The 1991 Civil Rights Act: A Constitutional, Statutory, and Philosophical Enigma

Douglas W. Kmiec
FOREWORD

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The subject of this Symposium issue—civil rights—remains a particularly timely and important one, and one that has a long history and association with the University of Notre Dame. It was from Notre Dame, after all, that Father Theodore Hesburgh both entered the governmental arena of civil rights and exited it; and, I do not think he would mind my saying, in both cases, "fired with enthusiasm." The Civil Rights Commission on which Father Hesburgh served with commitment and distinction from 1957 to 1972 was a political compromise, a delegation to committee if you will, largely to avoid an issue thought too sensitive (as embarrassingly late as 1957) to be legislatively handled. The initial work of the Commission focused on voting rights, but with Father Ted's prompting, and ultimately under his chairmanship, the Commission addressed employment, housing, education, administration of justice, and public accommodations. Father Ted describes the difficult task confronting the Civil Rights Commission of the 1950s and 1960s in his recent autobiography:

It may seem hard to believe now, but in the late fifties and early sixties, we were just as bad about public accommodations in this country as they were in South Africa. Practically everything was for whites only—drinking fountains, rest rooms, drugstores, hotels, beaches, churches, cemeteries, barber shops, lunch counters, clothing stores, and schools . . . .

Where blacks were permitted to tread, they were carefully segregated. They were allowed to travel on city buses, but had to ride in the back. They could go to the movies, but had to sit in the balcony. When federal agricultural subsidies were distributed by all-white county governments, the white farmers got all the federal aid, the black farmers got nothing . . . .

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Not surprisingly, the conditions that afflicted minority citizens were visited upon the Commission and the witnesses called to testify before it. The Commission, itself, because it had minority membership and staff, was denied accommodations in hotels and even military bases. Witnesses were harassed. At one point in 1959, the Commission was enjoined from conducting hearings by a federal judge in Louisiana. Again, Father Ted and Notre Dame facilitated the progress of Civil Rights by transporting the Commission to a Notre Dame retreat house, where the atmosphere of conviviality, indeed humanity, was so pervasive that the Commission was able to submit a virtually unanimous report to President Eisenhower.

The legacy of Notre Dame's involvement with civil rights continues today, not only with this Symposium, but also through the Center for Civil and Human Rights, which is an active archive for the papers of the Civil Rights Commission—or as Father Ted fondly calls it, "The Civil Rights Commission in Exile."

Father Hesburgh makes two observations in his autobiography that will help us focus on the 1991 Act. First, while acknowledging that all the problems of racial inequality have not been solved, Father Hesburgh submits "apartheid in the United States disappeared forever with the passage of [the Civil Rights Act] in 1964 and it will never come back." In this, he declares, and we certainly can hope that he is correct, that intentional discrimination has been disclosed in public law for what it is: fundamentally immoral. In the natural law tradition of this law school, such discrimination is a wholesale disregard of the fact that each of us, regardless of color or race, has been created in God's image. To intentionally discriminate is to deny this nature, and to act against one's own nature is a denial of reason.

Father Hesburgh's second observation is a bit more troubling. He reports that shortly before the 1970 midterm elections, the Civil Rights Commission completed its report on civil rights within the federal government. He writes:

No subjective criteria were used. All the findings were based strictly on statistics and empirical data that could be easily tabulated and verified, such as the number of blacks employed in each department or agency. The report was in no way an

2 Id. at 206.
attempt to embarrass the administration. But it did.\textsuperscript{3}

This report led some two years later to Father Hesburgh's separation from the Commission. He stands by it, and he should, if the statistics reveal actual intentional discrimination on the basis of race or the other prohibited categories under the 1964 Act. Yet if the statistics are not premised upon intentional discrimination, but are merely reflective of legitimate employment inquiries or practices, to use mere statistical imbalances as evidence of discrimination is more problematic.

And so we edge closer to the 1991 Civil Rights Act and the controversies surrounding its enactment and interpretation. To not put too fine a point on it, the nagging question that lingers behind much of the controversy surrounding the enactment under focus in this Symposium is whether the absence of preference on the basis of race can be statutorily, constitutionally, or morally characterized as discrimination.

A failure to fully explore this issue tends to produce statutory, constitutional, and philosophical muddle. First, focus on the statutory puzzle. As I have written elsewhere:

Employers [can be] alleged to discriminate when they do nothing more than reasonably require a high school diploma as a condition of employment. If more white applicants than black happen to be high school graduates in the local community, an employment discrimination lawsuit is likely. Employers can raise their particular employment goals or the purposes served by the educational qualification, but it is often unavailing. In effect, these employers are presumed to have "discriminated" if there is a statistical racial imbalance [between their workforces and the relevant labor market]. The fact that the statistical disparity could be traced to any one of thousands of factors from geography to work commuting distance to more attractive job choices competing for the same labor pool largely doesn't matter.\textsuperscript{4}

It was this concern, of course, that led President Bush to veto the forerunner of the 1991 Act. The President observed that

[p]rimarily through provisions governing cases in which employment practices are alleged to have unintentionally caused the disproportionate exclusion of members of certain groups,

\textsuperscript{3} Id. at 208.
the [1990 Act] creates powerful incentives for employers to adopt hiring and promotion quotas. These incentives are created by the bill's new and very technical rules of litigation, which will make it difficult for employers to defend legitimate employment practices. In many cases, a defense against unfounded allegations will be impossible.\(^5\)

Professor Rotunda nicely sketches the outlines of the "very technical rules of litigation," as the President called them, that resurfaced in the 1991 Act, which—somewhat mysteriously—the President signed nonetheless. Professor Rotunda rightly reflects that the convoluted nature of the 1991 Act will impose significant costs on both employers and employees.\(^6\) By this, I take it, he means mostly economic cost, but there are significant constitutional costs as well. For starters, it might be wondered how Congress could justify the Act under the Constitution, especially in light of the strong disavowal of class legislation by the text and history of the Fourteenth Amendment.\(^7\) This question becomes even more intriguing when it is coupled with the fact that the modern Supreme Court has unequivocally held that to prove a violation of constitutional equal protection, there must be evidence of discriminatory intent.\(^8\)

Technically, this constitutional quandary was one not directly posed by the text of the 1964 Civil Rights Act. The statutory language of the 1964 Act, it will be recalled, required proof of discriminatory intent. In a nutshell, the Act made it unlawful to "discriminate . . . because of race."\(^9\) Indeed, when the sponsor of Title VII was pressed to assure the Senate that the legislation would not be used to sanction racial quotas and preferences wherever a work force was statistically imbalanced, Senator Hubert Humphrey stated

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7 The Senate sponsor described the amendment as intended to "abolish all class legislation and do away with the injustice of subjecting one caste of persons to a code not applicable to another." CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (statement of Senator Howard). Similarly, Senator Wilson pointed out: "we have advocated the rights of the black man because the black man was the most oppressed; but we mean that the poorest man, be he black or white, . . . is as much entitled to the protection of the law as the richest and the proudest man in the land." Id. at 343.


that the bill "does not provide that any quota systems may be established to maintain racial balance in employment. In fact, the title ... prohibit[s] preferential treatment for any particular group, and any person, whether or not a member of any minority group." To further emphasize the point, it was explicitly provided in Title VII that nothing in the legislation should be interpreted to require preferential treatment because of race.11

Thus, when Father Hesburgh was toiling in government's civil rights garden, the focus was not impact, but intent. Neither the Constitution nor the 1964 statute said otherwise. However, in Griggs v. Duke Power Co.12 the Supreme Court sweepingly opined that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."13 Thus began a judicial odyssey of statutory disfiguration that continues to this day. Justice Scalia has characterized the process as a transformation in favor of racial bias; moving toward proportionate representation in the workplace.14 When the statutory transformation slowed in 1989, most noticeably in Wards Cove Packing Co. v. Atonio15 where the Court required job applicants to at least specifically identify the employment qualification that they thought discriminatory and to show that it served no business purpose, the 1991 Civil Rights Act resulted.

All of the papers that follow assume the 1991 Act's constitutional validity. No one can fault either law professors or practitioners for this bit of practical legal realism. But being practical, does not make the proposition true. Father Hesburgh once observed sadly that "official slavery coexisted with [Christianity] four hundred years after the death of Christ. When it reoccurred a millennium later, Christians were the best customers of the Arab traders .... Throughout the world, human dignity and human rights continued to exist in travesty rather than reality."16 The same might be said of the constitutionality of the 1991 Act—that it, too, exists in travesty, rather than reality.

The two sources of constitutional power that the Act may be claimed to be premised upon seem unavailing. First, there is

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10 110 Cong. Rec. 11,848 (1964).
13 Id. at 431.
Congress' so-called section 5 authority to enforce the guarantee of equal protection. But, as already noted, the contours of equal protection are bounded by the necessity of showing discriminatory intent for its violation. True, former Justice Brennan claimed that Congress has the power to define equal protection in the Fourteenth Amendment differently than the Court. But a majority of the Court has never formally acceded to Brennan's view because it fundamentally displaces the Court's article III role to "say what the law is." And even if Congress has wide latitude to craft its own racial preference schemes, a narrowly affirmed federal liberality that still greatly divides the Court and does not extend to the states, the scope of Congress' authority to undertake such programs in its own right is arguably inappposite to its ability to define unintentional impacts to be discriminatory practices by private parties.

The alternative source of congressional power that may be claimed to underlie the 1991 Act is the power to regulate interstate commerce. The commerce power, of course, played an instrumental role in the validity of the 1964 Civil Rights Act. But there, the assertion of authority made some sense. Congress was rightly concerned about removing impediments to the free flow of goods and persons that result from intentional racial discrimination. The Hesburgh Civil Rights Commission's difficulties in securing accommodations is illustrative. Admittedly, too, the Court's Commerce Clause cases hold that Congress may legislate against individual action under the analytically boundless "cumulative effect" principle. Yet, as broad as the commerce power is, it is hard to see how commerce is advanced by de facto racial employment quotas. In actual fact, commerce is very likely burdened, not advanced, by such social engineering. In all events, whatever the scope of the commerce power with respect to private parties, Congress should not disregard hornbook equal protection guarantees, at least with respect to public employers, and those again relate to intent, rather than impact.

For political reasons and others, these constitutional misgivings are not likely to be soon addressed in court. So disregard the constitutional muddle, if you will, and turn to the statute. For the

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most part, I will defer the exposition of these difficulties to the excellent papers that follow. But here are some highlights: Professor Rotunda reveals that the 1991 Act is a case of "planned ambiguity" and that "[t]he inherent result of [this] planned ambiguity in the Civil Rights Act is unnecessary make-work for lawyers" as well as increased and burdensome litigation for employers and employees.20

Congress left the "business necessity" defense undefined and the issue of "retroactivity" unaddressed. While Professor Rotunda highlights the positive aspects of the 1991 Act, including for example, the allowance of some declaratory relief in the context of mixed motive cases,21 he correctly bemoans Congress' deliberate failure to speak with clarity at several critical junctures. This not only increases litigation and its costs, it distorts the constitutional structure by forfeiting legislative accountability and inviting the nonmajoritarian Court to usurp the legislative function.

Professor Devins supplies some behind the scenes explanation for the political game-playing that resulted in the 1991 Act. It is not pretty. As he reports, some of the statutory ambiguity may result not only from the inevitable compromises among political adversaries, but also from President Bush's ability to be of at least two minds on the issue of racial preferences: denouncing them as part of the 1990 Act, praising them in relation to the separate subject of race-based college scholarships, and then, of course, seemingly pretending that the tendency toward preference had somehow been extricated from the 1991 Act.22 In the end, Devins concludes: Bush's "last minute compromise seemed a complete capitulation because his anti-quota rhetoric was obviously self-contradictory and self-serving. On too many occasions the President had made the politically expedient choice, making it difficult to view his 1991 Act compromise as something other than a political sell out."23

In his submission, Attorney Glen Nager suggests that the Act actually "begs the question of affirmative action in employment."24 In point of fact, Nager finds that the Act creates new

20 Rotunda, supra note 6, at 927.
21 Id. at 947.
23 Id. at 999.
weapons for the opponents of racial preference as well as incentives for employers to institute and expand such efforts. With respect to the former, the Act precludes "race-norming" or the adjustment of performance test scores on the basis of race.\(^\text{25}\) In addition, Nager speculates that section 107 of the 1991 Act, which makes reliance upon race, sex, or other prohibited categories to be unlawful even in a mixed motive case,\(^\text{26}\) may shift the burden of proving the legality of a racial or gender preference plan to the employer, the proponent of the plan. Nager also posits that by expanding the scope of the race-based prohibition in section 1981 to include the entire employment relationship, not just the making or enforcement of a contract,\(^\text{27}\) challenges to racial quotas and set asides may now be possible under this statute.

On the other side of the ledger is the powerful incentive for racial preferences driven by the codification of disparate impact theory already discussed. Increased compensatory and punitive damage awards and the availability of jury trials seemingly can pull in both directions favoring or disfavoring preferences depending upon the plaintiff. Nager admits, however, that this is more likely to spur racial or gender preference by employers in order to eliminate the most likely plaintiffs. In the end, Nager concludes that the Act's schizophrenic approach to discriminatory preferences may be explained, but of course not justified, by an overly narrow definition of "affirmative action:" formal quotas are forbidden, but not the logical, quota-producing consequences of the disparate impact theory.

The next two papers address the implications of the 1991 Act for sex discrimination. Insofar as one of the political explanations for the "push me/pull you" character of the Act supplied by Devins was the timing of the Anita Hill allegations in the Clarence Thomas confirmation hearings; these investigations are of considerable interest and importance. Marian Haney brings a litigator's perspective to the existing theories underlying sexual harassment claims—both quid pro quo and hostile environment. Haney sees the Act as engendering increased litigation because the new provisions for monetary compensation for harassment are not dependent upon actual lost income.\(^\text{28}\) This, too, will complicate or frus-

\(^{25}\) Id. at 1073.

\(^{26}\) Id. at 1073-74.


\(^{28}\) Marian C. Haney, *Litigation of a Sexual Harassment Case After the Civil Rights Act of*
trate good faith settlement attempts. In addition, one of the consequences of allowing for emotional distress recoveries is to put the plaintiff's mental state in issue. Indeed, Haney observes that "the court, upon a showing of good cause, may order the plaintiff to submit to a physical examination by a physician or a mental examination by a psychologist or physician." It will be remembered, that a good number of the changes in the political landscape during the last national election were said to be inspired by Senator Specter's aggressive questioning of Anita Hill on such personal subjects. Ironically, the incentives of the Act may be to have this ordeal replicated across the country.

Professor Jules Gerard approaches the sexual harassment issue from the vantage point of a First Amendment scholar. Given the Supreme Court's recent invalidation of certain criminal punishment of hate speech as an impermissible content restriction, Gerard inquires whether the federal law prohibiting gender discrimination, and specifically the EEOC guidelines defining sexual harassment, impermissibly violates the guarantee of free speech. In a wide-ranging exploration of First Amendment doctrine, Gerard sees at least overbreadth and content discrimination flaws in the EEOC's approach.

Having laid the groundwork of the 1991 Act, the Symposium next turns directly to matters of statutory interpretation. In an article that is certain to have lasting significance well beyond the Civil Rights context, Eric Schnapper of the NAACP Legal Defense Fund, and a strong proponent of the 1991 Act, undertakes a "legal autopsy" of what he terms judicial misinterpretation in sixteen Supreme Court decisions, eight of which were overturned by the 1991 Act. Schnapper traces the fatal flaws in these opinions to four principal causes: the pretense of relying upon plain meaning when none exists; a reliance upon judicially-created presumptions in the face of ambiguity that contradict the underlying purpose of Congress; looking for the purpose of a statute in the arguments of its opponents; and interpretations that are more extrapolations of previous judicial opinions or a principle unrelated to the statute, than the statute itself. As the above discussion suggests, Schnapper

29 Id. at 1051.
is unlikely to get much disagreement on the absence of a plain meaning in much of the 1991 Act. Unlike Rotunda, however, he is less bothered by this. Schnapper prescribes that the Court confine itself to interpretation that is based on legislative history (something which Justice Scalia has expressly disavowed because of its often manufactured nature), the purpose of the law, and some consideration of the unfairness or irrationality of the result.\textsuperscript{32} Somewhat confusingly, however, Schnapper then disowns both text and legislative history. Thus, with respect to the legislative history of the 1964 Act and its statutory text that ostensibly disclaims quotas, Schnapper opines that both should be judicially disregarded because the quota objection was "a political ruse" hiding "blatant, malicious bigotry," and thus, the response assuring against quotas was nothing more than "an equally political bit of posturing."\textsuperscript{33} But if neither text nor legislative history governs statutory interpretation, the law becomes little more than what we say it is, and then only because we say it.

Michael Carvin, formerly with the Civil Rights Division of the Justice Department, opposed the 1991 Act in part because, in his view, a disparate impact requirement is a straightforward "government mandate for proportional quotas."\textsuperscript{34} Reading his paper, one speculates that Carvin is likely to be cast by Eric Schnapper as a clever misinterpreter of the statute.\textsuperscript{35} In his defense, Carvin might plead that you cannot misinterpret that which is obtuse or undefined. In this regard, Carvin interprets the 1991 Act as reversing \textit{Wards Cove} with respect to the burden of proof (both production and persuasion)—shifting it from plaintiff employee to defendant employer—but, by virtue of Congress' non-definition of the "business necessity" defense, leaving \textit{Wards Cove} in place as to the substance of that defense. While the statute provides that an employer must demonstrate that the challenged practice is "job related for the position in question and consistent with business necessity," Carvin argues that the governing concept is job relatedness since "[i]f a practice is job related, it is, by definition, \textit{consistent with} business necessity."\textsuperscript{36} While leaving this terminology unde-

\textsuperscript{33} \textit{Id.} at 1134-35.
\textsuperscript{35} Schnapper, \textit{supra} note 32, at 1113.
\textsuperscript{36} Carvin, \textit{supra} note 34, at 1158.
fined, the 1991 Act does specify, as Carvin observes, that the language is to be understood in relation to Supreme Court opinions prior to *Wards Cove*.\(^{37}\) Carvin responds, however, that "[t]here is no hint in the [Wards Cove] opinion that [the Court's] understanding of this concept marked a departure from prior case law or that *Wards Cove* otherwise overruled previous decisions."\(^{38}\) Were Carvin's interpretation to be accepted, the quota-impelling impact of the codification of the disparate impact theory in the 1991 Act would be less fearsome. Obviously, however, much remains to be seen in the years of invited litigation that lie ahead.

The Symposium offered here is rich in analysis and, like the statute under examination, hardly free of controversy or contradiction. But before concluding this brief introductory essay, there is one last important puzzle to briefly touch upon—the philosophical one. This has already been implied by the suggested moral difficulty in treating the absence of racial, gender, or other preference as discrimination. It is not hard to understand why this is troubling—the introduction of preference, after all, does not exclude race or gender as irrelevant; it makes race or gender the determining factor. In this, it seems to be a wholesale rejection of the "colorblind" society Justice Harlan long ago in his dissent in *Plessy v. Ferguson*\(^{39}\) opined that we were meant to be.\(^{40}\) The late Thurgood Marshall, however, reminded us that Harlan's view was that of a lone dissenter.\(^{41}\) For all too long, "separate but equal," or worse, was the order of the day. And, here, of course, is the nub of the philosophical dilemma because while natural law enjoins us to disregard race, it also directs that we rectify harm.

Surely, the proponents of the 1991 Act conceived of the Act as this rectification. What is less well understood is that opponents of the Act may well have viewed their opposition in this light as well. Avoiding a disparate impact theory that perpetuates invidious classification can, in itself, be said to be salutary. But more, the opposition to the Act may also be put more broadly: that the rectification of past societal harms by those who are not the direct discriminating parties must rely not on government specification

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37 *Id.* at 1160.
38 *Id.* at 1162.
39 163 U.S. 537 (1896).
40 Justice Harlan wrote: "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Id.* at 559 (Harlan, J., dissenting).
or compulsion, but the practical reasoning and discovery of each person's individual human nature within the context of family, school, work, and church. More than anything else, the 1991 Act symbolizes an unwillingness to rely upon these critical elements of the natural law community to seek the good, including the inclusion of those who not only merit position but also suffer the ill-effects of past discrimination. As it is, the 1991 Act not only imposes great uncertainty and costs upon these nongovernmental communities vital to our well-being, but it also displaces them. Eric Schnapper noted in his paper that "Title VII applies to over 100 million employees working for several million employers," and further that much of what was left undefined in the Act is traceable to the fact that "Congress abandoned the task as impossible, in part because one side or another was always able to imagine yet another possible application." Maybe, just maybe, Congress should have abandoned, nay trusted, the task altogether to the reasoned judgment of each time and place and person in community.

42 Schnapper, supra note 32, at 1106.