

THE CIVIL RIGHTS ACT OF 1964

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INTRODUCTION

In early 1963, Dr. Martin Luther King, Jr. led what would become known as the “Birmingham Campaign” with the Southern Leadership Conference in which confrontations between protestors and police were widely publicized.¹ Protesters included elementary school students who would be seen worldwide on television being hosed with high-pressure water hoses and attacked by police dogs.² 1963 and 1964 saw sit-ins at lunch counters such as the Woolworth’s and wade-ins at pools in places like St Augustine, Florida. These confrontations were televised and brought the Civil Rights movement into the American home.

In June 1963, Medgar Evers, the civil rights leader, was shot in the back while entering his home. In September 1963, four little girls died in the bombing of the 16th Street Baptist Church in Birmingham, Alabama. President John F. Kennedy, who had long struggled with the moral issue of civil rights, addressed the nation about the topic of civil rights on June 11, 1963, declaring that “[t]hose who do nothing are inviting shame as well as violence [and t]hose who act boldly are recognizing right as well as reality.”³ From this era of protest and violence was born the Civil Rights Act of 1964 (the “Act”).⁴ Now fifty years later we reflect on the Act’s promise, whether the promise of the Act has been fulfilled and for whom, and consider the future of the Civil Rights Act of 1964.

On June 19, 1963, President Kennedy sent a Civil Rights Act to Congress.⁵ The bill sent by President Kennedy sought to address discrimination in public places but refrained from addressing discrimination in employment.⁶ Also, President Kennedy’s bill did not

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1. Gerald N. Rosenberg, *The 1964 Civil Rights Act: The Crucial Role of Social Movements in the Enactment and Implementation of Anti-Discrimination Law*, 49 ST. LOUIS U. L.J 1147, 1150 (2004).

2. *Id.*

3. President John F. Kennedy, Report to the American People on Civil Rights (June 11, 1964) (transcript available at http://www.jfklibrary.org/Asset-Viewer/LH8F_0Mzv0e6Ro1yEm74Ng.aspx).

4. Pub. L. No. 88-352, 78 Stat. 241(1964).

5. H.R. Res. 7152, 88th Cong. (1963).

6. Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 434 (1966).

contemplate gender equality. Title VII as originally introduced in the House of Representatives merely authorized a Commission on Equal Employment Opportunity, which would have the powers “to prevent discrimination on the ground of race, color, religion or national origin in Government employment.”⁷

Title VII of the equal employment provision of the Civil Rights Act of 1964 took shape over a long amendment and debate process. Gender equality was added only two hours before a vote on the Act, and was only included as means of derailing it.⁸ This last minute addition has significantly shaped the application of the Act over the course of the past 50 years.

Fifty years after the enactment of the Civil Rights Act of 1964, some parallels can be drawn between the debates and amendments that shaped the Act and the controversy surrounding the Supreme Court’s decision in 2013, in which it significantly reshaped provisions for voting equality hard fought for in the debates of 1964 and 1965 and the Voting Rights Act of 1965—the progeny to the Civil Rights Act of 1964.

Periodically, we pause to reflect on great moments in history such as the enactment of the Civil Rights Act of 1964. In 2014, fifty years after the enactment of the Act, which sought to end segregation in public places and ban employment discrimination on the basis of race, color, religion, sex and national origin, we must reflect and ask—has the Civil Rights Act of 1964 lived up to its promise?

In many ways the promise of the Act has been realized in areas likely not visualized by its framers. For example, it has provided the legal basis for advancement with respect to sexual orientation discrimination and disability discrimination. The Equal Employment Opportunity Commission (“EEOC”) established by the Civil Rights Act of 1964 has received and investigated nearly a million charges of employment discrimination in the last decade.⁹ At the same time, efforts to bring about racial equality through such means as affirmative action have been curtailed, and in many ways the reach of the Civil Rights Act of 1964 has been slow with respect to its original promise of racial equality. We need not go further than our own profession of law, which has experienced painfully slow and at times nonexistent increases in diversity and inclusion. The American Lawyer has discussed the “Diversity Crisis” in

7. *Id.* (internal quotation marks omitted).

8. *Id.* at 441–42.

9. *Charge Statistics FY 1997 Through FY 2013*, EEOC, <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Dec. 6, 2014).

big law firms across the nation.¹⁰ “More than a quarter century after the first national efforts to boost the presence of black lawyers at large firms, African-American partners” remain rare at most firms, notwithstanding the fact that large firms have “more than doubled in size in the past two decades.”¹¹

It is in this light that this Article examines the path that led to the Civil Rights Act of 1964, particularly legislation on civil rights and the inclusion of antidiscrimination in employment provisions; looks to the promise of the Act and its expansion; and finally asks whether the promise of the Civil Rights Act of 1964 has been realized in the area it most clearly targeted—racial discrimination. Part I of this Article discusses federal legislation on civil rights leading up to the Civil Rights Act of 1964, specifically, the Civil Rights Acts of 1866 and 1957. Part II focuses on the Act, discussing the atmosphere in which the Act was proposed by President Kennedy and ushered through Congress by President Lyndon Johnson. Part II also includes a synopsis legislative history of Title VII focusing on the unintended manner in which “sex” was added to the Act. Part III discusses the expansion of the Civil Rights Act of 1964 into areas not forecasted in President Kennedy’s vision, and how these populations have benefitted from the Act. Part III also looks at the Act’s effect on racial discrimination through the lens of diversity and inclusion in the legal profession and discusses ways in which the promise of the Civil Rights Act of 1964 has not been realized with respect to racial equality in employment. Part IV concludes by looking prospectively to the next fifty years and proposing steps that can be taken to better fulfill the promise of the Civil Rights Act of 1964.

I. FEDERAL LEGISLATION ON CIVIL RIGHTS LEADING TO THE CIVIL RIGHTS ACT OF 1964

A. *Civil Rights Act of 1866*

The Civil Rights Act of 1866, “An Act to protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication,” marked the first time Congress legislated on the issue of

10. Juliet Triedman, *The Diversity Crisis: Big Firms’ Continuing Failure*, THE AMERICAN LAWYER (May 29, 2014), <http://www.americanlawyer.com/id=1202656372552/The-Diversity-Crisis%3A-Big-Firms’-Continuing-Failure>.

11. *Id.*

civil rights.¹² It was enacted on the heels of the Thirteenth Amendment, which abolished slavery, and in response to the “Black Codes”—state legislation, which placed restrictions on the activities and movement of freed slaves. “Black Codes” essentially circumvented the Thirteenth Amendment¹³ to the extent that the “freedom” granted to slaves under the amendment was meaningless. It is in this light that the Civil Rights Act of 1866 was enacted. The debate in the Senate and House centered on the statute’s broad language. Interestingly, this emphasis on broad language and application was also prominent in the congressional debate preceding the Civil Rights Act of 1964.

The Civil Rights Act of 1866 did several important things which were impactful to the Civil Rights Act of 1964. The Civil Rights Act of 1866 overturned the Supreme Court’s 1857 decision in *Dred Scott v. Sandford*,¹⁴ by declaring that all persons born in the United States, with the exception of non-tax paying Native Americans, were citizens of the United States. The *Dred Scott* Court had held that only Congress could confer citizenship and that Article II of the Constitution did not confer such citizenship to slaves.¹⁵ Through the Civil Rights Act of 1866, Congress finally conferred the citizenship the *Dred Scott* Court had discussed.

Civil rights cases under the Civil Rights Act of 1866 have been prosecuted well past the enactment of the Civil Rights Act of 1964 in areas such as housing discrimination,¹⁶ racially discriminatory policies in schools¹⁷ and employment, specifically, with respect to racial harassment.¹⁸

Section 1981 of the Civil Rights Act of 1866 provides in relevant part that:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal

12. 14 Stat. 27-30 (1866).

13. The Thirteenth Amendment states:

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

U.S. Const. amend. XIII.

14. 60 U.S. 393 (1857).

15. *Id.* at 405.

16. *See, e.g.*, *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

17. *See, e.g.*, *Runyon v. McCrary*, 427 U.S. 160 (1976).

18. *See, e.g.*, *Patterson v. McLean Credit Union*, 491 U.S. 164 (1988).

benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Runyon v. McCrary held that the prohibition on racial discrimination extended to private schools, noting that it has been long held that the Civil Rights Act of 1866 “prohibits racial discrimination in the making and enforcement of private contracts.”¹⁹ The Supreme Court in *Patterson v. McLean Credit Union* held “that racial harassment relating to the conditions of employment is not actionable under § 1981 because that provision does not apply to conduct which occurs after the formation of a contract and which does not interfere with the right to enforce established contract obligations.”²⁰ As such, the Civil Rights Act of 1866 has been interpreted to apply only in the formation of a contract and not prevent discrimination after such formation.

B. Civil Rights Act of 1957

Proposed in 1957 by President Eisenhower, the Civil Rights Act of 1957 was the first civil rights legislation since Reconstruction and came on the heels of the Supreme Court’s decision in *Brown v. Board of Education*.²¹ *Brown* declared “separate but equal” institutions unconstitutional.²² After the Supreme Court’s decision in *Brown*, the Justice Department began work on drafting civil rights legislation and establishing strategies to overcome the anticipated filibuster in Congress.²³ Although the final Act after amendment was a shell of what it was at its inception, the Civil Rights Act of 1957 accomplished two vitally important missions. First, it established the Civil Rights Section of the Justice Department. Second, it established the Civil Rights Commission.²⁴ “Both of these agencies have been powerful forces in promoting civil rights over the years.”²⁵

Interestingly, Lyndon B. Johnson, who would later push to get the Civil Rights Act of 1964 passed, similarly pushed through the Civil Rights Act

19. *Id.* at 168 (citing *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459–60 (1975); *Tillman v. Wheaton-Haven Recreation Assn., Inc.*, 410 U.S. 431, 439–40 (1973)).

20. *Patterson*, 491 U.S. at 171.

21. 347 U.S. 483 (1954).

22. *Id.* at 493.

23. Herbert Brownell, Essay, *Civil Rights in the 1950s*, 69 TUL. L. REV. 781, 791 (1995).

24. *Id.*

25. *Id.*

of 1957. However, it was the compromises that Lyndon Johnson had to make to get this Act passed that eviscerated much of the power from the bill as originally proposed.

II. CIVIL RIGHTS ACT OF 1964

A. *The Promise of the Civil Rights Act of 1964*

In President Kennedy's televised national address on civil rights and race relations, on June 11, 1963, he promised to enforce the civil rights of every American.²⁶ Sometimes referred to as the moment that defined President Kennedy's legacy,²⁷ this address was intended to confront the crisis at the University of Alabama, where the Alabama National Guard confronted Alabama Governor George Wallace and desegregated the University of Alabama on orders from the President.

In his inaugural speech, Governor Wallace had proclaimed "Segregation now! Segregation tomorrow! Segregation forever!" and on June 11, 1963, surrounded by state troopers, Governor Wallace blocked the entrance to registration at the University of two Black students, Vivian Malone Jones and James Hood.²⁸ President Kennedy issued Proclamation 3542, "Unlawful Obstructions of Justice and Combinations in the State of Alabama."²⁹ Governor Wallace stepped aside only after the Deputy Attorney General of the State of Alabama returned with Proclamation 3542 and the federally deputized Alabama National Guard. It was the intent of President Kennedy to address the nation if the crisis continued so it was assumed that the President would no longer address the Nation when Governor Wallace stepped aside. However, President Kennedy asked that a speech be drafted and continued with his plan for a televised national address.

26. Kennedy, *supra* note 3.

27. Peniel E. Joseph, *Kennedy's Finest Moment* N.Y. TIMES, June 10, 2013, <http://www.nytimes.com/2013/06/11/opinion/kennedys-civil-rights-triumph.html>.

28. See *Civil Rights Movement*, JOHN F. KENNEDY PRESIDENTIAL LIBRARY AND MUSEUM, <http://www.jfklibrary.org/JFK/JFK-in-History/Civil-Rights-Movement.aspx?p=2> (last visited Dec. 6, 2014).

29. Proclamation No. 3542, 3 C.F.R. 292 (1959–63). Proclamation 3542 concluded:

Now, Therefore, I, John F. Kennedy, President of the United States of America, under and by virtue of the authority vested in me by the Constitution and statutes of the United States, including Chapter 15 of Title 10 of the United States Code, particularly sections 332, 333 and 334 thereof, do command the Governor of the State of Alabama and all other persons engaged or who may engage in unlawful obstructions of justice, assemblies, combinations, conspiracies or domestic violence in that State to cease and desist therefrom.

Id.

President Kennedy began his address by giving an account of what had occurred at the University of Alabama.³⁰ The President then reminded the nation that when it had called on individuals to go to war in Germany and Vietnam that the nation had not only asked whites to go to war, but had been indiscriminate in its recruitment and drafting of all Americans.³¹ Therefore, the President stated that as Blacks had been asked to go to war, “[i]t ought to be possible . . . for American students of any color to attend any public institution they select without having to be backed up by troops.”³² President Kennedy then laid out the promise of the Civil Rights Act of 1964, in what he referred to as the promise of America as a Nation—that all “American consumers of any color [would] receive equal service in places of public accommodation, such as hotels and restaurants and theaters and retail stores, without being forced to resort to demonstrations in the street”; that all “American citizens of any color [be allowed] to register and to vote in a free election, without interference or fear of reprisal”; that “every American . . . enjoy the privileges of being American, without regard to his race or his color”; and that “[i]n short, every American . . . have the right to be treated as he would wish to be treated.”³³

Importantly, President Kennedy confronted the issue of civil rights as a “moral issue” and a “moral crisis” not regional or unique to any particular part of the country and not merely a political issue. He stated that legislation “cannot solve this problem alone. It must be solved in the homes of every American in every community across our country.”³⁴

On November 22, 1963, about five months after President Kennedy set forth the promise of the Civil Rights Act of 1964, he was assassinated in Dallas, Texas. Much has been written about President Lyndon B. Johnson with respect to his personal beliefs and support of civil rights; however, irrespective of motivation or personal feelings on the issue of race equality, it is not disputed that Lyndon B. Johnson used his reputed influence in the Congress to push through the Civil Rights Act of 1964.³⁵ Lyndon B. Johnson’s push of the Civil Rights Act of 1964 began with his address to a joint session of the Congress on November 27, 1963. President Johnson proclaimed that “no memorial oration or eulogy could

30. Kennedy, *supra* note 3

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. See Brownell, *supra* note 23, at 791.

more eloquently honor President Kennedy's memory than the earliest possible passage of the civil rights bill for which he fought so long."³⁶ In addressing the long history of civil rights, President Johnson stated that the nation had "talked for one hundred years or more" about equal rights and that it was time "to write the next chapter, and to write it in the books of law."³⁷ In his address, President Johnson reiterated the promise of the Civil Rights Act of 1964—"a civil rights law" that would "eliminate from this Nation every trace of discrimination and oppression that is based upon race or color."³⁸

B. Overview of the Civil Rights Act of 1964

The Civil Rights Act of 1964 was enacted

[t]o enforce the constitutional right to vote, to confer jurisdiction upon the district courts of the United States to provide injunctive relief against discrimination in public accommodations, to authorize the Attorney General to institute suits to protect constitutional rights in public facilities and public education, to extend the Commission on Civil Rights, to prevent discrimination in federally assisted programs, to establish a Commission on Equal Employment Opportunity, and for other purposes.³⁹

This part of the Article explores the various ways in which the Act attempted to fulfill this purpose.

1. Voting Rights

Title I of the Civil Rights Act of 1964 barred unequal application of voter registration requirements. However, the Civil Rights Act of 1964 allowed for the use of literacy tests as a qualification, so long as the test was administered to every individual and conducted in writing, although a rebuttable presumption was written in the Civil Rights Act of 1964 that if the person had not been adjudged incompetent and had at least a sixth grade level education, they could vote.⁴⁰

36. President Lyndon B. Johnson, Speech Before a Joint Session of Congress (Nov. 27, 1963) (transcript available at <http://www.lib.utexas.edu/johnson/kennedy/Joint%20Congress%20Speech/speech.htm>).

37. *Id.*

38. *Id.*

39. Civil Rights Act of 1964, Pub. L. No. 88-352.

40. *Id.* § 101.

2. *Injunctive Relief Against Discrimination in Places of Public Accommodation*

Title II barred discrimination in lodging establishments, including hotels and motels; eating establishments, like restaurants and lunch counters where sit-ins had occurred; places of entertainment, such as theaters, retail establishments; and all other public accommodations where “operations of the establishment affect commerce,” as defined in the statute. However, private clubs, though not defined, were exempted from Title II. Under Title II, the Attorney General was authorized to bring action against any person or group of persons engaging in discrimination barred under this title.⁴¹

3. *Desegregation of Public Facilities*

Title III authorized the Attorney General, upon receiving a written complaint of discrimination with respect to a public facility, to bring an action, as long as the Attorney General believed the complaint to be meritorious, and the person submitting the complaint did not have the ability to initiate and maintain legal proceedings independently.⁴²

4. *Desegregation of Public Education*

Title IV encouraged the desegregation of public schools by commissioning surveys and reports discussing the lack of equal educational opportunities; rendering technical assistance to school districts; providing training institutes to school teachers and personnel to deal with problems resulting from desegregation; providing grants to school boards; and finally, authorizing the Attorney General to bring suit on receipt of a complaint and determination that the individual or individuals subject to violations of Title IV were unable to bring and maintain a legal proceeding. It also allowed the Attorney General to bring suit to force desegregation.⁴³

41. *Id.* §§ 201–207.

42. *Id.* §§ 301–304.

43. *Id.* §§ 401–410.

5. *Commission on Civil Rights*

As discussed herein, the Civil Rights Act of 1957 authorized the establishment of a Commission on Civil Rights; however, under the Title V of the Civil Rights Act of 1964, procedures of the Commission were more clearly laid out or established and the duties of the Commission were expanded. The Act authorized the Commission through January 1968.⁴⁴ The Commission has been consistently reauthorized since, most recently with the Civil Rights Commission Amendments Act of 1994.⁴⁵

6. *Nondiscrimination in Federally Assisted Programs*

Title VI authorized the withdrawal of federal funds from programs which practiced discrimination. All such withdrawals of federal funds under Title VI would be subject to judicial review.⁴⁶

7. *Equal Employment Opportunity*

As further detailed below, Title VII barred discrimination in employment in any business employing more than twenty-five people. Further, Title VII created the Equal Employment Opportunity Commission to review and investigate complaints.⁴⁷

8. *Registration and Voting Statistics*

Title VIII directed the Secretary of Commerce to conduct a survey to collect registration and voting statistics based on race, color, and national origin, but provided that individuals could not be compelled to disclose such information.⁴⁸

9. *Intervention and Procedure After Removal in Civil Rights Cases*

Though an order to remand a case to the state court from which it was removed is not typically reviewable by a federal appellate court, Title IX provided that civil rights cases remanded to state court could be subject to review by a federal appeals court. In addition, Title IX allowed the

44. *Id.* §§ 501–507.

45. Pub. L. No. 103–419.

46. Civil Rights Act of 1964 §§ 601–605.

47. *Id.* §§ 701–716.

48. *Id.* § 801.

Attorney General to intervene on behalf of the United States where the case was deemed to be of “general public importance.”⁴⁹

10. Establishment of Community Relations Service

Title X was established, initially as a part of the Department of Commerce, a Community Relations Service (“CRS”), which was later moved to the Department of Justice. The CRS was created to provide assistance to communities in resolving disputes relating to discriminatory practices, where they might affect commerce.⁵⁰

Title XI⁵¹ contained a number of miscellaneous provisions.

C. Legislative History: The Addition of “Sex” into Title VII

President Kennedy’s civil rights bill proposed to address discrimination in employment. The issue, however, was not new to Congress. In fact, several civil rights bills proposing to address discrimination in both public and private employment had been proposed in 1963.⁵² At the very beginning of the congressional session H.R. 405, titled “A Bill to Prohibit Discrimination in Employment in Certain Cases Because of Race, Religion, Color, National Origin, Ancestry or Age,” was proposed.⁵³ After President Kennedy’s second address on civil rights, Representative Emanuel Celler of New York introduced H.R. 7152 in the House.⁵⁴ H.R. 7152 provided for the expansion of the powers of the Commission on Civil Rights, authorized under the Civil Rights Act of 1957 to advise and counsel in matters involving employment discrimination in both the private and public sectors.⁵⁵ In addition, H.R. 7152 proposed to authorize the establishment of a Commission on Equal Employment Opportunity,⁵⁶ which was established pursuant to Executive Order No. 10925. President Kennedy, through H.R. 7152, sought to give the Commission a statutory basis, and thereby solidify its existence and work.⁵⁷ However, the Commission was not authorized to address discrimination in the private sector, but instead, only employment discrimination in government

49. *Id.* §§ 901–902.

50. *Id.* §§ 1001–1004.

51. *Id.* §§ 1101–1106.

52. *See* Vaas, *supra* note 6, at 433.

53. *Id.*

54. *Id.* at 434.

55. *Id.*

56. *Id.*

57. *Id.*

contracts and subcontracts, and in any federally financed or assisted programs.⁵⁸

During subcommittee hearings, H.R. 405, which had been introduced by Representative James Roosevelt earlier in the year, was incorporated into H.R. 7152 initially, as Title VIII of the latter resolution.⁵⁹ The Judiciary Committee struck all but the enacting clause of H.R. 7152 and amended the bill so that the new Title VII now contained the fair employment provisions.⁶⁰ However, the powers of the Equal Employment Opportunity Board envisioned in H.R. 405 had been greatly reduced in the Title VII of H.R. 7152.⁶¹ The Judiciary Committee was concerned that as envisioned in H.R. 405, the Equal Employment Opportunity Board would have powers that extended into areas within the purview of the judiciary.⁶² Notwithstanding these concerns, the Equal Employment Opportunity Board under the Judiciary Committee amendments retained the authority to investigate complaints “concerning the existence of discrimination in business establishments, labor unions and employment agencies.”⁶³ Notably, the Committee stressed that it was not its job to promote equity to a mathematical certainty, but rather to correct abuses, and that the Committee could not force racial balance in employment.⁶⁴

The Report of the House Committee on the Judiciary was filed on November 20, 1963, only two days before President Kennedy was assassinated. H.R. 7152 was referred to the Committee on Rules five days after President Kennedy’s death. However, this speedy progress would not continue, and debate on the bill by the entire House did not begin until January 31, 1964.⁶⁵

After debate in the House, each amendment was read and voted on. With respect to Title VII, forty amendments were proposed; sixteen were accepted.⁶⁶ Representative Celler proposed many of the accepted amendments. After amendment, the House bill ensured that where national origin was a factor in employment, it was a qualification of employment; that “sex” was an area where Title VII would protect from discrimination

58. *Id.*

59. *Id.* at 435.

60. *Id.* at 435–36.

61. *Id.* at 435.

62. *Id.* at 436.

63. H.R. Rep. No. 88-914 (1963).

64. *Id.*

65. 110 Cong. Rec. 1511 (1964).

66. Vaas, *supra* note 6, at 438.

in employment; and that religious organizations and their affiliates could specify religion as an aspect of employment.⁶⁷

In *Meritor Sav. Bank, FSB v. Vinson*,⁶⁸ the Supreme Court discussed the manner in which “sex” was added to the Civil Right Act of 1964, noting that

The prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives. The principal argument in opposition to the amendment was that “sex discrimination” was sufficiently different from other types of discrimination that it ought to receive separate legislative treatment. This argument was defeated, the bill quickly passed as amended, and we are left with little legislative history to guide us in interpreting the Act’s prohibition against discrimination based on “sex.”⁶⁹

Important to later court interpretations of the term “sex,” Representative Howard W. Smith from the State of Virginia, when offering this amendment, read from a letter he purported to have received from a female constituent. This letter requested that the Civil Rights Act of 1964 also balance the inequalities between male and females.⁷⁰ However, the letter, as read, weighed equality in quantitative terms, rather than qualitative disparities in areas such as employment or education.⁷¹

Ultimately only two proposed amendments from the House were rejected in the Senate.⁷² At the conclusion of debate, amendment, vote and

67. *Id.* at 438–40.

68. 477 U.S. 57 (1986).

69. *Id.* at 63–64 (citations omitted).

70. Vaas, *supra* note 6, at 441.

71. The letter read in part:

I suggest that you might also favor an amendment or a bill to correct the present “imbalance” which exists between males and females in the United States. . . . The census of 1960 shows that we had 88,331,000 males living in this country, and 90,992,000 females, which leaves the country with an “imbalance” of 2,661,000 females. . . .

Just why the Creator would set up such an imbalance of spinsters, shutting off the “right” of every female to have a husband of her own, is, of course, known only to nature. But I am sure you will agree that this is a grave injustice to womankind and something the congress and president Johnson should take immediate steps to correct, especially in this election year. . . . Would you have any suggestions as to what course our Government might pursue to protect our spinster friends in their “right” to a nice husband and family?

Quoted in Scott Highhouse, *The History Corner: Was the Addition of Sex to Title VII a Joke? Two Viewpoints*, SOCIETY FOR INDUSTRIAL AND ORGANIZATIONAL PSYCHOLOGY, <http://www.siop.org/tip/jan11/12highhouse.aspx>.

72. Vaas, *supra* note 6, at 441.

enactment, Title VII of the Civil Rights Act of 1964 stated in pertinent part:

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency practices

It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.⁷³

III. FULFILLING A PROMISE: THE PAST 50 YEARS

A. *Affirmative Action—Once an Effective Tool*

Soon after the enactment of the Civil Rights Act of 1964, President Johnson moved to take specific steps to “open the gates of opportunity” for African Americans. He did so by requiring that certain amounts of federal contract funding be reserved for “minority” businesses.

On June 4, 1965, President Johnson gave the commencement address at Howard University.⁷⁴ Acknowledging Howard University as an “outstanding center for the education of Negro Americans[,]” President

73. Civil Rights Act of 1964, Pub. L. No. 88-352 § 703 (codified as amended at 42 U.S.C. § 2000e-2 (2012)).

74. Commencement Address at Howard University: “To Fulfill These Rights,” 2 PUB. PAPERS 635 (June 4, 1965).

Johnson discussed the Civil Rights Acts of 1957 and 1964 as the beginning of freedom for blacks in America⁷⁵ President Johnson argued, however, that the freedoms granted by these acts were not enough, and that one cannot “wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders you please.”⁷⁶ President Johnson provided statistical evidence of the continued racial inequalities and thus, of “American failure.”⁷⁷ President Johnson introduced what he saw as the next step in the civil rights movement:

You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, “you are free to compete with all the others,” and still justly believe that you have been completely fair.

Thus it is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates.

This is the next and the more profound stage of the battle for civil rights. We seek not just freedom but opportunity. We seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result.⁷⁸

President Johnson’s commencement speech forecasted steps he would take to implement affirmative action as a means of creating opportunity and factual equity that would be evinced by results. Following his commencement address, on September 24, 1965, President Johnson took further steps to end racial discrimination among federal government contractors and contractors working on federally assisted projects.⁷⁹ Through Executive Order 11,246, President Johnson required “that contractors make good faith efforts to achieve certain ‘goals’ of minority employment.”⁸⁰ President Johnson sought to accomplish these goals through the implementation of the “Philadelphia Plan,” issued on June 27, 1969, to all federal agencies.⁸¹ Under the Philadelphia Plan, coordinators from the Office of Federal Contract Compliance (“OFCC”) worked to

75. *Id.* at 635–36.

76. *Id.* at 636.

77. *Id.* at 637.

78. *Id.* at 636.

79. Robert P. Schuwerk, Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. CHI. L. REV. 723, 723–24 (1972).

80. *Id.*

81. *Id.* at 723 & n.5.

develop, in certain markets, compliance programs applied in the construction industry.⁸² For example, in Philadelphia, the low bidder on a federally assisted program, before the contract could be awarded to the bidder, was required to submit a plan indicating how the contractor would employ affirmative action to employ minority workers.⁸³ If the plan was unacceptable, the OFCC would work with the contractor to reach a negotiated acceptable affirmative action plan.⁸⁴ This controversial plan was revised under President Nixon to “require[] that construction bid invitations include target ranges, rather than quotas.”⁸⁵ Though controversial, under the 1972 amendments to Title VII, the executive order and the affirmative action plan it required was approved by Congress.⁸⁶

At or about the same period that the Philadelphia Plan was being introduced by executive order and being implemented, the Medical School of the University of California was implementing an admissions process to change the profile of its 1968 class, which did not have a single ethnically diverse member.⁸⁷ In its efforts to increase the number of minority students in the medical school, the University set aside 16 seats out of the 100 open seats in the incoming class in 1971 for “disadvantaged” (essentially meaning minority) students.⁸⁸

Allan Bakke’s application for admission was denied in 1973 and 1974. Bakke sued the Medical School of the University of California at Davis, arguing that he was discriminated against due to his race.⁸⁹ The United States Commission on Civil Rights (COCR) noted that in months leading to the *Bakke* decision, the case was compared to *Brown v. Board of Education*, in that the cases both sought “legal resolution to controversial issues on which there appeared to be no national consensus.”⁹⁰ However, unlike *Brown*, the Court’s decision in *Bakke* brought very little clarity to the allowable use of affirmative action as a means to remedy the effects of racial discrimination.⁹¹ The Supreme Court ordered that Bakke be admitted, but also held that the State of California had “a substantial

82. *Id.* at 739.

83. *Id.*

84. *Id.*

85. Daniel A. Farber, *The Outmoded Debate over Affirmative Action*, 82 CALIF. L. REV. 893, 896.

86. Schuwerk, *supra* note 79, at 724–25.

87. U.S. COMM’N ON CIVIL RIGHTS, TOWARD AN UNDERSTANDING OF *BAKKE* 1 (1979) [hereinafter “USCCR”].

88. *Id.*

89. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

90. USCCR, *supra* note 87, at 1.

91. *Id.*

interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin.”⁹² The COCR expressed concerns about the uncertain application of the *Bakke* decision to affirmative action in settings other than higher education admissions.⁹³

In *Fullilove v. Klutznick*, the Public Works Employment Act of 1977 (Public Works Act) was challenged as unconstitutional.⁹⁴ The Public Works Act conditioned the receipt of federal funding of state and local public works projects on the assurance that at least 10% of the value of the funding would be allotted to subcontract minority business enterprises (MBE). The Supreme Court first found that the Constitution, through the commerce clause, and Congress’ power to regulate interstate commerce, enabled Congress to enact legislation that “control[led] discriminatory contract procurement practices.”⁹⁵ Second, the Court found that Congress could enact legislation that used racial quotas and further require parties, even those not participating in the discrimination, to share the burden of righting the wrong of prior discrimination.⁹⁶ However, Congress’ use of such quotas had to be narrowly tailored.⁹⁷

The Court would address this narrow tailoring in *City of Richmond v. J.A. Croson Co.*, which considered the use of racial quotas in the City of Richmond’s construction contract bidding process.⁹⁸ For the first time, the Court applied the strict scrutiny standard as applied in equal protection analysis, stating that the standard would “assur[e] that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.”⁹⁹ Thus, after *City of Richmond*, affirmative action became a “highly suspect tool.”

Twenty-five years after *Bakke*, the Supreme Court again addressed affirmative action in higher education. The Court reviewed the University of Michigan’s undergraduate¹⁰⁰ and law school¹⁰¹ admissions processes,

92. *Bakke*, 483 U.S. at 320.

93. USCCR, *supra* note 87, at 3.

94. 448 U.S. 448 (1980).

95. Julia Grace Thigpen, Comment, *Fullilove v. Klutznick: Do Affirmative Action Plans Require Congressional Authorization?*, 38 WASH. & LEE L. REV. 1315, 1319 (1981).

96. *Fullilove*, 448 U.S. at 480; *see also* Thigpen, *supra* note 95, at 1321.

97. *Fullilove*, 448 U.S. at 480 (“We recognize the need for careful judicial evaluation to assure that any congressional program that employs racial or ethnic criteria to accomplish the objective of remedying the present effects of past discrimination is narrowly tailored to the achievement of that goal.”).

98. 488 U.S. 469 (1989).

99. *Id.* at 493.

100. *Gratz v. Bollinger*, 539 U.S. 244 (2003).

101. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

which employed different forms of racial quotas. The Court held that the University's undergraduate program point system that awarded points to minorities did not hold up to strict scrutiny.¹⁰² On the other hand the law schools admissions process, which was a "highly individualized, holistic review of each applicant's file," stood up to strict scrutiny and was constitutional.¹⁰³ Justice O'Connor famously concluded her decision by stating the expectation "that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."¹⁰⁴

A little over a decade into Justice O'Connor twenty five-year limit on affirmative action, and almost fifty years after the enactment of the Civil Rights Act of 1964, the Supreme Court was asked to decide whether Michigan's constitutional amendment banning affirmative action was constitutional.¹⁰⁵ In *Schuette v. Coalition to Defend Affirmative Action*, the justices disagreed as to whether the case was an affirmative action case, or as Justice Kennedy, writing for the majority, argued, about "who may resolve [the debate about racial preferences]".¹⁰⁶ In a 6-2 decision, the Supreme Court held that Michigan's constitutional amendment banning affirmative action was constitutional. However, it was Justice Sotomayor's dissent, joined by Justice Ginsburg, that pointed to the history that affirmative action sought to put behind us, stating, "it is a history that still informs the society we live in, and so it is one we must address with candor."¹⁰⁷ Citing literacy tests, grandfather clauses, and post-*Brown* political restructuring, Justice Sotomayor argued that, under the "political-process doctrine," the majority disregarded *stare decisis* by upholding the political restructuring by Michigan's amendment to ban affirmative action.¹⁰⁸ Moreover, Justice Sotomayor noted that the admissions policies banned by Michigan's constitutional amendment all met the strict scrutiny standard under *Grutter* "and thus already constituted the least restrictive ways to advance Michigan's compelling interest in diversity in higher education."¹⁰⁹

102. *Gratz*, 539 U.S. at 271–272.

103. *Grutter*, 539 U.S. at 337.

104. *Id.* at 343.

105. *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623, 1629 (2014).

106. *Id.* at 1638.

107. *Id.* at 1654 (Sotomayor, J., dissenting).

108. *Id.* at 1653 (citing *Hunter v. Erickson*, 393 U.S. 385, 391 (1969), *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 467 (1982)). The political-process doctrine states that "[w]hen the majority reconfigures the political process in a manner that burdens only a racial minority, that alteration triggers strict judicial scrutiny." *Id.*

109. *Id.* at 1660.

Justice Sotomayor's dissent noted that racial disparities are facts not only in our history, but are a part of our present society. She argued that we are choosing to ignore current racial disparities and warned against the evisceration of affirmative action, a necessary tool in fulfilling the promise of the Civil Rights Act of 1964.¹¹⁰ Unfortunately, other tools that are necessary to fulfill that promise have also moved away from prioritizing the application of the Civil Rights Act of 1964 to eliminating racial discrimination.

B. The Changing Focus of the EEOC

The EEOC has also been vital in the implementation of the Act's promise. The scope of the EEOC's authority was originally limited to receiving and investigating complaints, providing statistics, and researching discrimination in employment.¹¹¹ Importantly, the EEOC did not begin with the authority to bring actions against employers. This important aspect of the EEOC's work today came about in 1972, with the enactment of the Equal Employment Act.¹¹² Until this time, the EEOC lacked the power to effectuate change. In addition, the EEOC suffered from significant organizational and administrative problems for the first seven years of its existence.¹¹³ These structural problems, including inadequate staffing, would persist and affect the EEOC's ability to implement the promise of the Civil Rights Act of 1964. Notwithstanding the difficulties in getting the EEOC on its feet, so to speak, the EEOC was able to force changes to the employment practices of several large national employers, including AT&T, General Electric, General Motors, Ford, and Sears.¹¹⁴

Soon after the restructuring of the EEOC, President Carter shifted the enforcement of the Equal Pay Act of 1963 and the Age Discrimination Act of 1967 from the Department of Labor to the EEOC.¹¹⁵ These additional enforcement responsibilities immediately impacted the number of charges it received. In 1978, the EEOC received further responsibilities when

110. *Id.* at 1683.

111. Anne Noel Occhialino and Daniel Vail, *Why the EEOC (Still) Matters*, 22 HOFSTRA LAB. & EMP. L.J. 671, 672–73 (2005). *Why the EEOC (Still) Matters* provides a complete overview of the EEOC from when it opened its doors through the 2000s, detailing its organizational changes as well as its changing responsibilities, and gives the number of matters handled from 1965 through about 2004.

112. *Id.* at 677.

113. *Id.* at 672–66.

114. *Id.* at 679–80.

115. *Id.* at 681–82.

Congress amended Title VII to encompass the Pregnancy Discrimination Act of 1978.¹¹⁶ It was at this time that the Commission also began to see a shift in the types of charges it received and pursued. In the early 1980s, there was an increase in charges of age discrimination, and the EEOC also began to see an increase in the number of sexual discrimination charges.¹¹⁷ The increase in sex discrimination charges is pertinent to the discussion herein of the challenges faced by the courts in interpreting the term “sex” and the expansion of Title VII to areas not anticipated when President Kennedy discussed the need for a comprehensive civil rights law.

Although the EEOC would be plagued with understaffing and a lack of funds, in the 1990s, the its responsibilities in other areas increased again with the expansion of Title VII to disabled employees through the American with Disabilities Act of 1990, the Older Workers Benefit Protection Act of 1990, and the Civil Rights Act of 1991.¹¹⁸ With these added responsibilities, the EEOC made significant strides in its charge and litigation process, including the implementation of alternative dispute resolution to be able to address its expanded responsibilities. The EEOC shifted focus. In 2009, President Obama signed the Lily Ledbetter Fair Pay Act.¹¹⁹ In the years that have followed, the EEOC focused on hiring practices and equal pay. The Agency’s strategic enforcement plan for fiscal years 2013–2016 lists the following priorities:

1. “Eliminating Barriers in Recruitment and Hiring. . . .
2. Protecting Immigrant, Migrant and Vulnerable Workers. . . .
3. Addressing Emerging and Developing Issues. . . .
4. Enforcing Equal Pay Laws. . . .
5. Preserving Access to the Legal System. . . .
6. Preventing Harassment through Systematic Enforcement and Targeted Outreach.”¹²⁰

Very recently, EEOC stated that it had “an agency[-]wide focus on sex discrimination and equal pay issues for women.”¹²¹ This shift to focus on

116. *Id.* at 682.

117. *Id.* at 683.

118. *Id.* at 686.

119. Pub. L. No. 111-2 (2009).

120. *Strategic Enforcement Plan FY 2013–2016*, EEOC (Dec. 17, 2012), <http://www.eeoc.gov/eeoc/plan/sep.cfm>.

121. Scott Flaherty, *Equal Pay, Working Parents Top EEOC Priorities, Official Says*, LAW360 (June 5, 2014), <http://www.law360.com/articles/545338/equal-pay-working-parents-top-eeoc-priorities-official-says>.

sex discrimination began forty years ago with the advancement of the women's movement and organizations such as the National Organization for Women ("NOW"), specifically established to promote Title VII with respect to women's rights and to combat negative connotations of the women's rights.¹²² Notably absent is a priority by the EEOC to bring claims based on race.

C. Expansion of the Promise of the Civil Rights Act of 1964

The interpretation of the term "sex" in the Civil Rights Act of 1964, with little help from the limited legislative history, has been essentially defined by the courts. Interpreted initially to describe the male and female gender, notions of gender identity and gender stereotyping have come to shape the courts' analysis of "sex" under Title VII of the Civil Rights Act of 1964.

1. Interpretation of Title VII's Prohibition Against Forms of Sex Discrimination

Federal courts, noting the limited legislative history due to the speed and context with which "sex" was added to Title VII, initially held that the plain meaning of "sex" did not extend to transsexuals.¹²³ These courts looked to the plain meaning of the term "sex" and defined "sex" under Title VII as being limited to the differences between men and women.¹²⁴ Particularly important to these courts was that later legislation did not change the language of Title VII to be more inclusive. Because of this, courts refused to extend the reach of Title VII where the legislature had chosen not to do so, given the opportunity. In *Holloway v. Arthur Andersen & Co.*, the Ninth Circuit further noted that "[s]everal bills ha[d] been introduced to amend the Civil Rights Act to prohibit discrimination against 'sexual preference'" and that "[n]one ha[d] been enacted into law."¹²⁵ *Holloway* was the first time an appellate court addressed transsexual discrimination. When Holloway was employed at Arthur Anderson, she appeared as a male but soon after being employed, began

122. See Rosenberg, *supra* note 1, at 1152.

123. See, e.g., *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984); *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748 (8th Cir. 1982); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977).

124. Brian P. McCarthy, *Trans Employees and Personal Appearance Standards Under Title VII*, 50 ARIZ. L. REV. 939, 945 (2008).

125. *Holloway*, 566 F.2d at 662

female hormone treatments. A few years later she informed her employer she would be undergoing surgery for anatomical change to female. In that same year, she requested that her human resource paperwork reflect her name as Ramona rather than Robert.¹²⁶ Although the majority determined that this was a sexual preference case, and that Title VII did not protect against transgender discrimination, the dissent in the case viewed the issue differently. The dissent argued that the case was in fact a sexual discrimination case because Holloway had been terminated because she was a woman and the fact that she had not been born a woman was not relevant to the analysis under Title VII and that a different analysis should have occurred in the trial court and by the majority, and thus, the dismissal should be vacated and the case remanded.¹²⁷

In *Price Waterhouse v. Hopkins*,¹²⁸ the Supreme Court introduced “sexual stereotyping” into the analysis of sexual discrimination under Title VII. Hopkins, in her candidacy for partnership at Price Waterhouse, was advised to be more feminine and specifically, to adjust not only how she walked, but also how she spoke, dressed, and wore her hair, makeup and jewelry.¹²⁹ *Price Waterhouse v. Hopkins* held that the Hopkins had been discriminated against because she was a woman and because the defendant had certain notions of how women should behave. The Court noted that although Hopkins was criticized for being aggressive, aggressiveness was in fact required for her job, and held that Hopkins’ gender, specifically gender stereotyping, played a motivating part in the decision to not make Hopkins a partner.¹³⁰

In the cases that followed *Price Waterhouse*, courts readily applied sexual stereotyping to cases in which traditional notions of gender, including appearance and behavior, were at issue. For example, in *DeSantis v. Pacific Telephone & Telegraph Co.*, the Ninth Circuit found discrimination where a male employee did not appear to conform to traditional characteristic notions of his gender.¹³¹ However, some courts stopped at applying *Price Waterhouse* to cases brought under Title VII for transgender and transsexual discrimination,¹³² distinguishing *Price*

126. *Id.* at 661.

127. *Id.* at 664.

128. 490 U.S. 228 (1989).

129. *Id.* at 235.

130. *Id.* at 244.

131. 608 F.2d 327 (9th Cir. 2001).

132. *See Oiler v. Winn-Dixie La., Inc.*, No. Civ.A. 00-3114, 2002 WL 31098541, at *6 (E.D. La. Sept. 16, 2002) (“This is not just a matter of an employee of one sex exhibiting characteristics

Waterhouse by “concluding that the decision by a transgender person to present as a different sex than his or her birth-assigned sex constitutes a wholly different form of gender nonconformity.”¹³³ Emerging legal arguments in transgender discrimination have focused on the principle of sexual stereotyping laid out in *Price Waterhouse*, and have argued gender nonconformity is a basis of extending Title VII to transgender discrimination. The District Court for the District of Columbia is the only court to hold that Title VII applies *per se* to transgender discrimination.¹³⁴ Interestingly, the approach in *Schroer v. Billington* reflects the dissent in *Holloway v. Arthur Andersen & Co.*, stating that the “Library’s refusal to hire Schroer after being advised that she planned to change her anatomical sex by undergoing sex reassignment surgery was literally discrimination ‘because of . . . sex.’”¹³⁵

D. Unfulfilled Promises: Racial Discrimination in Employment

Whereas the promise of the Civil Rights Act of 1964 has been extended to areas of sexual discrimination through application by the courts, and extended to disability discrimination by the legislature, the Act clearly always applied to racial discrimination.¹³⁶ However, diversity in many sectors of employment remains low, indicating that there have been some limitations on the application of Title VII in certain professions. Notably, one of these professions is the legal profession. These limitations with respect to women attorneys and attorneys of color were highlighted by Professor Nancy Levit.¹³⁷ Unfortunately, there has been no improvement with respect to diversity in the statistics discussed by Professor Levit. A

associated with the opposite sex. This is a matter of a person of one sex assuming the role of a person of the opposite sex.”).

133. Jason Lee, *Lost in Transition: The Challenges of Remediating Transgender Employment Discrimination under Title VII*, 35 HARV. J.L. & GENDER 423, 435 (2012); *see also* Etsitty v. Utah Transit Authority, 502 F.3d 1215, 1222 (10th Cir. 2005) (stating that Title VII only extended to transgender discrimination “if they are discriminated against because they are male or because they are female.”).

134. *See* *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008).

135. *Id.* at 308.

136. Kimberly A. Yuracko, *The Antidiscrimination Paradox: Why Sex Before Race?*, 6 (Northwestern University School of Law, Working Paper No. 183, 2009), available at <http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/183> (noting that “[a]lthough Title VII prohibits employment discrimination based on both race and sex, race was its primary target”); *see also* Rosenberg, *supra* note 1, at 1151.

137. Nancy Levit, *Lawyers Suing Law Firms: The Limits on Attorney Employment Discrimination Claims and the Prospects for Creating Happy Lawyers*, 73 U. PITT. L. REV. 65, 70 (2011).

recent *American Lawyer* article summarized the current situation as follows:

In 2013, only 1.9 percent of partners—one in 54 at the 223 firms that submitted data for our Diversity Scorecard—were black, a percentage that hasn't changed in five years. For black women partners, the numbers are even worse: They average just one in every 170 partners in our surveyed firms, half the number of black male partners, according to data collected by the National Association for Law Placement.

For black associates, the situation is not much better. The recession was a disaster for lawyers of all minorities at large firms; they were almost twice as likely to be laid off as their white peers. Between 2008 and 2009, the number of minority lawyers at the nation's largest firms dropped by 9 percent, mostly associates. But while the numbers of Asian-American and Hispanic lawyers have since rebounded past prerecession levels, black lawyer head count has continued to slide. The percentage of black lawyers at the largest firms is now at a level not seen since 2000: 3 percent of all lawyers, down from 3.1 percent in 2012.¹³⁸

Although the *American Lawyer* focused its discussion on the diversity crisis at large firms, Professor Levit notes that 70% of lawyers work for firms which have fewer than fifteen employees.¹³⁹ Title VII extends to businesses with twenty-five or more employees; however, the Equal Employment Act of 1972 extends Title VII to business having fifteen or more employees. Thus, as an initial matter, with respect to diversity and disparities in the legal profession, for 70% of lawyers, Title VII does not even apply.

Moreover, the realities of the legal profession make employment discrimination actions difficult for lawyers generally. Most lawyers are subject to employment agreements requiring that such disputes be arbitrated.¹⁴⁰ With respect to disparate treatment, litigations that have gone forward have been limited by the lack of required comparator evidence.¹⁴¹ Litigants have been forced to rely on circumstantial evidence,¹⁴² and

138. Friedman, *supra* note 10.

139. Levit, *supra* note 137, at 70.

140. *Id.*

141. *Id.* at 72–74.

142. *Id.* at 74–75.

statistical comparisons of disparate impact and systemic disparate treatment do not provide needed case specific evidence.¹⁴³

“The numbers do not lie.”¹⁴⁴ In the past fifty years, the promise of the Civil Rights Act of 1964 has been extended to a number of areas, particularly as it related to sex discrimination, through the application of Title VII in areas such as sexual orientation discrimination, gender identity discrimination, same-sex bias, and through the ADA, disability discrimination.¹⁴⁵ As noted herein, equal pay and flexible work schedules, as they affect women in the workplace, is the current focus of the EEOC. However, the numbers with respect to racial disparities indicate that while the Civil Rights Act of 1964 continues to be expanded to provide needed protection in areas other than race, the changed focus by the EEOC and eating away of affirmative action have been limiting.

As we embark on the next 50 years, what more can we do to continue to expand the reach of the Civil Rights Act of 1964 without adversely impacting its mission to address racial discrimination and the effect of past racial discrimination particularly in employment?

IV. FULFILLING A PROMISE: THE NEXT 50 YEARS

Race and color have historically been difficult issues to confront. There is no question that the three Civil Rights Acts were born of the pox of slavery. The expanding scope of the Civil Rights Act of 1964, the changing focus and specific focus of the EEOC, and the whittling away at affirmative action has provided a means by which race can be avoided or at least be given a back seat. Considering the transition of the Civil Rights Act of 1964 over the past 50 years, one wonders whether the promise of race equality will ever be fully achieved.

143. *Id.* at 79–80.

144. Mellody Hobson, *Color blind or color brave?* (May 2014) (transcript available at http://www.ted.com/talks/mellody_hobson_color_blind_or_color_brave/transcript). Hobson notes “significant, quantifiable racial disparities that cannot be ignored, in household wealth, household income, job opportunities, [and] healthcare.” Rejecting the notion of color blindness, similarly rejected by the *Fullilove* Court, as merely ignoring the problem, Hobson proposes that we move towards being a “color brave” society:

So right now, what I’m asking you to do, I’m asking you to show courage. I’m asking you to be bold. As business leaders, I’m asking you not to leave anything on the table. As citizens, I’m asking you not to leave any child behind. I’m asking you not to be color blind, but to be color brave, so that every child knows that their future matters and their dreams are possible.

Id.

145. Rosenberg, *supra* note 1, at (noting that “although the Act was designed to end discrimination against African-Americans, women have greatly benefited[,] largely because of the political mobilization of women that occurred in the late 1960s and early 1970s”).

The Civil Rights Act of 1964 with respect to race, color, religion, sex or national origin is not an either-or proposition. The rights that others have been able to attain as a result of the Act should in no way be diminished. Over the course of the next 50 years, there has to be an additional focus on race. Going back to the words of President Johnson uttered at Howard University's graduation on June 4, 1965, "the scars [of gone-by] centuries" continue to exist, but there are many tools available to take the country beyond the barriers that prevent the Civil Rights Act from fulfilling its promise.¹⁴⁶ It will require constant discussion and education. In the context of the legal profession, it is critical to use as many tools as necessary to remove the dubious title of the "palest profession".

The promise will not be fulfilled if we are not intentional and if there is not recognition that all is not well. There must be a return to the basic principle of fairness. This is not an esoteric discussion. The majority of the United States Supreme Court has not concerned itself in recent years with the promise of the Civil Rights Act of 1964. There appears to be some notion that there is either nothing left to achieve as it relates to race, that or too much has already been given. It would further appear that using the precedent of the Act, the Supreme Court affords rights to other groups where race is not a factor.

There must be a return to collective efforts similar to those employed during Freedom Summer or in South Africa to end Apartheid. It is necessary to recognize, as was done 50 years ago, that there is a problem. Not talking about it will not make it go away. Talking is a first step. The next step is a long-term process of cultural change.

146. *See supra* note 74.