outlaw tests that examined applicable job qualifications is credible because it goes against their own preferences for a more expansive reading. Their interpretation thus went against the grain of the otherwise broad constructions of the Act proposed in many other parts of their memorandum. So, while not ideal from the perspective of the ardent supporters, this reassurance was intended to bring pivotal legislators into the camp of supporters. For this reason, the Court's reliance on the legislative history should have supported the argument of the defendants. Or, at the very least, the Court ought *not* to have drawn upon the legislative history to support the opposite conclusion, that the legislature intended section 703(h) to forbid employment tests that resulted in a disparate impact on minority employees.

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perhaps brought the rest of the Act down with it.
RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 197 (1992).

[335] 401 U.S. at 434.

[336] *Id.* at 436.

[337] *Id.* at 434 (quoting 110 CONG. REC. 7247 (1964)).

Despite these efforts by ardent supporters at reassurance, pivotal legislators were not, it appears, entirely convinced. Even with the statements of Senators Clark and Case on behalf of the coalition of ardent supporters, moderate legislators worried that section 703(h) would nonetheless be read by the courts to outlaw employment tests. Senator Tower's introduction of an amendment after the presentation of the Clark-Case memorandum provides the best evidence of this concern among the moderates. The amendment sought explicitly to authorize such employment tests.[338] Wholly apart from the fate of this amendment (discussed in more detail shortly), the fact that such an amendment was introduced in the face of these efforts at reassurance strongly suggests that pivotal legislators were hardly persuaded by the Clark-Case memorandum.[339]

Given the Court's reliance upon the Tower amendment for its conclusion that the legislature intended to forbid employment testing with a disparate impact, we now turn to consider this legislative episode in some detail.

b. *The legislative debate over employment testing*

On March 5, 1964, during the height of the Senate struggle over the Civil Rights Act, a hearing examiner in Illinois issued a ruling

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[338] *See* 110 CONG. REC. 13,504 (quoting Senator Tower as stating that his amendment allowed for tests which were administered "honestly and firmly and applied to all racial groups alike").

[339] This fear was shared by a number of senators, including both pivotal legislators and ardent supporters, and exploited by southern Democrats. *See, e.g.*, *id.* at 5614-16 (quoting Senator Ervin of North Carolina: "Under [Title VII, the federal government] could dictate to the employer whom he must hire, whom he must discharge, whom he must promote, and whom he is to dismiss in times of financial adversity."); *id.* at 5999-6000 (quoting Senator Smathers of Florida: "[I]f by refusing to hire a prospective employee [an employer] is going to run the risk of going to jail, they do not have to ask him any more . . . . [T]he employer says, 'If he looks like a troublemaker perhaps I had better put him on.'"); *id.* at 7013-14 (quoting Senator Holland of Florida: "If we take away from employers the right to prescribe the qualifications of the people whom they employ . . . we shall have left private enterprise and . . . the Federal Government . . . would in effect be telling employers whom they could employ and whom they could not employ."); *id.* at 9025-26 (quoting Senator Tower of Texas: "[The bill] does not guarantee anybody a job, but it would compel an employer to hire persons whom he does not believe to be competent to perform the work."); *id.* at 9599-600 (quoting Senator Fullbright of Arkansas: "[T]he threat of litigation which must inevitably weigh heavily on the mind of any employer subject to this bill will . . . subject [many employers] to capricious intimidation by any job applicant . . . who happens to be a racial minority."); *id.* at 9600 (quoting Senator Ellender of Louisiana: "Under the provisions of Title VII, then, few, if any, companies would be able to establish ways and means of obtaining employees who would fit into their pattern of employment.").

against Motorola Corporation in Chicago for using a general ability test in considering applicants for employment on their assembly lines.[340] The judge ruled that this test failed to consider environmental inequalities and differences and therefore was unfair to "culturally deprived and disadvantaged persons."[341] He ordered Motorola to cease and desist from using this test.

This decision sent shockwaves through Congress. Opponents and pivotal legislators expressed great concern that Title VII would, in the form in which it was then being considered (pre-Mansfield-Dirksen), leave other corporations unable to use employment tests.[342]

In the shadow of the *Motorola* decision, Senator John Tower introduced an amendment on June 11, 1964, that provided that employers could use "professionally developed ability test[s]" under certain conditions.[343] This amendment, explained Senator Tower, was introduced expressly to overrule *Motorola* and to unambiguously remove the legal basis for the EEOC to pursue employers who relied upon employment tests to gauge the capability of job applicants.[344] Ardent supporters of the Act argued strongly against this amendment. Senator Case claimed that the amendment would permit an employer to give any test "whether it was a good test or not, so long as it was professionally designed."[345] In one sense, this was a peculiar statement for an ardent supporter. After all, Senators Clark and Case declared in their interpretive memorandum, introduced one month after the *Motorola* decision, that Title VII "expressly protects the employer's right to insist that any prospective applicant, Negro or white, must meet the applicable job qualifications."[346] Although the Clark-Case memo did not refer to the *Motorola* decision by name, it would seem that the purpose

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[340] *See* Myart v. Motorola, Inc., No. 63C-127 (Ill. Fair Employment Practices Comm'n Feb. 27, 1964) (ordering Motorola to cease and desist from the use of its employment test), *reprinted in* 110 CONG. REC. 5662-64.

[341] 110 CONG. REC. 5664.

[342] For a description of the public and Congressional reaction to the *Motorola* decision, see GRAHAM, *supra* note 20, at 150-51.

[343] 110 CONG. REC. 13,492.

[344] In introducing his amendment, Senator Tower explained:

> If we should fail to adopt language of this kind, there could be an Equal Employment Opportunity Commission ruling which would in effect invalidate tests of various kinds of employees by both private business and Government to determine the professional competence or ability or trainability or suitability of a person to do a job.

Id.

[345] *Id.* at 13,504.

[346] *Id.* at 7247.

of this section was to reassure fellow senators (especially pivotal senators) that Title VII would not outlaw employment tests. Moreover, during the debate over the first Tower amendment, Senator Case described the *Motorola* decision as a "'red herring,' . . . which has been dragged across the trail, in an attempt to obscure the situation."[347] Senator Humphrey asked Senator Case whether it was true that the *Motorola* case was "nothing but a preliminary finding, and [therefore] has no binding effect," to which Senator Case replied, "[t]hat is absolutely true."[348] Tower's first amendment was defeated on a roll call vote, 38 to 49.[349]

Senator Tower then introduced a second amendment.[350] This amendment was virtually identical to the first. This time, ardent supporters relented and agreed to the amendment by a voice vote. Senator Humphrey declared:

> I think it should be noted that the Senators on both sides of the aisle who were deeply interested in [T]itle VII have examined the text of this amendment and have found it to be in accord with the intent and purpose of that title. I do not think there is any need for a rollcall. We can expedite it. The Senator has won his point.[351]

Senator Humphrey, acting in his official role as one of the principal bill managers, is issuing a costly signal: Tower has won his point and this amendment is "in accord with the intent and purpose" of Title VII. The Court explicitly chose to ignore this language.

Although Senator Tower and other senators (at least the thirty-eight who voted for the first version of the amendment) won the legislative battle and enshrined their concerns into the Act, they lost in the courts. The Supreme Court in *Griggs* read this amendment as essentially requiring employment tests to be job related, that is, to be justified by a business necessity in order to pass muster under Title VII. As has been pointed out elsewhere, this is a strained reading of the Act's legislative history.[352]

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[347] *Id.* at 13,081-82.

[348] *Id.* at 13,081.

[349] *Id.* at 13,505.

[350] *Id.* at 13,724.

[351] *Id.*

[352] *See, e.g.*, GRAHAM, *supra* note 20, at 387 ("Burger's interpretation in 1971 of the legislative intent of Congress in the Civil Rights Act would have been greeted with disbelief in 1964."); DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY 14-15 (1977) ("There is convincing legislative history to show that Congress intended the opposite of the result reached in *Griggs*."); Gary Bryner, *Congress, Courts, and Agencies: Equal Employment and the Limits of Policy Implementation*, 96 POL. SCI. Q. 411, 423 (1981) ("[T]he

Indeed, the Court's analytic leap about these amendments falls prey to the critique we have developed in this Article. The Court jumps from Senator Humphrey's assent to the second Tower amendment to the view that this amendment was so different from the first that, while the first clearly overruled the *Motorola* decision and would have barred Griggs's claim, the second amendment compels the *Griggs* result. This leap rests on the view that the expressed understanding of the ardent supporters (Humphrey's view about what the Tower amendment meant)[353] should determine the meaning of an ambiguous statute. Yet, by accepting the second Tower amendment, the ardent supporters receded from this view.

Of course, an argument that would provide a pedigree for Senator Tower's views would prove too much; he was, after all, an ardent opponent of the Act.[354] Yet the key group to recognize in this episode is the group of legislators who supported *both* versions of the Tower amendment. Senator Humphrey's circumvention of a roll call vote on the second amendment obscured the composition of this group somewhat; we can reasonably assume, however, that it includes the thirty-eight who made up the group supporting the first Tower amendment. Although thirty-eight senators are insufficient to pass legislation, they are sufficient to cause a motion for cloture to fail. The fact that Tower pressed on this issue and that Humphrey relented suggests that Humphrey cared less about winning this particular point than about whether winning this point would hurt the larger goal of obtaining cloture.

We make two additional observations about the Tower amendments. First, the language of the two is nearly identical.[355] Although

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Court's *Griggs* ruling . . . conflicts with the wording and legislative history of Title VII."); Hugh Steven Wilson, *A Second Look at* Griggs v. Duke Power Company*: Ruminations on Job Testing, Discrimination, and the Role of the Federal Courts*, 58 VA. L. REV. 844, 852-58 (1972) ("The overwhelming legislative response in opposition to the result of [*Motorola*] and the extensive commentary regarding the possibility of a similar result under Title VII reveal the weakness of the Supreme Court's conclusion . . . in *Griggs* . . . .").

[353] *See* Griggs v. Duke Power Co., 401 U.S. 424, 435-36 (1971) ("Speaking for the supporters of Title VII, Senator Humphrey, who had vigorously opposed the first amendment, endorsed the substitute amendment, stating: 'Senators on both sides of the aisle . . . found [the amendment] to be in accord with the intent and purpose of that title.'").

[354] *See* LOEVY, *supra* note 15, at 163 (recounting Senator Tower's role "on the filibuster team").

[355] *Compare* 110 CONG. REC. 13,492-93 (1964) (regarding the first amendment), *with id.* at 13,724 (regarding the second amendment).

the Court in *Griggs* claimed that "[t]he opposition to the amendment was based on its loose wording which the proponents of Title VII feared would be susceptible of misinterpretation,"[356] comparison of the two versions undermines this claim. Both amount to essentially the same thing; that is, both versions seem directed to overturning the *Motorola* decision and permitting employers to use job tests for employment purposes. Significantly, neither version squarely supports the linchpin argument in *Griggs* that all employment tests must be job related to meet the mandates of section 703(h) of Title VII.

Second, consider the Senate voting lineup on the first amendment as indicated in the roll call list.[357] Within the group of ardent supporters, three voted in favor of the amendment, thirty-seven against, and six abstained; of the ardent opponents, twenty-one voted in favor of the amendment, two against, and three abstained; finally, in the group of moderates, there was a nearly even split, with thirteen voting for, eleven against, and three abstaining. The Act's ardent supporters had become the ardent opponents for the purposes of this amendment, implying that their views about this amendment were as hostile as the ardent opponents' views were about the overall Act.

Clearly, something more than "loose wording" was at stake here. Supporters of the bill rightly feared that the passage of the amendment would cut the legs out from under *Motorola*. *Griggs*, it seems clear, would be quite impossible in light of this amendment's text. The fact that a majority of the Senate voted in favor of the amendment makes the supporters' position—essentially the position that had prevailed in *Motorola* and would prevail later in *Griggs*—precarious. In this light, it was sensible legislative strategy for Senator Humphrey to emphasize that the Tower amendment that *was* subsequently adopted reflected the consensus of the body. "*Senator [Tower] has won his point*," Humphrey explained.[358] However, Senator Humphrey's ardent-supporter colleagues would hardly have conceded so much ground to Tower. Since Tower and his ardent-opponent colleagues would vote against the Civil Rights Act, the audience for Humphrey's rhetoric was the moderate "swing" legislators. Without a roll call vote, we will never know how they divided in the final tally. Yet we can suppose that their support, that is, their decision to accept Senator Tower's position on *Motorola*, combined with the ardent supporters'

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[356] 401 U.S. at 436 n.12.

[357] Barry Weingast, Summary of Civil Rights Act of 1964 Roll Call Vote (n.d.) (on file with authors).

[358] 110 CONG. REC. 13,724 (emphasis added).

strategic decision to give up the fight to defeat the proposal to permit employment tests represents the basic compromise worked out during the June 11 to 13, 1964, episode.

The legislative history argument in *Griggs*, following the logic of the argument developed in much greater detail by Judge Sobeloff's dissenting opinion in the circuit court below, rests on the view that the introduction of the second amendment represented a retreat by ardent opponents and some pivotal legislators from the view expressed by the first amendment. This view cannot be reconciled with an understanding of the legislative history of section 703(h) as developed in light of our theoretical arguments described above. We thus echo Hugh Graham's observation that "Burger's interpretation in 1971 of the legislative intent of Congress in the Civil Rights Act would have been greeted with disbelief in 1964."[359]

c. *A missing piece of the puzzle: scienter and section 706(g)*

An additional argument from the legislative history casts doubt on the Supreme Court's reasoning in *Griggs*. Here we return to Senator Dirksen and his pivotal role in constructing a suitable compromise provision of Title VII through the introduction of key amendments. On April 16, 1964, Senator Dirksen introduced an amendment (labeled Number 507) that added the term "willfully" to the then-current language of section 706(g).[360] According to the legislators, "it is not intended that an accidental or unintentional violation should subject an employer to the provisions of this title."[361]

Although the issue raised by section 706(g) did not specifically pertain to employment tests, the thrust of this amendment to the subsection was to establish a scienter requirement for employers. With this requirement, employers in all employment discrimination cases, including those involving employee tests, could defend themselves by asserting that they did not "willfully" discriminate against any employee. Hence, even if one were able to stretch the meaning of the term "discriminate" in Title VII to include employer actions that result in disparate impacts on minority employees, the requirement added by Dirksen in section 706(g) that such discrimination be willful ap-

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[359] GRAHAM, *supra* note 20, at 387; *see also* ESKRIDGE, *supra* note 1, at 76-80 ("My judgment is that *Griggs* represented a policy more vigorous than that which Congress . . . would have wanted in 1971.").

[360] 110 CONG. REC. 8194.

[361] *Id.*

pears to preclude the claim, accepted by the Supreme Court in *Griggs*, that facially neutral employment practices could have a disparate impact on minorities and as a result violate Title VII.[362]

It is difficult to reconcile the inclusion of a scienter requirement in Title VII through the amendment introduced by Senator Dirksen with a decision establishing a nonscienter, disparate impact cause of action. Yet, the Supreme Court in *Griggs* was silent on the subject of scienter and section 706(g). If one accepts, as we urge above, the view that Dirksen's role in constructing the final compromise version that became the 1964 Civil Rights Act was critical,[363] it is difficult to see how section 706(g), along with Dirksen's explanation, could be disregarded. The intent of Dirksen's amendment seems clear: to avoid a situation in which "[a]ccidental, inadvertent, heedless, unintended acts could subject an employer to charges."[364]

2. Seniority Arrangements and Employment Discrimination: Selective Use of History in *Franks* and *Teamsters*

A central worry for the pivotal legislators considering the proposed Title VII was whether the bill would affect existing seniority systems. Many businesses had longstanding seniority arrangements. Of course, typically, few minority employees had substantial seniority in these businesses and, therefore, the maintenance of such arrangements impeded progress for minority workers. Many pivotal legislators were concerned that Title VII would require the dismantling of seniority arrangements in order to correct for past discrimination.

These concerns were assuaged in two different ways: First, supporters of the bill attempted to reassure their colleagues that existing seniority systems would be preserved.[365] Second, Senator Dirksen re-

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[362] Our view is consistent with the position of the EEOC in the years immediately following the Act's passage. *See* EEOC, THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION DURING THE ADMINISTRATION OF PRESIDENT LYNDON B. JOHNSON NOVEMBER 1963-JANUARY 1969, at 17 (1968) (stating that the legislative history "establishes that the use of professionally developed ability tests would not be considered discriminatory"). *See generally* EPSTEIN, *supra* note 334, at 205-41 (explaining the effect of *Griggs* on employee-testing requirements).

[363] *See supra* text accompanying notes 310-16 (defining Dirksen as one of the Act's "pivotal Republican legislators").

[364] 110 CONG. REC. 8194; *see also* GRAHAM, *supra* note 20, at 147 (concluding that the word "intentionally" was added "to Section 703(g) of Title VII, to make it clear that discrimination could not be legitimately inferred from statistical distributions in employment practices").

[365] *See, e.g.*, 110 CONG. REC. 7213 (quoting an interpretive memorandum on Title VII submitted by Clark and Case in which the Senators explained that "Title VII would

vised section 703(h) to mitigate any potential problem connected with these seniority arrangements.

When H.R. 7152 was the principal legislative proposal before Congress, the aim of Senators Clark and Case, and also of Senator Humphrey who spoke on the issue of seniority, was to reassure senators who were concerned about seniority and Title VII without alienating supporters of the bill.[366] To go too far in the direction of shielding seniority systems from civil rights enforcement would create an island of immunity in a sea of liability for employment discrimination.

The issue brought before the courts was how to consider the post-1964 operation of a seniority system on minorities who complain that the system perpetuates the effects of discrimination "occurring prior to the effective date of the Act."[367] A reading of the Act that shielded *all* the effects of a seniority system established before 1964 from scrutiny on the grounds that the system predated the Act and that seniority systems are immune from Title VII liability would temper significantly the scope of the Act.[368] On the other hand, many legislators—surely a critical number—worried about the extension of the Act to cover all the effects of post-Act operation of a seniority system established pre-1964. The reason for this concern was straightforward: in many businesses that contained employee seniority systems, the vast bulk of the most senior employees were white. Thus, these seniority systems were particularly vulnerable to challenge under Title VII.

This worry persisted beyond the insertion of the Clark-Case memorandum into the legislative record on April 8 and also beyond the introduction of the Clark-Case substitute proposal on June 6. Notably, Senators Mansfield and Dirksen offered new language in section 703(h), providing that "it shall not be an unlawful employment practice for an employer to apply . . . different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit sys-

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have no effect on established seniority rights"); *id.* at 7207 (recording Senator Clark's statement that "it is clear that the bill would not affect seniority at all").

[366] Sources cited *supra* note 365.

[367] Franks v. Bowman Transp. Co., 424 U.S. 747, 761 (1976); *see also* Lorance v. AT&T Techs., 490 U.S. 900 (1989) (deciding a case involving the manipulation of seniority rules to discriminate based on sex); United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977) (holding that a plaintiff cannot claim a Title VII violation based on a neutral seniority system that upholds the effect of a prior, time-barred discriminatory act).

[368] *See* EISENBERG, *supra* note 319, at 1011-17 (describing the dilemma of Title VII and seniority systems).

tem."[369] The scope and reach of this revised section was the subject of two significant Supreme Court decisions in the mid-1970s.

In *Franks v. Bowman Transportation Co.*, the Court considered a class action brought against Bowman Transportation Company and certain labor unions.[370] The group of plaintiffs asserted that the employer/unions were perpetuating, through the operation of a seniority system adopted prior to 1964, discriminatory practices. The plaintiffs were black truck drivers who complained that they were not hired because of their race. The district court found for the plaintiffs and ordered appropriate relief, including back pay and reinstatement of the seniority status that these employees would have enjoyed but for the discriminatory practices of Bowman Transportation. On appeal, the Fifth Circuit decided that section 703(h) insulated employer/unions from the responsibility to award retroactive seniority on the grounds that pre-Act seniority systems were immune from Title VII liability and therefore that "make whole" relief was improper.[371] Overruling the Fifth Circuit, the Supreme Court held that "make whole" relief was proper under section 703(h).[372]

The Court rested this reading of section 703(h) on the absence of any limiting language in section 703(h) and of any corresponding legislative history, indicating that the perpetuation of post-Act discrimination should be shielded from Title VII merely because the seniority system predated the Act. The Court explained that

> the thrust of the section is directed toward defining what is and what is not an illegal discriminatory practice in instances in which the post-Act operation of a seniority system is challenged as perpetuating the effects of discrimination occurring prior to the effective date of the Act. There is no indication in the legislative materials that section 703(h) was intended to modify or restrict relief otherwise appropriate once an illegal discriminatory practice occurring after the effective date of the Act is proved—as in the instance case, a discriminatory refusal to hire.[373]

In reaching its unanimous judgment that section 703(h) was not a complete bar to "make whole" relief in the face of continuing discriminatory practices, the Court noted, but avoided analyzing specifically, the section's legislative history. Indeed, it preceded the above quoted paragraph with the phrase, "whatever the exact meaning and

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[369] 78 Stat. 241, 257 (codified as amended at 42 U.S.C. § 2000e-2(h) (2000)).
[370] 424 U.S. at 750.
[371] *Id.* at 763.
[372] *Id.*
[373] *Id.* at 761-62.

scope of section 703(h) *in light of its unusual legislative history and the absence of the usual legislative materials*."[374]

Given its multiple references to legislative history, the Court's decision is peculiar in its neglect of that history as a source of interpretive guidance. The Clark-Case memorandum, other statements by supporters of the bill, and the fact that section 703(h) was introduced by Senator Dirksen in order to settle once and for all questions concerning the impact of this section on existing seniority rights, all seemed to point toward a conclusion that pre-1964 seniority systems were shielded from scrutiny.

Yet, the Court never grappled with these historical materials. Instead, it asserted that a reasonable interpretation of the "thrust of the section" supported its view that the Act was not intended to limit the sort of relief requested by the plaintiffs. At best, the Court regarded the legislative history as singularly unhelpful in understanding the problem posed by this litigation. At worst, the Court ignored it because it forced a legal conclusion different from its own.

By contrast, in *International Brotherhood of Teamsters v. United States*,[375] the Court gave a much closer look to section 703(h)'s legislative history. In *Teamsters*, the Court considered a claim by a group of black and Hispanic employees that their employer had discriminated against them in the following fashion: minority members were hired as "servicemen" or "local city drivers," less desirable jobs than higher paid long-distance drivers, a position held entirely by whites.[376] The United States also filed suit "challeng[ing] the seniority system established by the collective bargaining agreements between the employer and the union."[377] Under that agreement, some benefits such as bidding on jobs and layoff orders were determined based on seniority at the job level rather than seniority with the company. As a result, when minorities with seniority within the organization transferred over to more desirable jobs, largely as a consequence of Title VII enforcement, they felt locked into lower seniority than whites who had been at the job level for much longer. The government sought a remedy that would have allowed minority employees to transfer over to these more desirable jobs with full company seniority.[378] The Supreme Court held that section 703(h) barred this result, to the extent that

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[374] *Id.* at 761 (emphasis added).
[375] 431 U.S. 324 (1977).
[376] *Id.* at 329.
[377] *Id.* at 330.
[378] *Id.*

the Act shielded "bona fide" seniority systems from liability, regardless of whether the system perpetuated pre-Act discrimination.[379]

The Court relied on three elements of the legislative history to support its argument in *Teamsters*. The first was a provision of the Clark-Case memorandum:

> "Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier."[380]

The second represented a statement by the Justice Department, prepared at the request of Senator Clark:

> "Title VII would have no effect on seniority rights existing at the time it takes effect. If, for example, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by Title VII. This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes."[381]

A third statement was the declaration of Senator Humphrey made after passage of the Mansfield-Dirksen compromise substitute bill to the effect that the addition of section 703(h) "merely clarifies [Title VII's] present intent and effect."[382]

The *Teamsters* Court put together these three pieces of historical evidence to make the following argument in favor of its construction of section 703(h):

> While these statements were made before section 703(h) was added to Title VII, they are authoritative indicators of that section's purpose. . . . It is apparent that section 703(h) was drafted with an eye toward meeting the earlier criticism on this issue with an explicit provision embodying the understanding and assurances of the Act's proponents, namely, that Title VII would not outlaw such differences in treatment among

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[379] *Id.* at 353-54.

[380] *Id.* at 350-51 (quoting the Clark-Case memorandum, 110 CONG. REC. 7213 (1964)).

[381] *Id.* at 351 (quoting the Justice Department's response to Senator Hill, 110 CONG. REC. 7207).

[382] *Id.* at 352 (quoting Senator Humphrey's statement, 110 CONG. REC. 12,723).

> employees as flowed from a bona fide seniority system that allowed for full exercise of seniority accumulated before the effective date of the Act.[383]

The Court's account of the legislative history is a plausible one, given the political context of the Act. By contrast to other, questionable statements in the memorandum by Senators Clark and Case, their statements about seniority systems were credible, since they articulated the moderates', rather than their own, position. After all, they were expressing to the pivotal legislators the moderates' view during consideration of the Tower amendments, namely, that section 703(h) would not affect seniority systems.

Senators Clark and Case were willing to go rather far in their reassurance. In a prepared colloquy, Senator Clark responded to Senator Dirksen's questions as follows:

> Question: Would the same situation prevail in respect to promotions, when that management function is governed by a labor contract calling for promotions on the basis of seniority? What of dismissals? Normally, labor contracts call for "last hired, first fired." If the last hired are Negroes, is the employer discriminating if his contract requires they be first fired and the remaining employees are white?
>
> Answer: Seniority rights are in no way affected by the bill. If under a "last hired, first fired" agreement a Negro happens to be the "last hired," he can still be "first fired" as long as it is done because of his status as "last hired" and not because of his race.[384]

These statements from ardent supporters were costly signals. As a floor colloquy about the text of the amendment, ardent supporters would pay a high price for mischaracterizing the shared understanding about the provision's meaning. Moreover, they are credible given that they go against the grain of the larger objectives of ardent supporters to restrict the impact of seniority systems on the plight of minority workers. Indeed, Justices Marshall and Brennan in dissent in *Teamsters* stress the fact that the overall spirit and purpose of the Act is in conflict with the restrictions embodied in section 703(h).[385] As one commentator quoted by the dissenters in *Teamsters* aptly noted:

> "[The] statute conflicts with itself. While on the one hand Congress did wish to protect established seniority rights, on the other it intended to

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[383] *Id.*

[384] 110 CONG. REC. 7217 (reprinting Clark's prepared response to the Dirksen memorandum); *see also* Franks v. Bowman Transp. Co., 424 U.S. 747, 760 n.16 (1976) (relying on this exchange).

[385] 431 U.S. at 388 (Marshall, J., concurring in part and dissenting in part).

> expedite black integration into the economic mainstream and to end, once and for all, the de facto discrimination which replaced slavery at the end of the Civil War."[386]

Per our theory that statutes are mixes of provisions and aspirations of the ardent supporters in combination with specific restrictions and narrowing added to gain support of the moderates, the Civil Rights Act does indeed "conflict with itself." It contains broad and expansive aspirational provisions alongside provisions which, designed to attract pivotal legislators, limit the scope of the Act. As noted above, the statements of Senators Clark and Case espouse the moderates' view that section 703(h) leaves seniority systems mostly alone. Significantly, these statements were supplemented with confirming messages from other ardent supporters, including Senator Humphrey, Senator Thomas Kuchel, and Representative Celler.[387]

This reassurance was not enough, however, from the perspective of the pivotal legislators. In June, Senator Dirksen introduced a revised section 703(h). This section provided:

> [I]t shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin.[388]

In the end, the disagreement between the majority and dissenters in *Teamsters* involved the difficult question of what meaning to accord to the language of section 703(h) and its implication that seniority systems should be exempted from the Act. Justice Marshall's dissent in *Teamsters* shares with Justice Brennan's opinion for the Court in *Franks* the view that pre-1964 seniority systems that have the effect of perpetuating discrimination are invalid under the Act. The Court's decision in *Franks*, as Justice Marshall points out, ruled unlawful the post-Act operation of a seniority system that perpetuates the effects of dis-

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[386] *Id.* at 390 n.17 (Marshall, J., concurring in part and dissenting in part) (quoting Caroline Poplin, *Fair Employment in a Depressed Economy: The Layoff Problem*, 23 UCLA L. REV. 177, 191 (1975)).

[387] *See* 110 CONG. REC. 1518 (quoting Representative Celler: "It has been averted also that the bill would destroy worker seniority systems and employee rights vis-à-vis the union and the employer. This again is wrong."); *id.* at 6549 (quoting Senator Humphrey: "This bill is not an instrument to abolish seniority or unions themselves, as some here have charged."); *id.* at 6564 (quoting Senator Kuchel: "Neither would seniority rights be affected by [Title VII].").

[388] *Id.* at 11,931.

crimination "'occurring prior to the effective date of the Act.'"[389] "Congress was concerned," Marshall writes, "with seniority expectations that had developed prior to the enactment of Title VII, not with expectations arising thereafter to the extent that those expectations were dependent on whites benefiting from unlawful discrimination."[390]

Yet, the conclusion Justice Marshall draws from this assessment of legislative intent—that is, that the pre-1964 seniority system was vulnerable to challenge under Title VII because of its lingering effects on nonwhite employees of the company—is not obvious. Indeed, the evidence cuts against the dissenters' view: their opinion is contradicted by both Dirksen's amendment and the costly signals sent by ardent supporters who could be expected to share the underlying views held by Justices Marshall and Brennan about what the Act *ought* to do.

Considered in context, the *Teamsters* decision jibes with a sensible construction of section 703(h). Such a construction represents a compromise, an intermediate solution to a vexing problem raised by opponents to Title VII—a problem that did not go away with the reassuring statements of ardent supporters, such as Senators Clark, Case, and Humphrey. The analysis in these two cases and, in particular, *Teamsters*, illustrates that legislators can effectively offer costly signals in some instances and cheap talk in others. In *Griggs*, Senators Clark and Case offered what we regard as cheap talk, and the Court wrongly credited these statements in support of its view—a view that read the circumstances surrounding the Tower amendment as irrelevant to the outcome of the enactment process. Yet, the statements of these same legislators were costly signals in the context of section 703(h). Here, they ought to be credited for the light they shed on the meaning of this important part of Title VII.

3. Affirmative Action and *Weber*

United Steelworkers v. Weber involved a claim by a class of white employees of Kaiser Aluminum & Chemical Corporation against the use of hiring goals that reserved fifty percent of the positions for new craft trainees to blacks.[391] This set-aside would operate until the percentage of black skilled craft workers in the plant approximated the percent-

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[389] *Int'l Bhd. of Teamsters*, 431 U.S. at 384 (Marshall, J., concurring in part and dissenting in part) (quoting *Franks*, 424 U.S. at 761).

[390] *Id.*

[391] 443 U.S. 193 (1979).

age of blacks in the local labor force.[392] The legal decision turned primarily on the construction of section 703(a) and (d) of Title VII. Section 703(a) provided that "[i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire . . . or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin."[393] Section 703(d) further provided that "[i]t shall be an unlawful employment practice for any employer . . . to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training."[394] The question before the Court was whether these provisions outlawed the use by a private employer or labor organization of a *voluntary* affirmative action plan.[395]

Although these provisions had remained intact from the introduction of H.R. 7152 through the Senate debate and the introduction of the Mansfield-Dirksen compromise, which added a critical provision. The Court, following the sentiments of the ardent supporters, minimized the impact of these changes. Nonetheless, this amendment represented a significant alteration to the proposed legislation. The compromise added section 703(j) to ameliorate the concerns of pivotal legislators that Title VII could be construed to require preferential treatment and racial quotas.[396] Moreover, this provision would not have become part of the law had the ardent supporters not accepted the pivotal moderates' proposed change.

In a costly signal on June 4, 1964, Senator Humphrey explained the purpose of this amendment:

> A new subsection 703(j) is added to deal with the problem of racial balance among employees. The proponents of this bill have carefully stated on numerous occasions that [T]itle VII does not require an employer to

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[392] *Id.* at 197.

[393] Civil Rights Act of 1964 § 703(a), 42 U.S.C. § 2000e-2(a) (2000).

[394] *Id.* § 703(d), 42 U.S.C. § 2000e-2(d).

[395] *Weber*, 443 U.S. at 197.

[396] *See, e.g.*, 110 CONG. REC. 8616-19 (1964) (recounting a discussion among Senators Sparkman, Stennis, and Keating concerning the Act's effects on school desegregation, fair housing, and equal employment); *id.* at 11,471 (reprinting Senator Javits's argument that, contrary to the myths propagated by its opponents, the Act would not establish quotas in employment, nor would it abrogate seniority in trade unions); *id.* at 12,817 (providing Senator Dirksen's summary of the changes made to the Act's provisions on voting rights, public accommodations, and public education) *id.* at 14,313-14 (providing Senator Miller's description of the process through which the bill was amended in the Senate to reflect states' and individuals' rights with regard to busing, employment, and freedom of association).

> achieve any sort of racial balance in his work force by giving preferential treatment to any individual or group. Since doubts have persisted, subsection (j) is added to state this point expressly. *This subsection does not represent any change in the substance of the title. It does state clearly and accurately what we have maintained all along about the bill's intent and meaning.*[397]

As codified, section 703(j) provides:

> [N]othing contained in this [subsection] shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer . . . .[398]

With these three provisions in mind, the Court in *Weber* construed the legislative history in essentially the way suggested by Senator Humphrey. To begin with, the Court emphasized that "Congress' primary concern in enacting the prohibition against racial discrimination in Title VII of the Civil Rights Act of 1964 was with 'the plight of the Negro in our economy.'"[399] Much of the thrust of the legislative history, according to the Court, was toward opening up employment opportunities for minorities by, in the words of the House Report accompanying H.R. 7152, "'creat[ing] an atmosphere conducive to voluntary or local resolution of other forms of discrimination.'"[400] The critical pieces of evidence for the Court were the extended statements by Senator Humphrey in opening the Senate debate on the proposed legislation, statements made long before the design and passage of the Mansfield-Dirksen amendments. Both the House Report and Senator Humphrey are thus talking about the bill as constituted *prior* to the critical amendments dealing with this topic, and their statements thus must be used with caution, if at all.

Echoing the purposive approach described above, the Court looked beyond particular history that might shed light on the meaning of the latter provision—section 703(j)—and the only provision dealing with affirmative action expressly, instead resting its argument on the view that Title VII should receive an expansive construction and that, with respect to the legislative history, the introduction of section 703(j) did not change the Act in any substantial way. After all,

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[397] *Id.* at 12,723 (emphasis added).

[398] Civil Rights Act of 1964 § 703(j), 42 U.S.C. § 2000e-2(j).

[399] *Weber*, 443 U.S. at 202 (quoting Senator Humphrey, 110 CONG. REC. 6548).

[400] *Id.* at 204 (quoting H.R. REP. NO. 88-914, pt. 1, at 18 (1963)) (emphasis omitted).

section 703(j) merely ruled out a construction of Title VII that would *require* employers to use preferential treatment; it did not, the Court noted, expressly limit employers' decisions to pursue affirmative action voluntarily.[401]

The dissenting opinion of Justice Rehnquist considered the historical evidence relating to the question before the Court in *Weber* from a very different perspective. Section 703(j), as Rehnquist emphasized, was construed with a precise purpose in mind—to respond to the concerns expressed repeatedly in Senate debates over whether Title VII could be used as a means of authorizing discrimination through preferential treatment and affirmative action.[402] The central question before the Senate during the long debate on this issue was whether Title VII was designed to ensure a color-blind workforce.[403] In an oft-quoted statement, Senator Humphrey declared: "Title VII prohibits discrimination. In effect, it says that race, religion, and national origin are not to be used as the basis for hiring and firing. Title VII is designed to encourage hiring on the basis of ability and qualifications, not race or religion."[404] In their memo, Senators Clark and Case likewise emphasized the complete prohibition against any discrimination intended by H.R. 7152;[405] however, many senators remained unmollified. Section 703(j) was added as part of the Mansfield-Dirksen package in order to placate concerns that Title VII would authorize preferential treatment.[406]

Considered in the context of our suggested approach to the use of legislative history, *Weber* was incorrectly decided. Senator Dirksen's statements concerning the impact of section 703(j) on the legality of affirmative action should be taken most seriously; after all, Dirksen spoke for the group of pivotal legislators and insisted that affirmative action was a central issue for this group. In our view, there are very good reasons to believe that permitting affirmative action would have broken apart the coalition necessary to pass the Act. Moreover, Senator Humphrey's statements about section 703(j) are also significant here. His statements that the Act would encourage "hiring on the ba-

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[401] *Id.* at 205-08.

[402] *See id.* at 230-55 (Rehnquist, J., dissenting) (reviewing the legislative history of Title VII, with particular attention to the amendment process).

[403] *Cf. supra* note 339 (providing examples of the rhetoric used by southern Democrats to amplify the reservations and fears of moderates).

[404] 110 CONG. REC. 6549.

[405] *Id.* at 7213, 7216-17.

[406] *See id.* at 7215, 7217 (expressing the concerns of senators, including Senator Dirksen, that H.R. 7152 would result in quotas).

sis of ability and qualifications, not race or religion,"[407] were made in his role as legislative floor leader and were, therefore, costly signals. As such, we might credit his views about the meaning of this section, even in the face of other statements—also costly signals—by the section's architects.[408]

The critical mistake the *Weber* majority makes is its reliance on Humphrey's aspirational statements, statements that, as we explain, are cheap talk, instead of his later costly signals. Ultimately, the Court is simply, to recall Judge Leventhal's description, picking out its "friends"; that is, pulling together a hodgepodge of statements by ardent supporters to rationalize its conclusions. Thus, while there may be other defensible rationales to support the result in *Weber*, as we consider in the following Section B, the Court's use of legislative history is unsupported by the evidence and indefensible from the perspective of our theory of legislative history.

B. *Statutory Meaning Revisited*

The previous Section explained the Court's use of legislative history in several important civil rights cases. Our intent now is to analyze critically the Court's use of legislative history.

One response to our analysis might be that this critique is not mistaken but is misguided, in that it assumes that the courts care at all about a statute's "real" history. In other words, our critique assumes both that legislative intent is to be taken seriously and that the Court in fact takes it seriously.

In light of the problematic use of legislative history in the cases just described, we might well ask whether the Court was truly interested in getting to the bottom of what actually happened in the enactment process. There are plausible reasons to believe that the Court for the most part avoided grappling with the history of the Act.

A logical thread running through the decisions described above is captured well in Justice Marshall's concurring opinion in *Teamsters*,[409] in Chief Justice Burger's opinion in *Griggs*,[410] and in Justice Black-

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[407] *Id.* at 6549.

[408] *See supra* text accompanying notes 322-25 (discussing the Clark-Case memorandum as a source of judicial interpretation of Title VII).

[409] 431 U.S. 324, 377 (1977) (Marshall, J., concurring in part and dissenting in part).

[410] 401 U.S. 424 (1971).

mun's concurring opinion in *Weber*.[411] In bolstering his argument for a more expansive reading of plaintiff remedies under section 706(g) of Title VII and for a correspondingly narrower reading of section 703(h) in *Teamsters*, Justice Marshall relies upon an interpretive argument that might be loosely described as *purposive*.[412] "[I]t is important to bear in mind," begins Justice Marshall, "that Title VII is a remedial statute designed to eradicate certain invidious employment practices."[413] Justice Marshall argues that Title VII should receive a construction that is generous and expansive in light of its avowed purpose to root out the effects of discriminatory practices. In other words, courts should err on the side of broad rather than narrow constructions.

Similar emphases on the overarching purposes of the Act arise in *Griggs* and *Weber*. Although resting part of its ultimate result on the legislative history of the Act, the Court in *Griggs* stressed the point that employment testing undermines principles of equality of opportunity. This opportunity principle drives the Court to move the civil rights agenda forward through several expansionary decisions in the 1960s and 1970s. Indeed, in much of the case law in the first years following the Act's passage, the federal courts stressed the idea that "[c]hief among the complex of motives underlying the equal employment opportunity provisions of the Civil Rights Act of 1964 was doubtless a desire to enhance the relative social and economic position of the American black community."[414]

In an influential article written just after the *Griggs* decision by a central figure in the early EEOC implementation of the Act, Alfred Blumrosen explains that, when construing Title VII, "the principle of liberal construction of the statute is relevant."[415] He describes the

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[411] 443 U.S. 193, 209 (1979) (Blackmun, J., concurring in part and dissenting in part).

[412] *See generally* ESKRIDGE, *supra* note 1, at 25-28 (describing purposivism as a method of statutory interpretation that resolves ambiguities by "identifying the purpose or objective of the statute, and then . . . determining which interpretation is most consistent with that purpose or goal"); HART & SACKS, *supra* note 3, at 102-07, 166-67 (discussing the role of courts in reviewing statutes and illustrating the inconsistencies among courts applying principles of statutory interpretation).

[413] *Teamsters*, 431 U.S. at 381 (Marshall, J., concurring in part and dissenting in part).

[414] *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1113 (1971) (citation omitted).

[415] Blumrosen, *supra* note 326, at 73; *cf.* Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235 (1971) (arguing for the need to go beyond anti-discrimination and color blindness to achieve equal employment).

EEOC's efforts to "make the statute effective in dealing with the social problem by giving it the broadest construction."[416] And he commends this approach to the federal courts, highlighting the ways in which cases like *Griggs* manifest this "liberal construction" principle.[417]

Justice Harry Blackmun's concurring opinion in *Weber* provides a good example of this strand in the modern civil rights jurisprudence of the Supreme Court. Justice Blackmun begins his opinion with a statement that nicely illustrates this purposive approach: "While I share some of the misgivings expressed in Mr. Justice Rehnquist's dissent . . . concerning the extent to which the legislative history of Title VII clearly supports the result the Court reaches today, I believe that additional considerations, practical and equitable, only partially perceived, if perceived at all, by the 88th Congress, support the conclusion reached by the Court today . . . ."[418]

The characteristic quality of the argument for expansionary readings of the Act is that they rely on aspirational goals to avoid confronting squarely the arguments about specific provisions in legislative history.[419] Instead, as Justice Blackmun's concurrence in *Weber* illustrates, the courts rely upon the general purpose of the Act to ensure equality of opportunity and to enhance the life and work prospects of minority Americans. Legislative history, in this view, is only important insofar as it illuminates the broad purposes of the statute. Where there is a conflict between purpose and intent, the latter is disregarded, notwithstanding overwhelming evidence in the statute's historical record about what Congress meant.

There are three separate ways to understand the logic of this approach. First, we can understand the Court to be providing guidance as to how to do proper historical interpretation; perhaps Chief Justice Burger in *Griggs*, Justice Blackmun in *Weber*, and the Court's majority in *Franks* read Congress as wanting the Act to be read broadly. This is plausible, given that the Court *says* that it is considering the statute's

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[416] Blumrosen, *supra* note 326, at 73.

[417] *See id.* at 101-07 (arguing that to overcome the potential limits of *Griggs*, "liberal judicial construction and a maximum enforcement effort are . . . essential").

[418] *United Steelworkers v. Weber*, 443 U.S. 193, 209 (1979) (Blackmun, J., concurring).

[419] *See, e.g.*, Philip P. Frickey, *Wisdom on* Weber, 74 TUL. L. REV. 1169, 1177-84 (2000) (criticizing the Court's use of legislative history and departure from the statutory text of Title VII in deciding *Weber*); George Schatzki, United Steelworkers of America v. Weber*: An Exercise in Understandable Indecision*, 56 WASH. L. REV. 51, 55-58 (1980) (considering possible ambiguities in Title VII's statutory language and their effect on application of the statute).

legislative history.[420] However, in the absence of a coherent theory to explain how the Court goes about unraveling the statute's legislative history, we are left with a very odd and unsatisfying collection of rationales for the Court's interpretive results.

Second, this approach may indicate that the Court cares centrally about the *purpose* of the Act and not the intent of the legislature as evidenced by the statute's legislative history.[421] Although this perspective is beyond the scope of our argument in this Article, we acknowledge that this view is prominent in the contemporary debate about statutory interpretation theory and raises a challenge to many intentionalist and textualist theories of legislative intent.

Our theory of legislative history answers one of these challenges head-on: the challenge that the purpose of the statute is more illuminating as a guide to interpretation than statutory history and legislative intent because the latter cannot be sufficiently decoded. With a proper theory of statute making and legislative rhetoric, we can effectively ground the interpretation of legislative history. Thus grounded, this more effective way of understanding legislative intent can reply to a critical challenge made by these purposivist interpretations. Moreover, if what the Court had in mind in cases such as *Griggs*, *Teamsters*, *Franks*, and *Weber* is statutory purpose, rather than legislative history, then our approach raises serious questions about the reliance on purposive reasoning, a topic to which we turn in the next Part.

Third, and finally, the Court's confusing approach to interpreting legislative history may suggest that it wants to decouple its role from intentionalist theory altogether. Perhaps, at base, the Court is saying that the Civil Rights Act is special; it is, in William Eskridge and John Ferejohn's phrase, a "super-statute"; that is, a law

> that (1) seeks to establish a new normative or institutional framework for state policy and (2) over time does "stick" in the public culture such that (3) the super-statute and its institutional or normative principles have a

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[420] *See supra* text accompanying notes 27-29 (discussing how the Court makes use of legislative history).

[421] Ronald Dworkin, for example has argued that,

> [i]f it were clear that "discriminate . . . because of . . . race" was used in the neutral sense, it would have made no sense for the Court to leave open the question of whether it applied to affirmative action. The majority in *Weber* was right, both as a matter of ordinary language and precedent: the question of how Title VII should be interpreted cannot be answered simply by staring at the words Congress used.

RONALD DWORKIN, A MATTER OF PRINCIPLE 318 (1985).

> broad effect on the law—including an effect beyond the four corners of the statute.[422]

Tagging the 1964 Civil Rights Act as a "super-statute" seems to take it out of the realm of intentionalist interpretation altogether. Whatever the strengths and weaknesses of this perspective on statutory analysis and interpretation, we note that this renders the project of historical interpretation meaningless. As we show in the next Part, this view also creates unintended problems.

IV. STATUTE MAKING AND STATUTORY INTERPRETATION VIEWED THROUGH THE LENS OF POSITIVE POLITICAL THEORY

Thus far, we have argued that the meaning of legislative history ought to be viewed in light of the structure of legislative coalitions and, in particular, the comparative roles of legislators involved in the strategic processes of statutory enactment. Moreover, assessing that history requires consideration of the purposive efforts of legislators to communicate and strategize with one another prior to passage. In this final Part, we discuss how our approach sheds light on the meaning of the Civil Rights Act of 1964, on contemporary theories of statutory interpretation, and on the patterns of American social policy.

A. *Perspectives on Statutory Interpretation and Legislation*

Our study of the Act reveals a series of conspicuous legislative compromises among ardent supporters and pivotal legislators. The result of these intralegislative negotiations was a truly historic civil rights law, one which helped secure basic civil rights for millions of Americans, particularly African Americans. To the extent that the civil rights laws were a critical instrument in the battle for social justice, the carefully negotiated agreements within Congress were key to this success.[423]

The essential problem with the judicial interpretations identified above is that they look past the architecture of these compromises. The Justices relied on the selective use of legislative history to set aside critical elements of the legislative compromise necessary to produce the Act. This type of judicial decision making has a larger risk,

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[422] William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1216 (2001).

[423] *See* MOORE, *supra* note 15, at 81-143 (considering the role of race in policymaking).

namely, that it increases the possibility that members of Congress will not pass social legislation in the first place. Legislators operate in the shadow of other institutions that directly affect policy outcomes. Because legislators anticipate the effects of outside institutions, these effects are reflected in legislator incentives.[424]

We have emphasized that moderates will be willing to support legislation when they believe their changes—often placing limits on the scope, coverage, and meaning of an act—will be administered as part of the law.[425] Thus, the prospect that the terms of their bargain will be unraveled or ignored by courts makes it much less likely that pivotal legislators will put themselves at risk by negotiating with ardent supporters on the language of, and similarly by creating the legislative history of, an Act. If courts regularly set aside restrictive language in favor of the broad aspirational purposes of ardent supporters, then moderate compromises are not meaningful. Courts of this type essentially say to moderates, "You can have the status quo or you can have the expansive reading of the ardent supporters, but you cannot craft moderate legislation that restricts the ardent supporters' purposes." Faced with this stark choice, many moderates will rationally decide to oppose the legislation.

The moderates' reluctance to compromise presents ardent supporters with a difficult choice. Although they would most prefer to propose strong legislation and compromise with the moderates, the Court's expansionary interpretations make the moderates reluctant to do so. The ardent supporters must then decide between accepting the status quo and proposing more moderate and minor legislation that, by being more and minor, has far less a chance of being read in an expansionary manner by the courts.

In the end, then, an expansionary judicial interpretive regime creates negative feedback to the legislature, making major social legislation less likely. To the extent that most major pieces of social legislation require specific compromises between moderates and ardent supporters, expansionary courts paradoxically make such legislation less likely.

As we saw in the civil rights episode, ardent supporters succeeded by fashioning compromises with pivotal legislators; the consequence was a bill of historic dimensions that also assuaged many of the con-

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[424] *See* RIKER & ORDESHOOK, *supra* note 6, at 5 ("[E]nforcement is the necessary companion of selection.").

[425] *See supra* text accompanying notes 6-9 (discussing the process of securing the support of pivotal legislators).

cerns of more moderate legislators.[426] The efforts to assuage moderate legislators were critical; after all, pivotal Republicans could well have walked away from the bargaining table, leaving ardent supporters to bear the blame for failing to manufacture an acceptable compromise bill. Indeed, at a number of junctures in the enactment process, the civil rights bill was in jeopardy. At those junctures, influential legislators within both coalitions—McCulloch, Halleck, and Dirksen for the moderates, Humphrey, Clark, and Case for the ardent supporters—saved the day by careful negotiations and savvy leadership.[427] In the absence of such carefully negotiated compromises, no civil rights bill would have been enacted in that Congress.

The Court's expansionary reading of the Civil Rights Act raises a question of whether the moderates failed to anticipate judicial action. Our discussion above shows that, to a degree, the moderates did anticipate the possibility of expansionary readings. Many of Dirksen's "clarifying" amendments were designed to limit later court interpretation of particular provisions. So too was his deletion of the statement of purpose in Title VII. Yet no one in 1964 could have known the degree to which the courts would expand various new social legislation in the late 1960s through the 1980s. It is the unanticipated portion of this judicial behavior that moderates in 1964 could not have correctly anticipated.

One of the main lessons of positive political theory's application to the law is that the judicial process of interpretation affects the legislative process of statute creation.[428] Legislators, in their bargaining over the contents of statutes, will rationally take into account how courts use messages and texts in the process of statutory interpretation.[429]

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[426] *See supra* Part II.C-.D (examining the influence of moderate Republicans on the Act).

[427] *See supra* Part II.D (stressing the importance of pivotal legislators in passing the Act).

[428] *See* McNollgast, *Positive Canons*, *supra* note 11, at 706 (arguing that judicial methods of statutory interpretation should use explicit theories of legislative processes for consistency).

[429] *Cf.* Rodriguez, *supra* note 38, at 228-30 (considering the interaction between legislative rhetoric and judicial interpretation); *see also* Robert A. Katzmann, *Bridging the Statutory Gulf Between Courts and Congress: A Challenge for Positive Political Theory*, 80 GEO. L.J. 653, 653-55 (1992) (discussing "the extent to which . . . courts and Congress take into account one another's processes in making their own decisions").

To illustrate this abstract claim, consider two interpretive regimes.[430] In the first regime, courts respect the bargains made by legislators to pass their legislation. In particular, judges respect the restrictive language within the text when this interpretation is supported by the costly signals of ardent supporters and moderates. Further, judges under this regime respect this restrictive language, even when it contradicts the broad aspirational language of the legislation's preamble and of the cheap talk phrases of ardent supporters. In the second interpretative regime, courts do not feel bound to honor restrictive text that contradicts broad aspirational language, even if this restrictive meaning is supported by costly signals. Judges in this regime feel free to set aside restrictive text when this contradicts the broad aspirational language or other purposes they seek to read into the act.

Our claim is that, to the extent that legislators correctly anticipate these regimes, they will behave in different ways. Under the first interpretative regime, moderate legislators are far more likely to support legislation because they expect courts to respect the critical legislative compromises that are necessary to garner their support for the legislation. In contrast, moderates legislating under the second interpretative regime are much less likely to compromise, for fear that judges will set aside the very provisions necessary for them to support legislation. To the extent that legislators anticipate that courts will set aside provisions necessary for their support, they will refuse their support in the first place.[431] Ardent supporters may also react by proposing minor legislation that is less likely to provide courts with opportunities to read in broad social purposes.

Interpretive regimes may therefore dramatically affect how legislators construct legislation. Under the first interpretative regime, moderates have faith that courts will respect their desired provisions and are thus induced to behave moderately. Under the second interpretative regime, moderates have no faith that courts will respect their desired provisions and thus are induced to avoid legislative compromise. Put another way, judges acting under the second interpretative regime will generate a more polarized legislature than judges acting under the first interpretative regime. Because, in the second interpretative regime, moderates cannot be assured that their compromises will be

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[430] *See generally* William N. Eskridge, Jr. & John Ferejohn, *Politics, Interpretation, and the Rule of Law*, *in* THE RULE OF LAW: NOMOS XXXVI 265, 268 (Ian Shapiro ed., 1994) (considering the relationship between judicial interpretive regimes and democratically elected legislatures).

[431] For further discussion of this point, see *supra* text accompanying notes 6-11.

acknowledged by the courts, they are more likely to align with ardent opponents than produce a legislative compromise with the ardent supporters.

This perspective yields an important comparative statics prediction about how a change in interpretative regime by the courts will shape legislative politics. Suppose that courts move from the first interpretative regime to the second. In reaction to this change in interpretative regime, legislators alter their behavior in accordance with their rational expectations of how their legislation will be interpreted. So long as the courts move to broaden the scope of the legislation enacted by Congress, moderates are less likely to behave moderately, and legislative politics will become more polarized. To put it simply, moderate legislators perceive very little gain from acting "moderately" and from settling on a middle ground.

This perspective is consistent with aspects of American politics from the 1960s through today. The mid-1960s through the mid-1970s witnessed a broad set of social policy initiatives not seen since, including a range of new safety, health, environmental, and social regulation that, in toto, changed the relationship of the federal government to American society.[432] Most scholars studying this period and its aftermath take this change in legislative behavior after the mid-1960s as exogenous.[433] Our perspective, however, suggests that the courts may have influenced the tendencies away from enactment of broad-scale social legislation. To the extent that courts in the 1970s interpreted a range of social policies broadly, consistent with the statute's aspirational language, they may have unwittingly contributed to the greater political polarization that emerged in the late 1970s and matured in the 1980s, as Democrats and Republicans opposed one another far more frequently on major social issues.[434] In sum, a principal reason to be wary of approaches to statutory interpretation that neglect the role of pivotal legislators is that they frustrate efforts within the legislature to seek agreement across coalitions and thereby makes historic

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[432] *See, e.g.*, RICHARD A. HARRIS & SIDNEY M. MILKIS, THE POLITICS OF REGULATORY CHANGE 92-95 & tbl.3.2 (1989) (describing significant social regulatory measures of the 1960s and 1970s shaping public policy, such as the Occupational Safety and Health Act of 1970 and the Cigarette Labeling and Advertising Act); SUNDQUIST, *supra* note 13, at 250-86 (describing civil rights legislation of the 1960s).

[433] *E.g.*, PHILLIPS, *supra* note 212; SUNDQUIST, *supra* note 13.

[434] *See* THOMAS BYRNE EDSALL & MARY D. EDSALL, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS 137-53 (1991) (tracking increasing Democratic and Republican differences as to issues of race and civil rights in the wake of aggressive civil rights legislation during the 1960s).

social legislation less likely. When courts fail to respect legislative bargains, moderates are deterred from compromise and ardent proponents are deterred from proposing major new legislative initiatives. Ironically, then, those who favor activist judicial interpretations in order to broaden the scope of civil rights and other social legislation may be defeating their own purposes by making it less likely that such protections will be enacted in the first place.

One additional concern with our approach bears mention. The prescriptive literature on statutory interpretation often focuses on the perceived need to develop approaches to correct pathologies in the legislative process. Cass Sunstein, Jonathan Macey, Jane Schacter, William Eskridge, Jr., and others have argued for doctrines and theories of statutory interpretation that restrict the scope of self-interested legislative decision making and that advance important social policies.[435] These theories share a common concern that the structure of legislator incentives and the tendencies of the modern Congress favor the pursuit of private aims over the public good.

We accept that it is important to regard Congress with a careful eye and without naivete about legislator incentives, motivations, and behavior. Nonetheless, it is clear that, despite these problems, members of Congress are capable of passing landmark legislation, such as the Civil Rights Act of 1964. Accordingly, interpretive approaches that are designed to improve legislative decision making should ensure, at the very least, that the structures and incentives which enable significant, and even controversial, legislation to get passed remain intact.

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[435] *See* ESKRIDGE, *supra* note 1, at 151-61 (evaluating the possibility that "statutory interpretation can ameliorate some dysfunctions in the political process"); SUNSTEIN, *supra* note 317, at 111-59 (arguing against the belief that policy considerations should not influence statutory interpretation by a court); Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L.J. 1277 (2001) (suggesting institutional changes by which to improve the quality and candor of congressional deliberation on constitutional issues); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 266-68 (1986) ("[T]he Constitution permits judges, using traditional methods of statutory interpretation, to play a role in regulating the activities of special interest groups."); Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History, Debate and Beyond*, 51 STAN. L. REV. 1, 38-53 (1998) (considering the implications of the Court's "common law originalism" for the use of legislative history to identify the policy issues embedded in statutory text); Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 595 (1995) ("[D]emocratic legitimacy [in statutory interpretation] is measured *not* by the elimination of judicial discretion in statutory interpretation, but instead by the interpretive principles and default rules that shape and channel that discretion.").

Our approach demonstrates that interpretative regimes which purport to further public-regarding policy goals at the expense of private-regarding legislative intent may have exactly the opposite effect than intended.

Our approach also implies a great irony for those arguing that courts should correct legislative pathologies. To the extent that these corrections lead courts to look to broad social goals to interpret acts and set aside specifics designed to protect particular constituencies, they make it much less likely that Congress will rise to historic occasions to pass social legislation, such as the Civil Rights Act, in the first place.

While not denying that many serious pathologies exist within the contemporary Congress,[436] a sensible approach to statutory interpretation must be careful not to throw out the baby with the bath water. Misuse of legislative history or conscious disregard of the historical context of legislation may reduce some lawmaking pathologies only to create new ones.

Moreover, our approach confronts one key pathology in the lawmaking process, to wit, the incentive for legislators to engage in cheap talk in order to influence postenactment policy outcomes.[437] Cheap talk may affect electoral outcomes by allowing legislators to grandstand and to announce positions favored by their constituents, but it does not improve the quality of legislative deliberation on the proposals. As we have demonstrated, cheap talk often fails to serve the function of clarifying ambiguous terms for the benefit of the legislature as a whole—indeed, it accomplishes just the opposite task by making it harder for outside evaluators, such as courts, to understanding the nature of the legislation's bargain.[438] Although cheap talk statements, such as the Clark-Case memorandum, sometimes serve as efforts to help guide legislators in the process of making up their minds, they simultaneously operate on a much more manipulative level. Although many forms of strategic behavior are ubiquitous in the modern Con-

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[436] *See, e.g.*, Rodriguez, *supra* note 34, at 52-80 (explaining that the lack of guidance as to procedural components of legislative and presidential decision making in the Constitution leads to procedural and legislative choices overinfluenced by political processes).

[437] *See supra* text accompanying notes 87-96 (describing the distinction between cheap talk and costly signaling that may lower the probability of a bill's passage).

[438] *See supra* text accompanying notes 87-91 (explaining the ease with which ardent supporters can plant cheap statements in order to support subsequent broadening interpretations).

gress,[439] there is precious little reason to encourage legislators to obscure the meaning of legislation—either to their constituents or to their colleagues—in a legislative battle.

Thus, decreasing the value to legislators of engaging in this strategic use of cheap talk helps tackle a significant pathology in the lawmaking process. The theory of legislative rhetoric suggests that legislator incentives to spin the legislation in one way or another will be unlikely to disappear. However, controlling one facet of this strategy—namely, the opportunistic effort to influence postenactment statutory interpretations—minimizes at least one of the incentives to engage in such rhetoric.

B. *Perspectives on Contemporary American Social Policy*

Central to the view of those who argue for expansionist readings of the Civil Rights Act is the idea that Congress stepped into the breach in the early 1960s and provided the essential legislative underpinnings of the modern civil rights era.[440] In one sense, this is absolutely true; in another sense, it is greatly exaggerated. While appreciating what Congress did in 1964, we believe it is equally important to look at what did *not* happen. Looking at the roads not taken gives us important lessons for modern legislative policymaking.

We know with hindsight that the 1964 Act was a landmark piece of legislation in several senses: first, it transformed American race relations in many ways;[441] second, it ushered in a new era that transformed the relationship of the American federal government to the American people; and third, it became a major factor in the regional shift in American electoral politics. The Democrats started losing the solid South and many urban working-class communities in the North, while

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[439] *See supra* Part II (analyzing strategic behaviors such as acting within legislator coalitions, cheap talk, and manipulation of legislative histories in the context of the Civil Rights Act).

[440] *See, e.g.*, Eskridge, *supra* note 27, at 618-23 (describing the cooperation between the Supreme Court, the President, and Congress in addressing civil rights legislation in the 1960s); Eskridge & Ferejohn, *supra* note 422, at 1237-42 ("[T]he Civil Rights Act's antidiscrimination principle has saturated American social and political culture.").

[441] *See, e.g.*, GRAHAM, *supra* note 20, at 153-76 (exploring the effect of the 1964 Act, and its accompanying regulatory apparatus, on social and business relationships); THERNSTROM & THERNSTROM, *supra* note 15, at 158 ("As Bayard Rustin noted, with dizzying speed the 'legal foundations of racism in America' had been 'destroyed' [by the Civil Rights Act of 1964 and the subsequent Voting Rights Act]. The 'elaborate legal structure of segregation and discrimination' had 'virtually collapsed.'").

gaining the overwhelming support of African Americans.[442] Although the creation of new federal civil rights policy during this era suggests that the 1964 Act was an inevitable step in the march toward an expanding national presence in this area, none of this was foreseen from the vantage point of the legislators in 1963 as they took up H.R. 7152 and, later, the various Senate amendments. Hence, the incentives of pivotal legislators were to hedge their bets and to guard against expansive, and thereby politically risky, civil rights legislation. Obtaining the support of the moderates through careful cultivation of their support and through compromise was essential to the objectives of civil rights' ardent supporters.

These elements of legislative deal making are not unique to civil rights or to the 1963 to 1964 time period. The last thirty-odd years have seen almost unbroken divided government.[443] Agreement has been difficult to achieve across this partisan divide.[444] One of the consequences of this division during the 1960s and early 1970s, a period in which public demands for strong economic and social legislation were paramount, was that several landmark statutes were passed only after bitter, intralegislative struggles.[445] As with the civil rights episode, the results were typically compromise statutes that reflected less than the ardent supporters would have liked and hoped, but more than nothing. The Clean Air Act Amendments of 1977,[446] for example, also indicated carefully crafted agreements between opposing forces.[447]

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[442] *See* ALEXANDER P. LAMIS, THE TWO-PARTY SOUTH 20-43 (1984) (describing the Democrats' loss of southern support after the party's embrace of equal rights issues in the 1960s); SUNDQUIST, *supra* note 25, at 66-101 (describing how, after the Democrats suffered defections in the South, there was a torrent of Republican activity leading to the collapse of the racial rationale for the one-party South); THERNSTROM & THERNSTROM, *supra* note 15, at 303-06 ("Black allegiance to the Democratic Party—across social classes—has been extremely stable since 1964.").

[443] *See* DAVID R. MAYHEW, DIVIDED WE GOVERN 1 (1991) ("Since World War II, divided party control of the American national government has come to seem normal."); Morris Fiorina, *An Era of Divided Government*, 107 POL. SCI. Q. 387, 387 (1989) (noting that in the last quarter century "we seem to have settled into a persistent pattern of divided government").

[444] *See* BRADY & VOLDEN, *supra* note 9, at 94 ("[B]y the time of the 1992 election divided government had become part of the normal vocabulary of American politics.").

[445] *See* ACKERMAN & HASSLER, *supra* note 44, at 29-33 (describing the struggle involved in passing clean air legislation).

[446] Pub. L. No. 95-95, 91 Stat. 685 (codified as amended in scattered sections of 42 U.S.C.).

[447] *See* ACKERMAN & HASSLER, *supra* note 44, at 29-33 (describing the political battle behind the amendments to the Clean Air Act); BERNARD ASBELL, THE SENATE NOBODY KNOWS 173-89 (1978) (chronicling the maneuvering of multiple legislative

What is perhaps even more striking is the fact that several efforts to enact other major pieces of social legislation failed. Our approach suggests one plausible reason for these failures: pivotal legislators were afraid to enter into agreements with ardent supporters because these agreements would be susceptible to expansionary interpretations. The terms of the deal were therefore precarious; moderate legislators could rightly fear that their agreements would not remain moderate. From this perspective, it is not surprising that efforts to fashion compromises similar to the Civil Rights Act of 1964 floundered.

This development is especially interesting in connection with civil rights legislation. From 1964 to the early 1980s, Congress enacted a few pieces of civil rights legislation. Two of these acts were truly historic: the Voting Rights Act of 1965,[448] and the Civil Rights Act of 1968.[449] The scope of the other statutes enacted during this era was more limited.[450] Moreover, several efforts to expand the reach of federal intervention in civil rights were defeated in Congress, often with the help of many of the same legislators whose support for civil rights in 1964 was critical.[451] This result is, on the surface, perplexing. After all, the conditions would appear ripe for expanding civil rights protections: Congress became more liberal during this period,[452] and the demise of the entrenched southern Democrats signaled a greater opportunity within Congress to pass civil rights legislation. Further, the political changes wrought by significant legislative and judicial deci-

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proposals and special interest groups from the perspectives of Senators Muskie and Hart).

[448] Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 U.S.C.).

[449] Pub. L. No. 90-284, 82 Stat. 73 (codified in scattered sections of 42 U.S.C.).

[450] *See* MOORE, *supra* note 15, at 79-80 (explaining how the 1965 and 1968 acts were subjected to less "devastating" policy compromises than were earlier proposals).

[451] *See id.* at 79 ("[S]ixties civil rights legislative proposals were, in effect, stripped of their most critical enforcement provisions."); SUNDQUIST, *supra* note 13, at 275-86 (analyzing the defeat of civil rights legislation in 1966, including Senator Dirksen's role in defeating the bill).

[452] Groseclose, Levitt, and Snyder provide evidence for this broad claim. *See* Tim Groseclose et al., *Comparing Interest Group Scores Across Time and Chambers: Adjusted ADA Scores for the U.S. Congress*, 93 AM. POL. SCI. REV. 33, 39-42 (1999) (discussing how both Republicans and Democracts shifted leftward). Moreover, Eskridge uses this fact to explain why the Supreme Court expanded the scope of civil rights legislation in the 1960s and early 1970s. *See* Eskridge, *supra* note 27, at 619-20 ("On the Court, sentiments shifted dramatically to the left after 1962. . . . The national shift to the left was reflected in the Court's lopsided votes upholding the constitutionality of the [Civil Rights Act of 1964 and the Voting Rights Act of 1965].").

sions, including the Voting Rights Act and the reapportionment decisions, shifted the political landscape in a direction favorable to the pro-civil rights agenda.[453]

To be sure, the scope of civil rights protections grew during this era, but largely through expansionary statutory interpretations by the courts, not through legislative action.[454] Whether Americans were better or worse off depends, of course, upon your underlying views about federal civil rights policy. Yet our approach suggests that expansionary judicial interpretations worked at cross purposes with the pro-civil rights agenda within Congress. Our view explains an important asymmetry between legislative and judicial action: pivotal legislators were likely nervous about agreeing with ardent supporters on legislative bargains which, when they came before the courts, would be rewritten.[455]

Our view offers a new perspective on the growing polarization of the modern Congress in the area of social policy. Because the courts frequently rewrote the terms of legislative bargains, there were decreasing incentives for moderate behavior and, thus, fewer moderate legislators. With greater polarization, there are fewer opportunities for historic breakthroughs; we would expect to see less social legislation passed.

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[453] *See* J. MORGAN KOUSSER, COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION 366 (1999) ("[T]he new abolitionists dismantled mandatory segregation, strengthened the guarantee of equal participation in politics, and attacked public and private discrimination in public accommodations, housing, employment, and other areas."); Chandler Davidson & Bernard Grofman, *The Voting Rights Act and the Second Reconstruction*, *in* QUIET REVOLUTION IN THE SOUTH 378, 380 (Chandler Davidson & Bernard Grofman eds., 1994) (discussing how the Voting Rights Act changed the political landscape "by giving the executive branch extraordinary monitoring and enforcement powers in that region of the country where adamant opposition to black voting rights was still widespread").

[454] *See* ESKRIDGE, *supra* note 1, at 14-28 (describing the Court's interpretation of Title VII in *United Steelworkers v. Weber*, 443 U.S. 93 (1979)); *see also supra* text accompanying notes 98-99 (discussing how courts choose different interpretations of legislative intent).

[455] Professor Eskridge also argues that the expansionary judicial readings made congressional civil rights legislation less likely. By taking advantage of congressional veto groups, such as the filibuster pivot, the court expanded civil rights interpretation just enough to forestall congressional action. *See* Eskridge, *supra* note 27, at 646-50 (explaining the interaction between the Court's expansionary judicial readings and Congress's unwillingness to enact new legislation). Our approach suggests that Eskridge's argument tells only part of the story in that his argument misses how judicial willingness to set aside moderate compromises means that moderates are less likely to support legislation.

In the period from the mid-1970s to the present, Congress has enacted relatively few pieces of major social legislation. In the civil rights area, few statutes have been passed whose scope and significance could be compared to the watershed acts of the 1960s and early 1970s.[456] Without minimizing the various reasons for this result, we would highlight the impact of legislative polarization, polarization facilitated by the court-fueled disincentives for compromise.

We draw two lessons from our analysis for American social policy. First, courts engaged in statutory interpretation of contentious statutes should use available legislative history to appreciate the bargaining process between ardent supporters and moderates that precipitated the statute. By honoring this bargain when construing such laws, courts may create incentives for future legislators to be accommodating and to behave in more moderate ways. At the same time, by decreasing incentives among moderates to become polarized, courts interpreting statutes can facilitate legislative agreement and therefore fulfill the objective of getting controversial social legislation enacted.

This latter observation is admittedly a speculative one. It remains for future work to delve more analytically into the question of a relationship among judicial activism, legislative polarization, and the decline of sweeping public policy. The process by which the 1964 Act was enacted into law, however, provides at least one important example of how moderation and compromise are critical to legislative success. Additionally, the difficulties faced by civil rights supporters in the years following the passage of the 1964 Act provide additional evidence in support of our observation in this Section.

Second, court interpretation of a range of statutes has generated a lively debate about the role, if any, of courts in social policy.[457] Many scholars argue for restraint by the courts for reasons based in democratic theory: by virtue of being unelected and relatively insulated, judges should not extend their authority into arguably political spheres. Our argument shows that more is involved than simply unelected representation, as expansionary interpretations may actually create disincentives in subsequent legislative efforts.

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[456] *See supra* text accompanying notes 432-35 (indicating that "[t]he mid-1960s through the mid-1970s witnessed a broad set of social policy initiatives not seen since").

[457] *See, e.g.*, HOROWITZ, *supra* note 352, at 17-19 (noting that "[t]he appropriate scope of judicial power in the American system of government has periodically been debated").

CONCLUSION

The story of modern civil rights legislation is often fashioned as a story of great events and heroic figures. Given the powerfully resonant episodes that underlay the larger social context within which key civil rights laws were passed, this is not surprising. The political history of the civil rights laws, especially the foundational Civil Rights Act of 1964, easily conjures up the images of the March on Washington, Dr. Martin Luther King, Jr.'s paean to social justice in his "I Have a Dream" address, and the forceful rhetoric of the key advocates of federal intervention in the name of civil rights, including Hubert Humphrey and Lyndon B. Johnson.[458] Without doubt, the historical 1964 Act would not have happened without these events.

The trouble with this heroic picture is that we may well come away with a distorted view of what actually happened within Congress between the summers of 1963 and 1964. The focus on the social context of civil rights too easily leads to the presumption that meaningful civil rights legislation was, by the beginning of the 1960s, inevitable. A more nuanced look at the history of the Act reveals that passing the legislation was not inevitable, and that its passage required critical compromises—compromises which, while not altering the essential nature and spirit of the Act, nonetheless meaningfully reshaped it in ways that appealed to more moderate, and more pivotal, legislators. The story of the civil rights movement is, quite rightly, a story of heroic figures triumphing over ignorance and inertia. However, the story of the Civil Rights Act is also a story of legislative politics, strategic behavior, and compromise in the face of what had previously been insurmountable obstacles to enacting meaningful civil rights legislation.

The principal consequence of this revised history of the Civil Rights Act, and the approach it portends for other statutes, is a new approach to statutory interpretation. The main critiques in the statutory interpretation literature of reliance on legislative history have been directed toward practical objections, stressing that legislative his-

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[458] *See, e.g.*, BRANCH, *supra* note 121, at 282 ("Senator Hubert Humphrey formally commenced a final debate on the civil rights bill with a speech of three hours and twenty-six minutes, opening with the Golden Rule quotation . . . ."); KLINKNER & SMITH, *supra* note 13, at 242-87 (describing the roles that Senator Humphrey and President Johnson played in the civil rights movement).

tory is messy, convoluted, difficult to assess, and frequently contradictory.

Our perspective, building upon the work of positive political theorists, rescues legislative history from a central strand of this critique. Although legislative history may be confusing, this does not imply that it is worthless. The theory of political rhetoric provides an explanation for why the legislative record necessarily provides multiple and conflicting views. More usefully, it also suggests how to unpack these conflicting views in ways that are not arbitrary. Although we agree with many scholars of statutory interpretation when they observe that the legislative record is confusing, we disagree with those who conclude that it is therefore worthless.

The chief lessons for statutory interpretation are threefold. First, because legislative history is inherently contradictory, courts should make an effort to disentangle who said what, when, and about what version of the legislation. Our approach suggests that not all supporters are alike. Because ardent supporters have different incentives than pivotal legislators, courts should be sensitive to the ardent supporters' strategic incentives to expand the scope of an act's meaning.

Second, courts should distinguish between different types of statements by the ardent supporters. Following McNollgast,[459] we distinguish between statements that are cheap talk and those that are costly signals; that is, whether an ardent supporter may pay a cost for mischaracterizing the nature of the legislation. Legislators are more likely to characterize a provision accurately when mischaracterization jeopardizes the bill's passage.

Costly signals include discussions on the chamber floor about the language in question and committee reports that explain the meaning of that particular version of the bill. Ardent supporters who mischaracterize the nature of the legislation at these stages jeopardize the support of the pivotal legislators, and hence of the legislation itself. Cheap talk occurs in contexts where a legislator pays no price for mischaracterization. This includes grandstanding statements at the opening of committee or chamber considerations; statements made

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[459] *See* McNollgast, *Legislative Intent*, *supra* note 11, at 28 (discussing the danger of cheap talk and suggesting that legislators' statements be used for statutory interpretation "[o]nly when the majority exerts effort to monitor and to constrain talk"); McNollgast, *Positive Canons*, *supra* note 11, at 707 ("When talk is cheap—when members of Congress or the president cannot be held accountable for their statements about a bill by members of the coalition—its information content is not reliable.").

outside the legislature, such as in press conferences; and statements made after the legislation has passed, such as memoirs.

Third, courts should distinguish among statements made at different points in the legislative process. Thus, opening statements at the beginning of the process are not only typically cheap talk, but they also typically take place prior to the critical compromises necessary to transform a proposed bill into an act. In the case of the Civil Rights Act, for example, Humphrey's statements at the opening of floor consideration could not have accurately characterized the nature of the final legislation since he could not have accurately anticipated the compromises necessary to ultimately pass the Act.

We applied our perspective to the Civil Rights Act of 1964 in two ways. First, we analyzed the Act's passage. Second, we studied the major civil rights cases of the 1970s to consider how the Court constructed arguments based on legislative history to support its rulings and how the history was used in dissent. We summarize these points in turn.

A. *Politics of the Civil Rights Act of 1964*

We have argued that analysts too often have taken the rhetoric of the principal leaders at face value without a sufficiently critical eye to the incentives of these leaders to bias and shade their rhetoric to serve political ends. This has led many to misunderstand the scope and intent of the changes made in the Senate in order to gain the support of Republicans to pass the historic Civil Rights Act. Our analysis of the Act highlights the special role played by pivotal legislators, particularly Senator Dirksen, in securing enactment of a strong, yet more moderate, version of the legislation.[460] The success of this endeavor was a result of intricate maneuvering on the part of ardent supporters and moderates, a process that took place within—and, indeed, was facilitated by—the industrial organization of Congress. Without exaggerating the role of pivotal legislators, it is fair to say that the expressed views of this group were not only essential to getting the bill passed, but they also represent the intent of the pivotal legislators whose votes were critical.

Our approach yields a number of specific lessons about civil rights. First, as every account of the Act's passage suggests, breaking the filibuster in the Senate was central to the Act's passage, and doing

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[460] *See supra* Part II.C.2 (discussing Senator Dirksen's role in securing the votes necessary to obtain cloture through the tactical moderation of certain provisions).

so required the support of most Republican senators.[461] What is not well understood is the nature of the bargain necessary to gain that support. We emphasize that, although the Republicans did not alter the Act's structure significantly, they did materially affect its meaning by blunting the impact on the North.

Second, we argue that all parties involved had an incentive to minimize the perception of the effects of these changes. Democratic leaders had three compelling reasons to minimize the perceived impact of the Republicans. They did so because they supported a stronger version of the Act and wanted to enshrine this vision in legislation. Democratic leaders also sought to claim the lion's share of the political credit for the Act as part of their repositioning of the Democratic party in national politics. In addition, these leaders wanted to minimize the nature of the Senate changes as part of their effort to obtain assent by the House to their changes so as to avoid a conference committee.

The Republicans had equally compelling reasons to minimize the effects of their efforts. Like the Democrats, they too wanted the House to accept the Senate's changes and thus avoid a conference committee. Looking ahead to the 1964 elections, Republican leaders also wanted to avoid giving Democrats the ability to paint Republicans as having sold out on civil rights. Finally, and most subtly, Republican leaders wanted to take a relatively low profile on civil rights so that the Democrats, in claiming the lion's share of the credit, would risk losing the South. Put simply, Democratic losses in the South would be Republican gains.

The evidence suggests that, as to this last objective, Republicans profited greatly in fact from the Democrats' action on civil rights and voting rights, particularly by improving the Republicans' ability to win the presidency. From the election of Franklin Roosevelt and the initiation of the New Deal era in 1933 until 1968, Democrats held united government—that is, control of the House, Senate, and presidency—in thirteen congresses, while the Republicans held united government in just one, with control divided in the remaining four congresses. By contrast, from 1969 through 2002, divided government has been the norm—holding in fourteen congresses—with the Democrats holding

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[461] *See supra* Part II.C.2 (explaining the legislative arithmetic which made moderate Republicans the key to overcoming resistance by southern Democrats).

united government in only three congresses and the Republicans not at all.[462]

Analysts typically—and, in our view, accurately—ascribe this transformation to the civil rights era.[463] What is infrequently considered, though, is how the Republicans developed strategies, through and within the legislative process, to facilitate these long-term political aims. The development and implementation of a legislative strategy in the area of civil rights was, as we have explained, a critical part of this larger political objective. It remains for future work to consider more systematically how Republicans and Democrats forged strategies through the legislative process to implement their aims and how courts assisted and resisted these strategic devices.

B. *Supreme Court's Use of Legislative History in Major Civil Rights Cases*

Part III considered how the Court used and misused legislative history in a number of significant civil rights cases. In construing especially controversial provisions of Title VII, the Court rested its decisions on dubious pieces of legislative history. In the case of *Griggs*, the Court eschewed reliance on costly signals, instead relying on legislators' statements which were little more than cheap talk. When examining the disputes over bona fide seniority systems, the Court scrambled to find textual and historical support for its conclusions about discrimination and seniority. In one case, it turned away from the legislative record altogether; and, in the other, it attached significance to legislators' statements that did not support the conclusion reached.[464] Finally, in *Weber*, the Court rested its very controversial conclusion upholding voluntary affirmative action on aspirational statements from ardent supporters, even where the leading ardent supporter himself—Hubert Humphrey—had elsewhere made costly signals supporting the views of the leading pivotal legislator, Senator Dirksen.

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[462] We use 1968 as the dividing line because this was the first election after the Civil Rights Act of 1964 and the Voting Rights Act of 1965, allowing the two parties and southerners to adjust to the new circumstances. For the data regarding the partisan composition of the Senate and House of Representatives, see ERIK W. AUSTIN, POLITICAL FACTS OF THE UNITED STATES SINCE 1789 tbls.1.20-.21 (1986).

[463] *See, e.g.*, KLINKNER & SMITH, *supra* note 13, at 290 (describing how "contrasts on racial issues" between political parties had a clear effect on elections).

[464] *See supra* Part III.A.2 (comparing the Court's reliance on legislative history in *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977)).

As we described more fully in Part III.B, one lesson to be learned from this survey of some key civil rights cases is that the Court struggles with the historical record because it lacks any coherent theory of legislative history. The judges are left with little else to guide them than the understandable temptation to pick out their "friends" by using legislative history selectively.

We focus attention so closely upon the use of legislative history by the Court in order to illustrate the normative objective of this Article; namely, that there is available to courts a better approach to statutory interpretation, one which ties the objective of figuring out what the legislature intended with a coherent rendering of the statute's history. Yet, even at the end of a very long Article, we leave some questions unanswered, in anticipation of future work. What is the proper role of courts in construing legislative history in which the text appears to point in a particular direction? This raises the classic puzzle of textualism versus intentionalism, a puzzle about which we have had little to say here.[465] What is the relationship among expansive or narrow judicial interpretations of statutes and legislative decision making? We have made some preliminary observations about this question in Part IV, but a more systematic consideration awaits future work. Finally, what light does a positive political theory of legislative decision making and statutory interpretation shed on our views about public policy and the role of government in the modern regulatory state? This last question is an enduring preoccupation of the growing cadre of lawyers and social scientists hard at work on the Positive Political Theory project.

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[465] For discussions of textualism versus intentionalism, see SCALIA, *supra* note 1, at 9-36; William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509 (1998); Manning, *supra* note 1, at 684-90; Lawrence M. Solan, *Learning Our Limits: The Decline of Textualism in Statutory Cases*, 1997 WISC. L. REV. 235.