

*Forthcoming in Shapiro, B (Ed.) Controversies
in Civil Rights, Charlottesville: Univ of Virginia
Press, 1999. B??*

Introduction

The issue of race has been a bone in the throat of our country for centuries. In the 1960s, national leaders of both major political parties sought to come to grips with this issue once and for all through the enactment of major civil rights legislation. In conjunction with the Voting Rights Act of 1965, the Civil Rights Act of 1964 totally transformed the shape of American race relations.¹ Supporters of the Civil Rights Act of 1964 sought, at minimum, the elimination of segregation of the races in publicly supported schools, hospitals, public transport and other public spaces, and the end to open and blatant racial discrimination in employment practices.² Judged in those terms, the Act is a remarkable success story.³ If ever any piece of legislation showed the power of the central government to change deeply entrenched patterns of behavior it is the Civil Rights Act of 1964. Together, the Civil Rights Act of 1964 and the Voting Rights Act of 1965 broke once and for all the Jim Crow legacy of the post-Reconstruction South and largely ended the overt and legally sanctioned forms of discrimination against blacks that had been found throughout the nation.⁴ In terms of the law, blacks were no longer second class citizens.⁵

After the passage of the major civil rights legislation of the 1960s, race was largely off the national policy agenda. Civil rights policies in subsequent decades continued to be shaped by the earlier legislation, but with subtle changes in policy induced by judicial interpretation and modes of bureaucratic implementation taking place largely out of public purview and with little or no public debate. Now, as a result of a variety of factors, from concern over the soaring violent crime rates among black teenagers and the seeming ineradicability of black poverty, to the racial fissures revealed by opinion about the O.J. Simpson verdict and the protests of whites and others against practices of "race-norming" and racially targeted hiring, civil rights issues are once again a matter of major public debate. But the focus of that debate is now mostly about

the negative side-effects of affirmative action rather than about the need for positive measures to end discrimination.

Bookshelves are now laden with books about affirmative action and civil rights. Why another one? We believe this book is different in three ways. First, the volume includes representatives of a diverse set of views from a set of writers who generally reflect non-dogmatic perspectives on civil rights -- and the essays in it are not polemic in tone. Second, the essays are not confined either to purely normative or to purely legal debates about civil rights policies, although each of these topics is covered. Third, the volume is intended to be primarily retrospective and stock-taking, with a number of the essays being heavily fact-oriented. The central aim of this volume is to provide a reference work on the Civil Rights Act of 1964 and its evolution over the past several decades.⁶ Its contributors are a distinguished set of political scientists, historians, lawyers, statisticians and sociologists-- all of whom have written previously on civil rights issues. They have been asked to stand back from today's headlines and the immediate controversies about civil rights they reflect, to provide historical and comparative perspective. We believe this book makes an important contribution to the national dialogue about race that President Clinton has called for. Moreover, it is intended to make a contribution to scholarship that will not soon go out of date.

The book is organized into five sections. The first two sections cover the origins of the Act and its historical evolution; the third section looks at the Act's consequences in several different policy domains, the fourth focuses on legal standards for statutory violations, and the fifth section looks ahead to the future of civil rights in the U.S. Contributions in each section are divided into two categories: lengthy review essays and shorter notes and comments. There is also a brief postscript by long time observer of U.S. race relations and a specialist on comparative ethnic politics around the world, Robin Williams. Williams, who co-edited with Gerald Jaynes, the 1989 report of the National

Academy of Sciences, A Common Destiny: Blacks and American Society, views civil rights policies in the U.S. in a comparative global perspective.

Paula McLain's forward to this volume shows how the resistance to Jim Crow of the civil rights movement of the 1950s and 1960s forced civil rights legislation onto the national agenda. The central essay in Section one of the volume, by David Filvaroff and Raymond Wolfinger, each of whom was "present at the creation," deals with the legislative history of the Civil Rights Act of 1964. They review the web of political forces and personal motives that led to the passage of the Act. They observe that the Act had bipartisan (albeit primarily Republican) support in Congress under the aegis of Lyndon Johnson, the first president from the South elected during this century. Morgan Kousser's note in this section puts the Civil Rights Act of 1964 in historical perspective by comparing its features with the text of the key civil rights bills that were passed after the Civil War. Kousser argues that the success of the Civil Rights Act of 1964, as compared to the post-Reconstruction repudiation of its predecessors, was made possible by the heavily bipartisan consensus described by Filvaroff and Wolfinger. He suggests that the recent breakdown of that consensus bodes ill for future civil rights enforcement.

The lead essay in the section two, by Hugh Graham, deals with the evolving history of U.S. civil rights policy in the thirty years since the Act's passage in the context of the changing role of the federal government in regulating economic and political life. Graham elaborates the ways in which a civil rights model first applied to blacks becomes extended to other groups. He also examines the ways in which civil rights policies changed from an early focus on eliminating direct forms of discrimination to a later concern for remedying the effects of past discrimination. His chapter is followed by a short essay by Stephen Wasby that looks at litigation and lobbying as complementary strategies for civil rights, and by some reflections by a leading civil rights attorney, Jack Greenberg, on the litigation strategies of the civil rights movement.

The third section deals with the three most important provisions of the Act, Titles II, VI and VII. The essays in it describe what we know about the consequences of the Act for public accommodations, education, and employment. These essays remind us that, however bitter the current controversies, the United States is a very much different (and far better society) because of the passage of the Civil Rights Act of 1964. Even for someone who was already an adult when the Act was passed, it is hard to believe that only a scant thirty years ago visible stigmata of discrimination such as segregated water fountains and back of the bus seating could ever have been permitted, much less legally enforced.

Gary Orfield's essay argues that, without the Civil Rights Act of 1964, the battle for ending de jure school desegregation would probably have been lost, and traces the time path of desegregation and resegregation in both the North and the South. Paul Burstein shows what happens to black employment after the passage of the Act, and helps elucidate the almost impossible task of attributing causation to changes in black employment in succeeding decades. Randall Kennedy's essay helps us explain why, what at the time seemed the most controversial of the Act's provisions, that requiring the desegregation of public accommodations such as hospitals, was implemented so immediately and with so little resistance.

The fourth section considers the role of social science and statistical analysis in the Act's interpretation by the courts, with a focus on statistical issues in measuring employment discrimination. The lead essay, by Joseph Kadane and Caroline Mitchell (statistician and trial attorney, respectively) reviews many of the major cases interpreting Title VII of the Act and offers a detailed analysis of the nature of the conflicts between expert witnesses in these cases. The essay by Richard Lempert extensively critiques the way in which courts have used statistics, and offers some suggestions for how the use of statistics by courts might be improved.

The final section deals with changing views of civil rights. Katherine Tate's opening essay examines changing white attitudes about race since the passage of the Civil Rights Act of 1964. The next essay, by Luis Fraga and Jorge Ruiz-de-Velasco, emphasizes the relevance of the changing racial and ethnic composition of the U.S. They suggest that the nature of discrimination against Hispanics may be distinct from the type of discrimination historically facing African Americans and may call for a different type of remedial approach. Barbara Phillips Sullivan's brief note considers (and rejects) recent arguments for segregated facilities that have been based on notions of cultural autonomy.

The last essay, in this section, perhaps the most explicitly normative chapter in the volume, inventories the key arguments made against current civil rights policies. I argue that most elements of that attack are either mistaken, overstated or wrongly lump together as targets those practices used as needed remedies for demonstrated discrimination and those whose principal justification is a claimed need for diversity. I argue for a civil rights policy based on common decency and common sense, which recognizes that continued discrimination still exists and must be combated, but which also recognizes that most observed inequalities between white and black America are due to causes that a constitutional jurisprudence of civil rights is simply impotent to address.

¹The central aim of most supporters of the Voting Rights Act of 1965 was the elimination of formal barriers to full black suffrage. That aim was largely achieved by the early 1970s. A third major piece of legislation passed under Lyndon Johnson's presidency, the Immigration Reform Act of 1965, also had transformative consequences for race relations in the U.S., but these were largely inadvertent. The Act eroded the strong advantages European immigrants had as compared to those from other continents and made family reunification easier. However, the vast increase in the number of immigrants and the shift in the racial and ethnic composition of the U.S.

caused by an inflow of immigrants from Mexico and Central America and a lesser but still major flow from Asia was in no way foreseen by the sponsors of that bill.

²Without denigrating the importance of the Civil Rights Act of 1964 for women Hispanics, or other groups, the moral urgency of the Act was triggered by revulsion against the American version of apartheid, and it is on the life chances of African-Americans that the Act has had its most striking impact. Most of the essays in this volume focus on the the Act's implications for black Americans.

³Of course, judged in broader terms, vis a vis its impact on the overall equality between whites and blacks in America, the Act has been deemed by many a great disappointment (see e.g., various essays in Lawrence and Matsuda, 1997).

⁴Although the civil rights and voting rights bills of the 1960s were once seen as applying largely or exclusively to the South; not long after passage applications of each "moved North."

⁵There are at least two other important legacies of the civil rights era in addition to the elimination of the most overt forms of racial discrimination: (1) the finishing blow to the Civil War political realignment, i.e., that in which Southern whites were loyalist Democrats and blacks were loyalist Republicans (Huckfeldt and Kohfeld, 1990; Carmines and Stimson, 1989; Grofman and Handley, 1997); and (2) the effective end of the states' rights doctrine as a significant force in either American political theory or American political life.

⁶This volume parallels in structure and format my earlier co-edited book on the Voting Rights Act of 1965 and current controversies in voting rights (Grofman and Davidson, 1992). The two volumes are complementary.