Alabama Civil Rights & Civil Liberties Law Review

The University of Alabama School of Law

Alabama Civil Rights and Civil Liberties Law Review

(ISSN 2160-9993)

The Alabama Civil Rights and Civil Liberties Law Review is published twice a year by students of The University of Alabama School of Law, Tuscaloosa, Alabama. The Editorial and Business Offices are located at:

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Subscriptions and Single Issues. The current subscription rates are not determined as of the publishing date. Please contact the Alabama Civil Rights and Civil Liberties Law Review with subscription requests. Subscriptions are automatically renewed unless notification to the contrary is received. Information on back issues is available upon request. Back issues are available on Hein Online.

Manuscripts. The Alabama Civil Rights and Civil Liberties Law Review invites submission of unsolicited manuscripts. Articles submitted to the Alabama Civil Rights and Civil Liberties Law Review should conform to the guidelines contained in The Bluebook: A Uniform System of Citation (18th ed. 2005). Articles selected for publication must be available in Microsoft Word (version '98 or later). Articles may be submitted via the ExpressO system, hard copy, or email.

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Printer. The Alabama Civil Rights and Civil Liberties Law Review is printed by Joe Christensen, Inc. of Lincoln, Nebraska.

Cite as ALA. C.R. & C.L. L. REV.
2014-2015
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INTRODUCTION

ALABAMA’S MIRROR: THE PEOPLE’S CRUSADE FOR CIVIL RIGHTS

Steven H. Hobbs

I plucked my soul out of its secret place,
And held it to the mirror of my eye
To see it like a star against the sky,
A twitching body quivering in space,
A spark of passion shining on my face.

from I Know by Soul,
by Claude McKay

On April 4, 2014, The University of Alabama School of Law hosted a symposium on the Civil Rights Act of 1964. The papers presented at that symposium are included in this issue of the Alabama Civil Rights & Civil Liberties Law Review. The symposium was an opportunity to reflect on the reasons and history behind the Act, its implementation to make real the promises of the Constitution and the Declaration of Independence, and the continuing urgency to make the principles of the Act a reality. We, in essence, plucked out the soul of our constitutional democracy’s guarantee of equality under the law and held it up for self-reflection. In introducing the symposium, I note the description that appeared in the program stating the hope for the event:

This symposium is a commemoration of the 50th anniversary of the enactment of the Civil Rights Act of 1964. The passage of the Act marked the beginning of a new era of American public life. At the time it was enacted, the Civil Rights Act of 1964 was perceived by many to be the codified culmination of decades of

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1 Tom Bevill Chairholder of Law, University of Alabama School of Law. The author wishes to thank Law Librarian Penny Gibson for her valuable research assistance.
2 Claude McKay, Harlem Shadows, in HARLEM SHADOWS (1922).
sustained effort to provide equal opportunity for women and racial minorities. To its supporters, the Act embodied a promise to end systemic, institutional, and private barriers to women and racial minorities’ full and fair inclusion in the public and economic life of the nation.

This introduction begins from the premise that we can make the teleological connection between the Civil Rights Act of 1964 and the events that transpired in Birmingham and in Alabama in 1963. Certainly, as the articles in this issue so ably demonstrate, the 1964 Act was the result of a struggle for human dignity and equal rights going back to the founding of this country. The articles also make plain that the Civil Rights Act of 1964 came about from a massive effort by organizations committed to achieving basic civil rights, and by individuals making monumental personal sacrifices. This introduction reflects on the organizations and people in Alabama who played a critical role in shifting the tide of history towards justice and situates the heart and soul of the Civil Rights Movement in Alabama.

I

There were a people, brave and strong, who held up a mirror for America to examine its very soul. We note the Birmingham Campaign, organized by the Alabama Christian Movement for Human Rights and the Southern Christian Leadership Conference with its critical Children’s Crusade, where Commissioner of Public Safety Eugene “Bull” Connor attacked children marching peacefully to claim their right to have access to public accommodations. Dr. Martin Luther King, Jr. marched with the citizens of Birmingham and was arrested and placed in jail, where he wrote his seminal letter about the crucial need to oppose injustice. As he said in

\[3\] Id. at 299.
\[6\] For a description of the Birmingham Campaign see Civil Rights Chronicles, supra note 3, at 222-33.
his letter, he had been invited to Birmingham by such leaders as Reverend Fred Shuttlesworth, who told Dr. King the story of students from Miles College, an historically black institution, who in 1962 organized and carried out a selective buying campaign (don’t shop where you can’t work or try on clothes or receive service equal to that of white patrons), which stung the white power structure in its pocketbook.

One also notes that, in 1963, the University of Alabama was finally integrated. That process began in earnest in 1957, when Autherine Lucy and Polly Myers applied to the University of Alabama. They sued the university when their applications were denied after initially being accepted, and the federal court granted injunctive relief. Autherine Lucy was the only one to attempt to register February 1, 1956, after Polly Myers’ acceptance process was delayed by the university. After Lucy enrolled, she was assaulted with thrown objects, including eggs, by a white mob that

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9 The economic impact of the Selective Buying Campaign was noted by Manis:

Yet the effort made a significant cut into the sales figures for the major downtown stores, especially during the Easter season when the African American community spent large sums on clothing. The boycott reduced Easter sales by 12 percent compared with the previous year and claimed 90 percent of black trade with the downtown stores. The efforts also drew national attention, and eventually even the local white press weighed in against the city commission’s retaliatory strikes, calling for open communications between blacks and whites. The boycott proved to both white and black leaders in Birmingham that economic pressure could be brought to bear on the racial status quo.

MANIS, supra note 8, at 309. See also Jesse Chambers, MILES COLLEGE ROLE IN CIVIL RIGHTS MOVEMENT HAS CREATED A PERMANENT LEGACY, (July 11, 2013 at 4:09 PM), http://blog.al.com/spotnews/2013/07/miles_college_role_in_civil_ri.html.


11 Lucy v. Adams, 134 F. Supp. 235 (N.D. Ala. 1955); aff’d 228 F.2d 619 (Former 5th Cir. 955).

12 CLARK, supra note 10, at 56-57.
was stirred up by the Klan. The Board of Trustees excluded her from school three days later on the grounds that her presence ran the risk of causing civil disturbances. The case stood for the proposition that institutions of higher education in Alabama must be open to all, and it became the legal precedent for the eventual integration of the university by Vivien Malone and James Hood on June 11, 1963. Of course, we know that Governor Wallace failed to block these brave students’ enrollment as Assistant Attorney General Nicholas Katzenback, backed by a federalized Alabama National Guard, ensured that desegregation order was carried out.

In August 1963, Dr. King delivered his classic “I Have a Dream” speech from the Lincoln Memorial in Washington, D.C., with the prophetic notation of George Wallace’s opposition to basic civil rights “…with his

13 Autherine Lucy was represented by Attorney Arthur Shores of Birmingham. The viciousness of the riots that greeted Ms. Lucy was described in a biography of Shores written by his daughters, Helen Shores Lee and Barbara Shores:

Agitators had had the needed time to bring in outsiders, and the crowds that gathered on the campus grew large and violent. Outside her classroom windows rioters shouted out death threats, “Kill Lucy!” they chanted. The hostile crowds grew from hundreds to thousands. For her safety, university officials and police surrounded Lucy and sneaked her out of class to a waiting patrol car. As they delivered Lucy to her next class in another building on campus, rioters pelted them with rocks and rotten eggs, exploded firecrackers, shattered the patrol car windows, and shouted more death threats. Later that day, police hid Lucy in the patrol car’s backseat floorboard and took her to a “secret” place of safety.


14 Id. at 162 -63. Lucy was later permanently expelled from the University. Id. at 162.


16 See CLARK, supra note 10. In U.S. v. Wallace, the Court noted, “The Honorable George C. Wallace, governor of Alabama, referring to the May 21, 1963, order entered by Judge Grooms, has stated and reiterated publicly that he will be present to bar the entrance of any Negro who attempts to enroll in the University of Alabama. He has also pledged that law and order will be maintained.” 218 F. Supp. 290, at 291.
lips dripping with the words of interposition and nullification… .”\(^{17}\) Dr. King was referring to Wallace’s inauguration speech of 1963 where he declared, “...Segregation now, segregation tomorrow and segregation forever!”\(^{18}\) Moreover, Wallace had declared with every fiber of his being to preserve the Southern way of life that featured not only the separation of races, but the clear recognition of the doctrine of white supremacy and the rights of states to order society without the intervention of the central government.\(^{19}\) Under the banner of segregation, violence was visited upon black people with bombs, riots, and threats of violence, culminating on September 15, 1963, with the bombing of the Sixteenth Street Baptist Church and the deaths of four little girls (Addie Mae Collins (14), Cynthia Wesley (14), Carole Robertson (14), and Denise McNair (11)) and the serious injury of a fifth little girl (Sarah Collins, now Rudolph (12)). This was followed later that Sunday by the deaths of two young black boys (Johnny Robinson, Jr. (16) and Virgil Ware (13)). President John F. Kennedy best expressed the call to America to examine its soul:

> If these cruel and tragic events can only awaken that city and state—if they can only awaken this entire nation—to a realization of the folly of racial injustice and hatred and violence then it is not too late for all concerned to

\(^{17}\) A Testament of Hope, supra note 7, at 219.
\(^{19}\) Wallace noted in his speech that our founding fathers had established the rights of states to have a control separate from the central government, and that the same was true in racial terms:

> And so it was meant in our racial lives...each race, within its own framework has the freedom to teach...to instruct...to develop...to ask for and receive deserved help from others of separate racial stations. This is the great freedom of our American founding fathers...but if we amalgamate into one unit as advocated by communist philosophers...then the enrichment of our lives...the freedom from our development...is gone forever. We become, therefore, a mongrel unit of one under a single all powerful government...and we stand for everything...and for nothing.

_Id._
unite in steps toward peaceful progress before more lives are lost.20

Dr. King, after just experiencing the soaring heights of the successful March on Washington, had to return to Alabama to give the eulogy for these children. He stood once more among the people with whom he marched the streets of Birmingham and went to jail to achieve a modicum of freedom in public accommodations. Yet he recognized that these young girls were “…martyred heroines of a holy crusade for freedom and human dignity.”21 He, like the President, still maintained a hope that a positive would come from such tragedy. He said in his eulogy:

We must not become bitter, nor must we harbor the desire to retaliate with violence. We must not lose faith in our white brothers. Somehow we must believe that the most misguided among them can learn to respect the dignity and worth of all human personality.22

These are the obvious mirrors that were held up to the soul of America. Those stories are told in the legal cases brought to enforce the Brown v. Board of Education23 mandate to end segregation in public schools and in the participation of young people in pushing forward the fight for equal rights. For me, I was fascinated with the work done by a cadre of lawyers who, with diligence, perseverance and the risk of their very lives, fought segregation and George Wallace in state and federal courts. These lawyers were my heroes as I studied law and eventually became a law professor. The list of lawyers is an honor roll of warriors for justice, including: Constance Baker Motley; Julius Chambers; Norman Amaker; Jack Greenburg; Derrick Bell, Jr.; Fred Grey; Arthur Shores; Oscar Adams; and W. L. Williams, among others. Their work was part of the battle led by the NAACP Legal Defense Fund, Inc. and local attorneys to find individuals who would be willing and able to withstand the stress of going up against the white supremacists who, like Wallace, insisted on segregation forever.24 As a law professor, I consider these lawyers

21 AT TESTAMENT OF HOPE, supra note 7, at 221.
22 Id. at 222.
24 See generally MICHAEL J. KLARMAN, BROWN V. BOARD OF EDUCATION AND THE CIVIL RIGHTS MOVEMENT (2007); see also RICHARD KLUGER, SIMPLE JUSTICE:
exemplars for my students as they contemplate their contribution to the community.

On a personal level, I recall my own childhood and educational experiences in 1962 and 1963 in contrast to the children involved in these cases. I was attending the Green Knoll Elementary School in Bridgewater, New Jersey, a school that my father attended in the 1930’s. In the spring of 1962, I was unsuccessfully completing the fourth grade with a very lackadaisical effort when it was determined that I had received the third highest score in the school on one of those achievement tests. Sensing that I might have more academic ability than I was then displaying, the school officials proposed that I repeat fourth grade and be placed in a class that was academically advanced. The only problem was that I would be the only black child in the classroom. After consulting with my parents, I repeated fourth grade in the 1962-63 school year in a class that contained the brightest children in the school. And I was the only black student. From then on, I was in the educational track that prepared me to take advanced and honors classes in high school, preparing me for college.

My experience certainly seems trivial compared with the fully segregated and brutal school systems that children my age were enduring in Alabama and throughout the South. But as I recall my fourth-grade self, living in an environment that experienced its own more subtle brand of racism (albeit not an apartheid), I tried to imagine what desegregating the schools meant for them. They were on the frontline of the battle for justice with an outcome that was hoped for but not assured. I began to wonder what it was really like for the children of Alabama, facing not only a governor with hatred-dripping lips and the Ku Klux Klan committing violent acts, but also ordinary citizens protesting the very presence of African Americans with thrown objects and spittle-laced invectives. How did they walk into a school through a gauntlet of signs that decried, “Nigger go Home!” What strength of character did they possess to be able to seek an education when their fellow white students either left that school or engaged in hateful conduct? How lonely was it to leave their friends behind to attend a school that was indifferent, at best, to their presence?

The goal of the cases brought by these NAACP-affiliated attorneys was to enforce the mandate of Brown. In Alabama, the task was to challenge not only the legal system which permitted local school boards to
maintain separate schools, but also legislative provisions enacted to thwart the Brown decision. First, Alabama amended its constitution to declare that there was no state constitutional right to a public education. 26 The idea was that no one could claim a right to an integrated education or access to certain schools that had been reserved for whites. Second, Alabama and other Southern states enacted student placement laws which permitted students to enroll in or transfer to schools of their choice or schools other than the ones to which the students were assigned.27 A student had to submit an application, file a variety of documents, take tests, and be evaluated psychologically.

That is what Rev. Fred Shuttlesworth had attempted to do in 1957 in order to speed up the integration of Birmingham Public Schools.28 Initially, Shuttlesworth sought to enlist as many black families as possible to push the schools toward integration by enrolling in a previously all-white school.29 Unfortunately, on September 2, 1957, shortly before the start of school, word spread that he planned to integrate the school, and this resulted in the Ku Klux Klan viciously assaulting a black man who just happened to be walking down a road and was not remotely involved with any of the civil

26 Id.
27 Id.
28 Id. at 145.
29 Under the auspices of the Alabama Christian Movement for Human Rights, Shuttlesworth sought to speed up the desegregation of the Birmingham Public Schools:

The Pupil Placement Law of 1955 governed school segregation in Alabama. Passed in the wake of the Brown decision, the statute gave local school boards wide latitude in determining which schools children in their district would attend. In effect, the law allowed white superintendents to keep black students out of white schools. It was viewed by Shuttlesworth and other blacks as a subterfuge to delay the Supreme Court’s desegregation ruling. Fred apprised several families of the possible repercussions under this law of seeking to desegregate the white high schools. Warning of possible job loss and certain harassment that would ensue, the minister managed to persuade eight sets of parents, largely by assuring them that he would be making the same request on behalf of his daughters and the ACMHR members would guard their homes just as they guarded his.

Id. at 146.
2014] Alabama’s Mirror

rights activities.\textsuperscript{30} After castrating him and soaking him in turpentine, they left him on the side of the road with a message to tell Rev. Shuttlesworth to stop trying to send black kids to white schools.\textsuperscript{31}

While the other black families chose not to join Shuttlesworth in this action, he persisted with his plan. On behalf of his daughters, Patricia and Ricky, Rev. Shuttlesworth had submitted all the necessary forms, but there was a considerable delay and administrative foot-dragging in providing an answer.\textsuperscript{32} When he did not hear back from the school board, Rev. Shuttlesworth acted as if that constituted a tacit approval. On September 9, 1957, with support from members of his organization, he, his wife Ruby, and his daughters, Patricia (14) and Ruby Fredricka (12, also called Ricky), along with two other students, Nathaniel Lee (17) and Walter Wilson (12), drove to Phillips High School and were met with an angry mob that viciously attacked him and his family.\textsuperscript{33} Shuttlesworth was attacked with bats, chains, and fists, receiving significant lacerations but no broken bones.\textsuperscript{34} He had sent word to the police that this was to happen, but there were only a few police officers on hand, and they did little to stop the brutal assault.\textsuperscript{35} Shuttlesworth managed to crawl back to his car and was driven to a hospital.\textsuperscript{36} Somehow he managed to find the strength to attend a mass meeting that evening.\textsuperscript{37}

In the suit to assert the right to an unsegregated education, Shuttlesworth claimed that the Alabama Pupil Placement Act was unconstitutional.\textsuperscript{38} The federal court refused to issue any injunctive relief on the grounds that the act was facially neutral but left open the possibility that the plaintiffs could come back to court later if it was found that the Birmingham school board was applying the law based on race.\textsuperscript{39}

Following the efforts of Rev. Shuttlesworth’s family, in 1957 James Armstrong also filed a suit in federal district court to integrate the Birmingham Public Schools on behalf of his children: Dwight; Denise;

\begin{itemize}
\item \textsuperscript{30} MANIS, supra note 8, at 147.
\item \textsuperscript{31} \textit{Id}.
\item \textsuperscript{32} MANIS, supra note 8, at 146-47.
\item \textsuperscript{33} \textit{Id}. at 150-52.
\item \textsuperscript{34} \textit{Id}.
\item \textsuperscript{35} \textit{Id}. at 151.
\item \textsuperscript{36} \textit{Id}.
\item \textsuperscript{37} \textit{Id}.
\item \textsuperscript{38} Shuttlesworth v. Birmingham, 162 F. Supp. 372 (N.D. Ala. 1958).
\item \textsuperscript{39} \textit{Id}. at 384; \textit{aff’d.}, Shuttlesworth v. Birmingham Bd. of Educ. 358 U.S. 101 (1958).
\end{itemize}
James, Jr.; and Floyd. The suit originally charged the Birmingham schools with violating the children’s Fourteenth Amendment rights under the Brown decision by maintaining a segregated school system, and also with the discriminatory application of the Alabama Pupil Placement Act. After being denied injunctive relief in federal district court, the parties appealed to the United States Fifth Circuit Court of Appeals. There, the judges found that Birmingham maintained a school district based on racial classifications and ordered it to be “…restrained and enjoined from requiring segregation of the races in any school under their supervision, from and after such time as may be necessary to make arrangements for admission of children to such schools on a racially nondiscriminatory basis with all deliberate speed, as required by the Supreme Court in Brown v. Board of Education of Topeka.” They were also ordered to submit a comprehensive plan for the total desegregation of the school system in Birmingham and Jefferson County.

With court order in hand, five students prepared to begin school in September 1963. Dwight and Floyd Armstrong had enrolled at Graymont Elementary School, a mere block from their home. Richard Walker was set to start at Ramsey High School, and Patricia Marcus and Josephine Powell were to enter West End High School. On September 5, on what was to be the first day, all public schools were temporarily closed on the orders of Governor Wallace. When they opened again on September 9, Rev. Shuttlesworth and James Armstrong escorted Dwight and Floyd to Graymont Elementary, where they were met by Colonel Al Lingo, head of the Alabama State Troopers, who turned them away. They were confronted by white demonstrators waving confederate flags, chanting obscenities, and throwing objects, and the state troopers were of no

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41 Id.
42 Armstrong v. Bd. of Educ. of City of Birmingham, 323 F.2d. 333 (Former 5th Cir. 1963).
43 Id. at 338.
44 Id. at 339.
45 The story of the integration of the Birmingham City Schools can be found at: McWhorter, supra note 5 at 476-77; 488-89; Manis, supra note 8, at 401-473; Glenn T. Askew, But for Birmingham, 318-19 (1997); Solomon Kimerling, George Wallace and the Road to Sixteenth Street Baptist Church, No More Bull, Sept. 18, 2013, www.weldbham.com/blog/2013/09/18/read-and-weep/.
46 Id.
47 Id.
assistance. Governor Wallace activated the Alabama National Guard to control the crowds and to prevent the schools from being integrated. President John F. Kennedy federalized the National Guard so that the federal court order could be enforced. The Birmingham schools were integrated even as violent demonstrations continued, including the awful bombing of Sixteenth Street Baptist Church. The Board of Education and the Birmingham school administrators were also ordered to submit a comprehensive plan for the total desegregation of the Birmingham school district.

In Tuskegee, Alabama, Governor Wallace made his last stand in a schoolhouse door. In the class-action case styled *Lee v. Macon County Board of Education*, the parents of Anthony and Henry Lee (Detroit and Hattie Lee) sought to challenge the biracial school system. There, the District Court found that Macon County had a school system where students, teachers, bus transportation, and finances were assigned by race in violation of the plaintiffs’ constitutional rights. The court ordered the school board to submit a desegregation plan by December 1963 and to begin desegregation by September 1963. The facts in that case demonstrated that specific desegregation plans had been made and that “…the Macon County Board of Education assigned 13 Negro pupils to the previously ‘white’ Tuskegee High School.” This order was thwarted by Governor Wallace and required further injunctive relief to enforce, as reflected in a subsequent opinion by the District Court. Without informing the Macon County School Board, Governor Wallace used an executive order to close Tuskegee High School from September 2 until September 9, 1963. When the thirteen black students arrived by bus on Sept. 2, the Alabama State Troopers turned them away. When the students again attempted to enter the high school on September 9, they were again turned away, and the Governor issued another executive order “…that no student shall be permitted to integrate the public schools of the City of Tuskegee,

48 *Id.*
49 *Id.*
50 *Id.*
52 *Id.*
53 *Id.*
54 *Id.* at 300.
55 *Id.*
56 *Id.*
57 *Id.*
Alabama.  

Wallace claimed authority for this action as President of the State Board of Education, which supported his takeover of the Macon County Schools.  

All of the white students had withdrawn from Tuskegee High School by September 12 and had transferred to the Shorter High School or Macon County High School in Notasulga, or to the private Macon Academy with grant-in-aid money furnished by the state. Not a thought was expressed about the applicability of the Alabama Pupil Placement Act’s stringent application process or whether the Macon Academy was a duly accredited school. In January 1964, the Alabama Board of Education ordered the Macon County Board of Education to close Tuskegee High School and to send “...the remaining 12 ‘Negro’ students to other schools in the Tuskegee area, meaning, send them to ‘the ‘all Negro’ Tuskegee Institute High School.’” The Federal District Court ordered that those students be transferred to the high schools in Shorter or Notasulga.  

However, public officials continued to stand in the schoolhouse door when the mayor of Notasulga tried to prevent the transfer by claiming that the extra students presented a fire and safety hazard and not one more student or teacher could fit into the school. In a separate suit for injunctive relief, the District Court found this was pretext to get around the order. Eventually, all of the white students in Shorter and Notasulga transferred out of those schools, attending either the private, all-white Macon Academy or other schools in the surrounding districts, all courtesy of the State of Alabama. By the end of the school year in 1964, six black students were in each of those high schools. Subsequently, the Court ordered Governor Wallace, the State Superintendent of Schools, the State Board of Education, and the Macon County Board of Education to proceed immediately with desegregation beginning in September 1964. Some of the black students

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58 Id. at 745.  
59 Id. at 754.  
60 Id. at 747.  
61 Id. at 757.  
62 Id. at 749.  
63 Id. at 748.  
64 Id.  
66 Id.  
68 Id.  
69 Id. at 758.
who attended Notasulga High School finished but could not graduate from that school because someone burned it down right before graduation day.\textsuperscript{70}

In Huntsville, Alabama, the school board was also successfully sued to desegregate in the case of \textit{Hereford v. Huntsville Board of Education} in 1963, despite pressure from Governor Wallace not to integrate.\textsuperscript{71} Under an order from the District Court, on September 9, 1963, 6-year-old Sonnie Hereford, IV, was escorted to Fifth Avenue Elementary by his father, one of two black physicians in Huntsville.\textsuperscript{72} He was the first black student to attend a previously all-white public school in Alabama.\textsuperscript{73} Later that morning, John Anthony Brewton entered the East Clinton School, Veronica Pearson entered the Rison School, and David (Piggee) Osman entered Terry Heights School.\textsuperscript{74} In Mobile, Alabama, also under court order,\textsuperscript{75} Dorothy Bryant Davis and Henry Hobdy entered Murphy High School on September 10, 1963, after first being blocked by Alabama State Troopers under orders from Governor Wallace on September 9, 1963.\textsuperscript{76} When Wallace again attempted to utilize the National Guard, President Kennedy federalized the Guard and the system began the long process of desegregation. Only a few

\textsuperscript{70} Maggie Martin, \textit{Former Students Look Back 50 Years after Integration of High School}, ALABAMA PUBLIC RADIO (September 1, 2013), http://apr.org/post/former-students-look-back-50-years-after-integration-tuskegee-high-school.

\textsuperscript{71} Order by Judge Grooms, 573 F.2d 268 (former 5th Cir. 1978) (on file with author).


\textsuperscript{74} Lee Roop, \textit{Father and Son Who Integrated Huntsville City Schools 50 years ago Will Recreate Famous Walk to Fifth Avenue School}, AL.COM (September 6, 2013, 9:21 AM), http://blog.al.com/breaking/2013/09/father_and_son_who_integrated.html; see also \textit{Unsung Heroes are Honored and Remembered for Their Courage to Integrate Huntsville City schools 50 Years Ago}, SPEAKIN OUT NEWS (2013), www.speaninoutnews.info/091113_Huntsville_City_School_Integration.html.

\textsuperscript{75} Davis v. Bd. of Sch. Comm’r of Mobile Cnty, Ala. 322 F.2d 356 (former 5th Cir. 1963).

minor demonstrations instigated by the white Citizens Council ensued, and those quickly faded away.\textsuperscript{77}

President Kennedy, in trying to “read the signs” of justice for all America and understanding that the “sweet joy and grace”\textsuperscript{78} of freedom have been for too long robbed from fellow citizens on account of race, boldly presented the proposed Civil Rights Act on the evening that the United States Justice Department, supported by the Alabama National Guard, secured equal educational opportunity at the University of Alabama.\textsuperscript{79} He called it a “moral crisis” that must be addressed by every American if we were to stem the rising tide of interracial violence.\textsuperscript{80} He noted that racial oppression had gone on for far too long.\textsuperscript{81} Such a state did not align with the ideals of freedom and democracy that the United States promoted around the world.\textsuperscript{82} The nationally televised speech was a clarion call to examine the American soul, plainly stated by the President as follows:

I hope that every American, regardless of where he lives, will stop and examine his conscience about this

\textsuperscript{77} Id.
\textsuperscript{78} Claude McKay, \textit{I Know My Soul}, in \textit{HARLEM SHADOWS} (1922).
\textsuperscript{80} Id.
\textsuperscript{81} President Kennedy observed:

One hundred years of delay have passed since President Lincoln freed the slaves, yet their heirs, their grandsons, are not fully free. They are not yet freed from the bonds of injustice. They are not yet freed from the social and economic oppression. And this Nation, for all its hopes and all its boasts, will not be fully free until all its citizens are free.

\textsuperscript{82} Id.

We preach freedom around the world, and we mean it, and we cherish our freedom here at home, but are we to say to the world, and much more importantly, to each other that this is a land of free except for the Negroes; that we have no second-class citizens except for the Negroes; that we have no class or cast system. No ghettos, no master race except with respect to Negroes?

\textsuperscript{Id.}
and other related incidents. This Nation was founded by men of many nations and backgrounds. It was founded on the principle that all men are created equal, and that the rights of every man are diminished when the rights of one man are threatened.

Today we are committed to a worldwide struggle to promote and protect the rights of all who wish to be free. And when Americans are sent to Viet-Nam or West Berlin, we do not ask for whites only. It ought to be possible, therefore, for American students of any color to attend any public institution they select without having to be backed up by troops.

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It ought to be possible, in short, for every American to enjoy the privileges of being American without regard to his race or his color. In short, every American ought to have the right to be treated as he would wish to be treated, as one would wish his children to be treated. But that is not the case.83

We honor the leaders and the lawyers who valiantly pushed forward this monumental series of litigation designed to not only secure the constitutional rights of the children named in the suits, but to fundamentally dismantle the system of educational apartheid. As noted earlier, 1963 in Alabama was key to the introduction and passage of the Civil Rights Act of 1964. The courage and tenacity of the students who went through this crucible should never be forgotten. It is clear that the bombing of the Sixteenth Street Baptist Church, on what was hailed as Children’s Day four days after the Birmingham, Huntsville, and Mobile schools were integrated, was a violent last spasm to quash the dreams of freedom and justice that these children carried in the secret places of their hearts. We should not only forever tell their stories, but we must also critically reflect on that moment in time to find wisdom for the struggles of today that confront our young people.

83 Id.
The discourse shared at this symposium was truly inspiring. We invite you to join in a continuing dialogue on the Civil Rights Act of 1964 by considering the thoughtful articles present herein. Each, in its own way, holds up a mirror through which we can glimpse the historical and contemporary significance of the Civil Rights Act of 1964. They make a valuable contribution to the civil rights jurisprudence and amply demonstrate that there continues to be a Civil Rights Movement, and that the effort to make manifest the guarantee of equality continues.

The challenge of reading statistical disparity as evidence of racial discrimination is taken up by Professor Trina Jones. She reminds us of the strides made in employment opportunities with the application of Title VII of the Civil Rights Act of 1964. She explains how sophisticated analysis to find illegal discrimination beyond purposeful intent is reflected in the disparate impact test by using statistics to show racial disparity. However, increasingly, this approach is being challenged as an illegitimate basis for finding discrimination. Accordingly, unconscious biases that have the effect of limiting employment opportunities are difficult to prove and rectify. Furthermore, contemporary Title VII jurisprudence is not keeping up with new discriminatory challenges in the workplace. For example, in spite of advances, albeit slow, in Supreme Court doctrine on sexual orientation (the right to marry someone of the same sex is an emerging reality), there is no statutory basis for protection against discrimination based on sexual orientation. Professor Jones suggests that it is difficult to find grounds for protection against discrimination based on sexual orientation using the analysis generally applied to gender.

Professor Jones explores the theory of formal equality as the measuring rod for finding discrimination and suggests some doctrinal limitations. With formal equality, if all races are treated alike and there is no finding of purposeful discrimination, then there is no need to speculate about disparate impact or low numbers of hires. Furthermore, race cannot be used to level the playing field through affirmative action or diversity programs. Claims of unconscious bias are not reached if formal equality is maintained. Therefore, she concludes that we are left with the challenge of articulating the purpose of anti-discrimination laws in a contemporary context where statistical differences are beyond the law’s reach to rectify discrimination that is not demonstrably purposeful.

Professor Alfred L. Brophy examines Title II of the Civil Rights Act of 1964, which requires equal access to public accommodation regardless of race, gender, national origin, or religion. He is interested in how that provision changed our notions of property rights. His analysis suggests that
the Act “...was radical and rebalanced the line between public and community rights and private rights.” Professor Brophy asks us to take seriously the arguments of the opponents—that is, the Act is radical and changed the concept of individual property rights. Opponents of the Act made a variety of claims that the Act was an unconstitutional infringement of private property rights that have historically been recognized. Fundamentally, there was the fear of the central government infringing on the rights of states and individuals by expanding its regulatory reach. Was this a slippery slope towards socialism or communism? Was the idea of state action so expansive that any attempt to enforce traditional rules of trespass and the free use of one’s property would mean that the right to hold and use property would disappear? And if there was a societal reason for forcing integration, was this a taking of property without just compensation? Professor Brophy considers these and other questions and concludes that the Civil Rights Act of 1964 did indeed place some limits on property rights to enforce the needs of the community, especially recognizing the negative impact of discrimination on commerce. More importantly, the Act recognized the necessity to increase human rights by offering access to previously denied public accommodation, thereby giving meaning to other constitutional rights. It also helped buttress our standing in the world of global politics as the Cold War raged.

Professor Dorothy A. Brown considers the issue of diversity, or lack thereof, in the workplace, especially in large high-tech corporations like Facebook, Google, LinkedIn, Twitter and Yahoo. Reviewing recently released data on hiring minorities, Professor Brown notes that, unlike with Asian employees, the numbers of blacks and Latinos in the workplace are woefully low considering their numbers in the general population. Even for Asians, there is a dearth of minorities in senior management and on boards of directors. Claims by the tech industry that they would hire and promote minorities if they could find them—the so-called pipeline problem—ring hollow, especially for Asians because of their significant numbers in the workforce but not in leadership positions. Professor Brown finds that, while we have overcome explicit discrimination, there are still pathways to opportunity that are effectively closed for minority employees.

Professor Brown’s challenge is to uncover unconscious bias in the workplace where people tend to hire and promote folks who are similar, despite the fact that a significant portion of the high-tech customer base is made up of minorities. She prescribes a first step by those in current leadership positions, i.e. white males, of acknowledging that there is a diversity problem that stems from unconscious bias. Second, she says, the
racial dynamics of the workplace must address stereotypes and racial or cultural biases. Third, based on this study, the leadership level must express a strong commitment to diversity, institute training on the subject, and measure success in achieving diversity; in other words, positive progress to weed out the vestiges of racial discrimination in employment can be confronted and corrected if the will is there.

Professor Gregory S. Parks and his co-authors, Rashawn Ray and Shawna M. Patterson, broaden the consideration of the Civil Rights Act of 1964 by discussing the longer, deeper history of black social, cultural and political organizations’ role in the struggle for civil rights. As they indicate, the struggle has been long and many organizations were formed over the 20th century that strove to achieve the promise of freedom, equality and justice. There are two fundamental themes that are woven throughout the article. First, the main focus is on the founding and development of Black Greek Letter Organizations with a review of their role in the fight for civil rights. The Alpha Kappa Alpha Sorority is used as a case study, although the history and activities of other fraternities and sororities are also included. Second, the authors approach their review in terms of the idea of racial uplift, or working to improve the lives of African Americans in a society designed for racial oppression in custom and in law.

Their historical review of African American organizations, including such mainstays as the NAACP, National Urban League and the Prince Hall Free Masons, reminds us that the Civil Rights Movement extends back through the founding of the country. We learn that AKA was a vital part of that movement, collaborating with other organizations and providing leadership to achieve gains in many arenas. Having examined the legacy of civic activism, the authors critique the AKA and other Black Letter Greek Organizations in terms of the current commitment to racial uplift. They explore a number of challenges facing these venerable organizations, including issues of racial identity, homophobia, the lack of strong organizational commitment, and achieving academic success on college campuses. The main conclusion reached is that, while these organizations were an essential part of the Civil Rights Movement, critical self-reflection and rededication to the cause of racial uplift are needed in order to stay relevant in the continuing fight for justice.

Professor Jasmine B. Gonzales Rose urges us to take a deeper look at contemporary challenges of racial discrimination by examining language (persons who speak a non-English language) and language ability as a source of rights to be considered under the Civil Rights Act of 1964. Specifically, while the Civil Rights Act was implemented in large measure to tackle the Jim Crow system of oppression against African Americans, the classic doctrinal analysis for finding racial discrimination does not easily
accommodate discrimination grounded in language. The Act identifies race and national origin as markers for stating a claim of discrimination in the various equality realms, such as housing, employment, education, etc.; Professor Gonzales Rose considers how Latinos can be discriminated against through language and language ability and the discrimination may not be viewed as being within the purview of the Act. Race and national origin could be said to be immutable characteristics, but language is not.

Professor Gonzales Rose presents a historical and contemporary review of discriminatory cases in education, employment, public accommodations, and access to the justice system. She ably demonstrates how language can be a proxy for discriminatory treatment based either on race or national origin. First, Latinos are often thought of as a racial, and not just a cultural, classification, especially when skin color is taken into account.84 Notwithstanding that Spanish-speaking persons or persons with Spanish surnames can come from many different nations and even the United States, language identification can become a trope for racial classification leading to purposeful or unconscious discrimination. Second, under the Act, there is a definitional challenge in stating exactly what is meant by national origin. How inclusive is this term and does it have a generational component, i.e., how far back in one’s ancestry do we have to go? Moreover, Professor Gonzales Rose posits that there exist biases against persons who are not native or accomplished English speakers. Hence, some Latinos experience unequal treatment because of a “perceived foreignness.” By studying the intersectionality of race, national origin, and language, Professor Gonzales Rose states a powerful case for developing civil rights doctrine in a manner that takes account of language and is still consistent with the principles of the Civil Rights Act of 1964.

Professor Richard Delgado offers his contribution to honor the late Professor Derrick Bell, the nation’s most preeminent scholar on race and the law. Professor Bell was also a civil rights lawyer active in the NAACP Inc. Fund’s drive to enforce equality and promote justice, especially in public schools. Delgado applies Bell’s interest convergence theory to the Civil Rights Act of 1964. The heart of the theory is that blacks and other minorities make social, economic, and political progress when their interests align with the interests of elite whites. Delgado critiques the standard traditional analysis that ties the legislation to massive civil rights activism and consciousness-raising of political leaders. Delgado’s deeper

84 I will leave to another day the discussion of whether, scientifically, humans can adequately be said to belong to separate races other than human.
analysis explores the impact of global economic and scientific competition with the former Soviet Union as the underlying motive for the passage of the Civil Rights Act of 1964. He concludes that these interests are no longer aligned, and thus the protections of the Act are being frittered away.

Our country had no choice but to pass the Civil Rights Act of 1964 because the essence of America’s soul is freedom, justice, and equality. The children of Alabama made America glimpse, even if only in part, its highest values in the mirror of their strength, perseverance, dignity, and deep desire to live free. The articles in this issue call for continued vigilance to not only maintain the hopes and dreams of the people who struggled and sacrificed, but also to continue the struggle in contemporary situations where rights and opportunities are limited by the essential qualities of each individual.

85 In Claude McKay’s poem he expresses a sense of hope in saying, “I need not gloom my days in futile dread, Because I see a part and not the whole.” Supra note 2. The articles in this issue fill in some of the missing parts of the analysis.
THE SHADOWS AND THE FIRE: THREE PUZZLES FOR CIVIL RIGHTS SCHOLARS

AN ESSAY IN HONOR OF DERRICK BELL

Richard Delgado*

INTRODUCTION: EXPLAINING A TRILOGY

During a conference commemorating the 1964 Civil Rights Act, a member of the audience asked one of the speakers, a prominent legal historian, what situational factors might have prompted Congress to enact this landmark law when it did. None of the participants had addressed this question, even though it echoed one that Derrick Bell had asked years earlier in connection with Brown v. Board of Education. After Bell’s groundbreaking article appeared in Harvard Law Review positing a materialist interpretation for that decision—and especially after historical research confirmed it years later—interest convergence emerged as a powerful tool for scholars seeking to understand the ebb and flow of racial events.

*John J. Sparkman Chair of Law, University of Alabama. J.D., U.C. Berkeley School of Law (Boalt Hall), 1974. Thanks to Jean Stefancic for comments and suggestions. My title borrows from Plato’s metaphor of the cave in which Socrates demonstrates the relation between appearance—the shadows—and reality in the form of a fire in a cave which casts reflections on a wall outside. An observer sees the play of shadows and believes he is seeing what is real when, in fact, he merely sees the reflection of a light source inside the cave. THE REPUBLIC: THE COMPLETE AND UNABRIDGED JOWETT TRANSLATION, BOOK VII (1991). This article posits that civil right scholars need to strive, as Bell did, to understand what is taking place inside the cave. For my own metaphor—of a child on a road trip—see note 20 infra.

3 In Brown v. Board of Education and the Interest-Convergence Dilemma, 93 Harv. L. Rev. 518 (1980) [hereinafter Interest-Convergence Dilemma], Bell posited that the decision arrived because of a momentary convergence of white and black interests, rather than the inexorable march of precedent or a fresh moral insight on the part of the Supreme Court. Interest convergence is a form of materialist analysis which seeks to explain the shifting tides of racial history by reference to underlying conditions such as labor needs, international competition,
Yet few, if any, seem to have applied this principle to the 1964 Civil Rights Act, which arrived only ten years after the Brown decision. This oversight invites attention, for the civil rights community had been imploring Congress for years to enact a broad statute forbidding discrimination, with little success. Sympathetic legislators would propose such legislation from time to time, only to see it wither for lack of support. When one such bill did pass in the 1870s, the Supreme Court struck it down as exceeding Congress’s authority. Yet in 1964, the skies opened when Congress enacted a wide-ranging statute prohibiting discrimination on the basis of race, color, religion, sex, or national origin in many areas. When it withstood Supreme Court and the search for profit. See infra Part I, discussing his signature proposition and subsequent research confirming it.

4 To wit, 1964, ten years after the landmark Brown decision. See infra Part IIB, outlining the standard account, which explains the statute’s arrival as a result of street protests, impassioned oratory, and a crisis of conscience among elite whites. 5 See Derrick Bell, Race, Racism, and American Law 145 (2d ed. 1980) [hereinafter RACE, RACISM]; A. Leon Higginbotham Jr., In the Matter of Color: Race and the American Legal Process—The Colonial Period (1978) [hereinafter MATTER OF COLOR] (discussing the period leading up to the 1964 Act, including black demands for federal protection); A. Leon Higginbotham Jr., Shades of Freedom: Racial Politics and Presumptions of the American Legal Process (1996) (discussing how the legal system contributed to ten racial “precepts” that relegate African Americans to second-class citizenship).

6 See Matter of Color, supra note 5; Robert Schenkkan, LBJ’s Second Great Battle: Enforcing the Civil Rights Act, Seattle Times, July 3, 2014, at A13 (noting the history of failure to enact a civil rights act). See Geoffrey Stone et al., Constitutional Law 802 (3d ed. 1996) (observing that the decision rendered the clause “a practical nullity” within five years of its ratification). See also The Slaughter-House Cases, 83 U.S. 36 (1872) (interpreting the Fourteenth Amendment’s Privileges and Immunities Clause so narrowly as to deprive it of much use as a source of civil rights protection).

7 See The Civil Rights Cases, 109 U.S. 3, 26 (1883) (ruling that the Civil Rights Act of 1875 was unconstitutional because it lay beyond Congress’s powers under the Thirteenth and Fourteenth Amendments). A 1957 statute, the 1957 Civil Rights Act, had weak enforcement powers. See Race, Racism, supra note 5, at 147; Gavin Wright, Sharing the Prize: The Economics of the Civil Rights Revolution in the American South 185-86 (2013) [hereinafter SHARING THE PRIZE].

8 To wit, public accommodations, education, and employment. See Race and Races: Cases and Resources for a Diverse America 147, 621, 731, 836 (Juan Perea et al. eds., 2d ed. 2007) (discussing the Act and the sectors that fall under it and a companion measure enacted in 1968).
The Shadows and the Fire

review, many states enacted their own measures, expanding the scope of civil rights protection even further.

Why did all this happen just then? The standard answer, the abovementioned historian explained, is that domestic activism, including street protests, coming on the heels of the assassination of a beloved president (with others soon to follow) set the stage for decisive action. Before then, the times were not right. The country’s thinking, especially in high circles, had not advanced sufficiently. Desegregating schools was as far as the country was prepared to go; further soul-searching and activism were needed before the nation was ready to expand Brown’s mandate to other areas. Sixties-era activism would provide that impetus, along with sober reflection in high places.

Perhaps sensing my reservations, the historian asked whether I thought this explanation was sufficient. I said I doubted it and that international considerations must have played a part as well, just as they did with Brown. I promised to look into the question. This essay is my effort to make good on that promise.

As we shall see, popular unrest and governmental soul-searching were only two of the reasons Congress took action in 1964. Bell had shown years earlier that “idealist” concerns, having to do with ideas, thoughts, public sentiment, and crises of conscience, rarely tell the full story. With Brown,

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10 See, e.g., Unruh Civil Rights Act CAL. CIV. CODE § 51 (Deering 2014). Enacted a few years earlier than the federal statute, the Act prohibits discrimination based on sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation. It applies to all businesses including hotels, motels, restaurants, theaters, hospitals, barber shops, housing establishments, and retail operations.
11 For example, Martin Luther King’s planned Good Friday and Easter Sunday demonstrations in Birmingham. See Walker v. Birmingham, 388 U.S. 307 (1967); RACE AND RACES, supra note 8, at 168-71 (discussing the civil rights movement).
12 To wit, those of John F. Kennedy, Robert Kennedy, and Martin Luther King, Jr.
13 Idealist approaches explain the march of history through powerful ideas, insights, argumentation, and the search for justice. Materialist reasons emphasize colonial expansion, geopolitical jockeying, the search for profits, and psychic gains for those on the winning side. See Richard Delgado, Two Ways to Think about Race: Reflections on the Id, the Ego, and Equal Protection, 89 GEO. L.J. 2279 (2001). Bell subsequently expanded his materialist view to the full sweep of black history in his casebook, RACE, RACISM, supra note 5 (discussing slavery, Jim
Bell showed, Cold War appearances and fear of domestic disturbance ("material" factors) played even more decisive roles. In particular, idealist concerns could not easily explain why the decision arrived when it did, nor its fate, months and years later, in the face of white resistance.

By the same token, I posit that sixties-era activism and late-arriving insights in high places do not fully account for the 1964 Civil Rights Act, much less its demise 25 years later with a series of Supreme Court decisions that robbed it of much of its force.

Parsimony suggests that we seek explanations for events that are both simple and fecund. This essay suggests such an explanation for the 1964 legislation: namely, economic and status competition with the former Soviet Union, including the space race. What emerges is an interpretation that draws on some of the same considerations that enabled Bell to explain Brown, but enlists the specific set that roiled the world ten years later.

Part I reviews Bell’s interpretation of Brown v. Board of Education as an interest-convergence case. Part II provides an overview of the 1964 Act and the standard account for its arrival. Part III questions this account and shows that international events, particularly economic and scientific competition with the Soviet Union, played an even more significant role in motivating Congress to take action when it did. Moreover, these other, more tangible considerations explain why the Act came to an end a few decades later with a series of Supreme Court decisions that robbed it of much of its efficacy.

This essay continues a trilogy devoted to pursuing and expanding Derrick Bell’s legacy. In the first article, I identified strands in Bell’s scholarship in the period just preceding his death. These show that Bell was concerned with law’s violence and was moving in the direction of a broad

Crow, the civil rights era, schools and education, the justice system, the black family, and many other topics).

14 See Interest-Convergence Dilemma, supra note 3, at 524-25.
16 See infra notes 66, 101-02 and accompanying; SHARING THE PRIZE, supra note 7, at 23 (noting that the Act lasted, in effect, for "perhaps 15 years").
17 By fecund, I mean an explanation that helps explain a wide range of phenomena. See Paul Vincent Spade, William of Occam, STANFORD ENCY. PHIL. (July 2011), at http://plato.stanford.edu/entries/ockham/ (explaining that one should not multiply entities beyond necessity).
synthesis explaining how and why law sometimes reinforces oppression, with the racial kind just one of many.

The present article, the second in the trilogy, shows how Bell, had he lived, might have applied interest-convergence to the 1964 Civil Rights Act. Having applied that principle to the judicial branch (in his *Brown v. Board of Education* article) and, as I do here (channeling him), to the legislative branch, the next step will apply critical analysis to the executive branch. Accordingly, a future article, the third in the series, will address why Barack Obama won election to the presidency in 2008, becoming the first African American to do so in over 200 years of U.S. history. In that article, I will show that the executive branch “got wisdom” when it turned colorblind in 2008 because this development was necessary for globalization to succeed, for the U.S. to press for environmental limits in the developing world, and for corporate capitalism to advance to the next level.19

The trilogy, then, examines the three branches of government, the judiciary, Congress, and the presidency, in light of material factors and interests, showing that, in the racial arena at least, we like to pretend that we

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19 That is, a president of mixed parentage and cosmopolitan upbringing could help America advance vital geopolitical, economic and strategic objectives. See Richard Delgado, *Why Obama? An Interest-Convergence Explanation of the Nation’s First Black President*, 33 LAW & INEQUALITY 345 (2015). [hereinafter *Why Obama?*]. With credibility in the eyes of emerging countries and oil-rich sheiks, such a leader could enable the tentacles of American business to extend into new regions. A multiracial-looking president could more readily secure cooperation from African and Asian nations in the campaign against radical Islam. See Mark Landler, *Obama Warns U.S. Faces diffuse Terrorism Threats: Tells West Point Cadets That Critics Misread His Cautious Response to World Crises*, N.Y. TIMES, May 29, 2014, at A1 (“We need partners to fight terrorists alongside us.”); Eric Schmitt, *U.S. Terrorism Strategy Increasingly Involves Proxies to Fight Battles*, N.Y. TIMES, May 30, 2014, at A8 (noting that his administration will set aside a “Counterterrorism Partnerships Fund to ‘facilitate partner countries on the front lines.’”). Moreover, the United States—as a developed country with a high standard of living—desires to promote environmental measures, including clean air and water, worldwide. This will necessitate convincing developing nations to forgo the smokestack industries many believe they need to advance rapidly and to realize that climate change is a serious danger requiring a multinational response. A president like Obama with a multiracial parentage could more readily advocate for America’s position abroad than one with a patrician background and family who immigrated on the Mayflower. See *Why Obama?*, supra; Paul Krugman, *The Climate Domino*, SEATTLE TIMES, June 7, 2014, at A9 (noting the need for a multinational response to global climate change).
act according to principles and high ideals, but in reality what calls the tune is national self-interest and the ambitions of elite groups.\textsuperscript{20}

I. **BROWN V. BOARD OF EDUCATION AND THE INTEREST-CONVERGENCE DILEMMA**

In Brown v. Board of Education and the Interest-Convergence Dilemma,\textsuperscript{21} Bell addressed a question that his colleague Herbert Wechsler had posed in a classic article. Published a short time after the Brown decision, Toward Neutral Principles of Constitutional Law\textsuperscript{22} challenged the civil rights community to provide a justification for sacrificing (as Wechsler saw it) the rights of whites in favor of those of blacks.\textsuperscript{23} When the Supreme Court upheld the right of black people to associate with whites over that of whites not to associate with them, it provided no neutral reason for this preference.\textsuperscript{24} Why should the right of the one group receive priority over that of the other? According to Wechsler, the Supreme Court never gave such a reason.\textsuperscript{25} Bell, however, did. For him, the justification for Brown’s ruling lay, simply, in a momentary coincidence that enabled both elite whites and ordinary blacks to gain from a ruling striking down segregation: interest convergence.\textsuperscript{26} White elites in the State Department and elsewhere benefited in their Cold War competition with the forces of godless communism because the decision enabled the United States to demonstrate to the uncommitted

\textsuperscript{20} Calls the tune, that is, for many breakthrough events, such as Brown v. Board of Education, the 1964 Civil Rights Act, and the election of the nation’s first black president. With these, we can easily adopt comforting theories of causation that assign a wide scope for personal control and agency. In this respect, we resemble those children whose parents give them a plastic steering wheel during long automobile trips. The child, sitting in the back seat, can pretend that by turning the wheel, he or she is directing the car. This amuses the child and gives the youngster a stake in the trip. But it is, of course, the parents who are directing the car, deciding how far to drive that day, and determining where to stop for the night. See Richard Delgado, Rodrigo’s Roundelay: Hernandez v. Texas and the Interest-Convergence Dilemma, 41 HARV. C.R.-C.L. L. REV. 23, 57 (2006) (discussing this similarity).

\textsuperscript{21} Interest-Convergence Dilemma, supra note 3.

\textsuperscript{22} Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1 (1959).

\textsuperscript{23} Id.


\textsuperscript{25} Wechsler, supra note 22, at 22, 26, 32.

\textsuperscript{26} Interest-Convergence Dilemma, supra note 3, at 518-25.
Third World, much of which was black, brown, and Asian, that it cared deeply about racial equality.  

In the years preceding Brown, the Soviet Union had scored propaganda victories each time the world press splashed headlines of American racial violence, occurring especially in the South. Each such story revealed the hollowness of the U.S. commitment to democracy and human rights and showed how this country was also about burly sheriffs, police dogs, whips, and lynching parties. We were in danger of losing the ideological war with our Cold War adversary.  

It was time, then, for America’s establishment to arrange a victory for African Americans, which the Supreme Court obligingly did in the form of the 1954 Brown decision. A second reason, according to Bell, was domestic, but still material in nature. When Brown came down, U.S. servicemen and women of color had been returning from World War II as well as the Korean War, having risked their lives fighting totalitarian enemies in the name of freedom and democracy. Many had experienced, for the first time, a relatively nonracist environment, where an alert minority youth who obeyed orders and performed with alacrity could move up the ranks, even achieving a commission. These veterans chafed against returning meekly to jobs of shining shoes and deferring to whites. For the first time in years, the possibility of racial unrest loomed.  

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29 Desegregation as a Cold War Imperative, supra note 27, at 111-12.
30 Id. at 80-82.
31 To wit, in the form of a landmark decision declaring segregated schools for white and black children unconstitutional.
32 Bell, supra note 3, at 524-25.
34 Id.
35 Id.
would go far to reassure black and Latino veterans that the country had their interests at heart.  

Bell’s article scandalized his liberal colleagues, who saw it as an unwarranted slight against a courageous Supreme Court that was at last doing the right thing. Some of the criticism abated when, a few years later, historian Mary Dudziak documented what Bell had merely posited in his Harvard article. Based on archival material and documents gleaned through Freedom of Information Act requests, she showed that Bell’s hypothesis was entirely correct. When the Supreme Court handed down the Brown decision, the Department of State had been secretly beseeching the Justice Department to throw its weight behind the NAACP’s campaign to reverse segregation, and for the very reasons Bell posited.

Brown’s subsequent career further vindicated Bell’s hypothesis. Once the celebrations died down, its ringing mandate subsided. The South mounted real resistance. Some school districts closed rather than desegregate. In the North, parents moved to the suburbs in what came to be known as “white flight.” The Supreme Court abetted this trend when it struck down metropolitan-wide relief a few years later. Today, sixty years after Brown, the nation’s schools are nearly as segregated as they were when the case came down.

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36 See id.
37 See id. at 1906.
38 COLD WAR CIVIL RIGHTS, supra note 27; Desegregation as a Cold War Imperative, supra note 27.
39 Desegregation as a Cold War Imperative, supra note 27, at 113-15, 118-19.
40 On the perils of triumphalist discourse, see Randall Kennedy, Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt, 88 COLUM. L. REV. 1622 (1986).
44 Milliken v. Bradley, 418 U.S. 717 (1994) (disapproving broad regional measures, such as busing that crossed district lines, to remedy school segregation).
45 See GARY ORFIELD ET AL., UCLA CIVIL RIGHTS PROJECT, BROWN AT 60: GREAT PROGRESS, A LONG RETREAT AND AN UNCERTAIN FUTURE (2014) (discussing the small amount of progress the nation has achieved in the years since Brown).
The same material factors that explained the initial decision also explain the retreat from it. Once the country gained the propaganda victory that the decision represented, school desegregation would bring few rewards. So long as Southern sheriffs kept their batons and cattle prods out of sight, the elite establishment could relax its vigilance, secure in the knowledge that the world press would not follow the slow erosion in school integration that ensued.

By 1964, however, the nation faced a different situation. Black frustration was rising over the slow pace of progress. The civil rights movement that sprang up in the late 1950s with peaceful sit-ins and boycotts of segregated lunch counters had taken on a harder edge, with the Student Non-Violent Coordinating Committee and, a little later, the Black Panthers prepared to challenge local authority more frontally. And our competition with the Soviet Union had taken on a different character.

II. THE 1964 ACT AND ITS SETTING

A. THE ACT AND ITS SPONSORS

Despite his initial resistance to the idea, President John F. Kennedy proposed a wide-ranging civil rights bill in mid-1963, a few months before his assassination in Dallas. His proposal, which came in a national speech, arrived on the heels of major civil rights protests in Birmingham, Alabama, and earnest conferences with civil rights leaders and his own Cabinet. During World War II, A. Philip Randolph had threatened a march on Washington as a protest against racial discrimination. In response, President

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46 See id. at 4-5 (noting the role of inadequate funding and racial segregation in many large school districts).
47 Rise and Fall, supra note 15, at 380.
48 Id.
49 See id. at 374.
52 Id. at 973 n.302.
Franklin Roosevelt signed the nation’s first executive order prohibiting discrimination in wartime industries.54

For the first time, large numbers of African Americans were threatening the normal functioning of American society.55 Some were advocating nonviolent resistance56 under the Southern Christian Leadership Conference and Martin Luther King, Jr., Ralph Abernathy, and Fred Shuttlesworth.57 A successful bus boycott in Montgomery, Alabama, and challenges to segregation in Birmingham riveted national attention on events in that region.58 The Freedom Riders and student demonstrations around the country had added new voices and numbers to the growing movement.59

After negotiation with the Republicans and consultation with his own advisors, President Kennedy proposed a skeletal bill shortly after his 1963 speech.60 A number of Republican congressmen offered amendments designed to weaken it even further, but the Democrats insisted on changes adding protection against discrimination in employment, voting, and a number of other areas.61 While Congress was deliberating, an assassin’s bullets killed Kennedy. Lyndon Baines Johnson stepped into the presidency, and pressure for a major civil rights bill increased.62 After a vigorous debate in the House and an even more fevered one in the Senate featuring filibusters by Strom Thurmond and Robert Byrd63 and an effort to derail the bill by

55 MORRIS, supra note 54, at xi.
57 MORRIS, supra note 54, at 83.
61 Id. See also SHARING THE PRIZE, supra note 7, at 14. The Voting Rights Act, which covered voting alone, arrived about one year later. Id. at 183.
62 Id. See also O’Donnell, supra note 60.
63 These may have been the longest filibusters in U.S. history. See Schenkkan, supra note 6, at A13.
adding women as a protected category,64 the law passed by substantial majorities in both houses.65

B. EXPLAINING THE 1964 ACT: THE STANDARD ACCOUNT

With a buildup and enactment not greatly different from those that accompany any major piece of social legislation,66 most initial commentary centered on the Act’s likely impact on the country’s future. What little analysis sought to explain its arrival did so in terms of the times and the role of great men who struggled with their conscience and finally did the right thing.67

These explanations, centering on the role of popular demand and courageous leaders, have not changed much today. Nearly a half century later, a major civil rights casebook attributed the Act to black activism, beginning with A. Philip Randolph’s threatened march on the capital years earlier.68 A prominent historian of civil rights, Aldon D. Morris, writing in 1984, assigned credit to the development of nonviolent protest by Martin

64 See Rosenberg, supra note 50, at 1151-53; Schenkkan, supra note 6 (“Women had [received] special protection under the new law, not out of any moral imperative but as a poison-pill amendment introduced by Virginia Rep. Howard W. ‘Judge’ Smith, who hoped that Northern senators sensitive to union concerns would not support a bill that granted women equal rights.”). Women’s rights, and some women’s careers, have flourished since the Act went into effect. See Dorothy Brown, Should Black Women Lean In: What Sheryl Sandberg Doesn’t Understand, 6 Ala. C.R.-C. L. L. Rev. (forthcoming 2014). Although their protection is still incomplete. See Trina Jones, The Civil Rights Act at 50: An Examination of Title VII’s Ebb and Flow, 6 Ala. C.R.-C.L. L. Rev. (forthcoming 2014).
65 See O’Donnell, supra note 60.
66 I.e., the usual editorials and speeches pro and con, congressional maneuvering, and a host of parliamentary maneuvers aimed at derailing its passage through Congress. See generally O’Donnell, supra note 60.
67 See RACE AND RACES, supra note 8, at 163-64 (explaining the Act as the product of a valiant civil rights movement); Rosenberg, supra note 50, at 1148 (“The Act owes its existence to the civil rights movement of the early 1960s that created a political and moral force that moved Congress and the courts.”); Schenkkan, supra note 6 (“The Civil Rights Act was the culmination of decades of bitter struggle and very real sacrifice. Only 11 days before Johnson signed the act, three young Freedom Summer volunteers disappeared in Mississippi. The bodies of James Chaney, Michael Schwerner, and Andrew Goodman would not be recovered for another month.”).
68 See RACE AND RACES, supra note 8, at 161-62.
Luther King, Jr.⁶⁹ A law professor at Georgetown attributed the Act to protests resulting from “years of organizing by some 85 local affiliates of the Southern Christian Leadership Conference” and the “integrated legion of Freedom Riders . . . young activists in the Freedom Summer [and] the more than 250,000 demonstrators in the March on Washington, a quarter of whom were white.”⁷⁰ Books like Vincent Harding’s There Is a River⁷¹ and John Egerton’s Speak Now Against the Day⁷² emphasize the role of ordinary people, some black, some white, who demonstrated bravery in the face of danger.

Courageous leaders who struggled with their conscience and ended up doing the right thing also come in for praise. A collection of essays devoted to the passage of the Civil Rights Act highlights the roles of presidents, including John F. Kennedy and Lyndon Johnson, and depicts their struggles with their conscience, or with refractory Southern politicians.⁷³ A

⁶⁹ MORRIS, supra note 54, at xi, 37, 83, 87, 91.
⁷¹ See generally VINCENT HARDING, THERE IS A RIVER: THE BLACK STRUGGLE FOR FREEDOM IN AMERICA (1993) (likening the civil rights movement to a river that can be stopped momentarily but will break free in time).
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famous presidential historian attributed the Act’s enactment to Johnson’s skill and determination coming on the heels of pressure from black leaders such as Roy Wilkins and Whitney Young, as well as the public at large.74 As she put it: “The country responded with empathy and understanding. More and more people realized something had to be done.”75

A book reviewer in The New York Times echoed her sentiments. Reviewing two recent books about the Act, Kevin Boyle wrote: “Drafted in the midst of a crisis created by the courage of children, pushed through the Senate past the defenders of an indefensible social order, it marked one of those extraordinary moments when the promise and practice of equality align and democracy is affirmed.”76 One of the books, written by an editor of Vanity Fair, is entitled “An Idea Whose Time Has Come: Two Presidents, Two Parties, and the Battle for the Civil Rights Act of 1964.”77 These are, of course, pristine examples of idealist interpretations of history, but many others take the same approach.

III. QUESTIONING THE STANDARD ACCOUNT: THE ROLE OF ECONOMIC COMPETITION AND THE SPACE RACE

Ideas—both the ones sweeping the nation and the ones in the hearts and minds of national leaders—unquestionably played major roles in advancing the civil rights agenda in the early sixties, including the 1964 Civil Rights Act.78 The build-up to the Act was full of bravery, personal sacrifice, and struggle. But, as with Brown v. Board of Education, national self-interest entered into the picture as well.79 Moreover, these more tangible factors,

75 Id.
78 See supra notes 66-74 and accompanying text (describing activism during this period).
79 For example, presidential historian Doris Kearns Goodwin also mentioned the material needs of the citizenry as a possible cause: “You had huge monopolies swallowing up small businesses. You had a huge gap between the rich and the poor and the middle class struggling to survive. . . . Suddenly, the country was talking about these problems.” See Cooper, supra note 74.
unlike their idealist counterparts, help explain why the Act came down when it did\(^\text{80}\) but lost force about 25 years later\(^\text{81}\), so that today it offers scant protection against discrimination.

A. **ECONOMIC COMPETITION WITH THE SOVIET UNION**

Blacks and their sympathizers had been agitating for major civil rights legislation for decades and achieving, at most, very narrow victories. Yet, in 1964, Congress relented and granted them a remarkable boon.\(^\text{82}\) One could, of course, attribute the Act’s arrival to even more fervent wishing and hoping, and more inspired advocacy, including, perhaps, the newly theorized nonviolent kind.\(^\text{83}\) In short, the breakthrough came, according to this view, because the civil rights community was doing what it had been doing for nearly a century, but with more energy, more impressive theorists and leaders, and in an organized fashion.\(^\text{84}\) By the same token, one could seek to explain the breakthrough in terms of the audience.\(^\text{85}\) Liberals in Congress and the White House, in this view, were more receptive than those who came

\(^{80}\) Viz, in 1964.


\(^{82}\) That is, the 1964 Civil Rights Act.

\(^{83}\) See *supra* notes 53-60 and accompanying text.

\(^{84}\) This is essentially the standard view. See *supra* Part IIA. But see SHARING THE PRIZE, *supra* note 7, at 81-82 (refuting this standard view and noting, on the contrary, that the early sit-ins, boycotts, and demonstrations of the period immediately prior to the 1964 Civil Rights Act—evincing the newly refreshed vigor—failed). National action—especially legislation—coming just a few years later, coupled with federal enforcement and motivated by anti-Soviet concerns, proved the key. See *infra* text and notes immediately.

\(^{85}\) That is, not those who spoke, beseeched, and raised their voices, but those on the other side—the ones who heard and took action.
earlier. Educated at Harvard and other elite institutions, they were more attuned to civil rights pleas. Or perhaps, desiring re-election, they were merely acceding to society’s wishes.

This form of argument is precisely what Derrick Bell rejected in connection with Brown v. Board of Education, for reasons that now strike most civil rights scholars as largely correct. It behooves us, then, to consider the possibility that the arrival, ten years later, of the 1964 Civil Rights Act also had roots in material circumstances, particularly Cold War imperatives.

It is this set of factors that goes far to explain the Act’s arrival and exit. Insistent advocacy and empathic leaders only get one so far, either in the effort to understand civil rights history or in ordinary life. Otherwise, African Americans would have made great progress under Obama (a lifelong liberal and fellow person of color), which they have not. Latinos, who have been agitating for immigration reform, with marches, civil disobedience, and unending protests, would have made strides as well. What does make a critical difference? Derrick Bell suggested a few places we should look.

With the Civil Rights Act of 1964, many of the same factors that Bell identified as paving the way for Brown v. Board of Education were in effect ten years later but with a few subtle shifts. For example, the same veterans of color, whose role Bell highlighted, still had not been fully integrated into postwar society. The Cold War with the Soviet Union, however, had in the

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86 This, too, is a major part of the standard view, see supra Part IIA.
89 These factors included Cold War competition with the Soviets and large numbers of veterans of color itching for something to do. See infra text and notes immediately. See also SHARING THE PRIZE, supra note 7, at 23 (noting that the two civil rights acts, the 1964 version and the voting rights act that came soon afterward, were “made possible by a unique and fleeting conjunction of circumstances”).
90 See generally COLD WAR CIVIL RIGHTS, supra note 27.
interim become even more heated, besetting the thoughts and concerns of the average citizen.\footnote{91 See \textit{id.} at 11.}

In short, competition with the Soviet Union had now entered a new stage.\footnote{92 See \textit{Desegregation as a Cold War Imperative}, \textit{supra} note 27, at 73-75.} During the period immediately preceding \textit{Brown}, competition between the two countries centered on appearances and ideology.\footnote{93 \textit{Id.}} Each side was vying to appear more attractive in the eyes of the uncommitted Third World, most of which was black, brown, or Asian.\footnote{94 \textit{Four Reservations}, \textit{supra} note 37, at 1908.} America’s racial policies, which at that time included brutality, segregation, and Jim Crow laws, were an acute embarrassment.\footnote{95 \textit{Desegregation as a Cold War Imperative}, \textit{supra} note 27, at 110.} When a photogenic event—such as a beating of a young black man, or a group of burly white Southern police officers dragging away a group of well-dressed college students who had been peacefully sitting-in in a segregated restaurant—appeared splashed on the front pages of newspapers in capitals across the world, our Cold War rivals won propaganda victories.\footnote{96 \textit{COLD WAR CIVIL RIGHTS}, \textit{supra} note 27, at 49.} Considerations such as these prompted white elites to engineer a well-deserved victory for the NAACP lawyers in \textit{Brown}.\footnote{97 \textit{See supra} notes 27-38 and accompanying text.}

By the late 1950s, however, competition between the two superpowers had entered a different phase.\footnote{98 \textit{Desegregation as a Cold War Imperative}, \textit{supra} note 27, at 73.} The few uncommitted nations that were prepared to join one camp or the other based merely on appearances and ideology—idealistic considerations—had already done so.\footnote{99 \textit{Id.}} The new competitive arena was economic development. Many postcolonial societies were eager to advance rapidly, industrialize, and exploit their natural resources and human capital. Colonialism, tribal wars, diseases, and other disadvantages had left them far behind Europe and the U.S.\footnote{100 See JARED DIAMOND, \textit{GUNS, GERMS, AND STEEL: THE FATES OF HUMAN SOCIETIES} (1997) for a description of some of them.}

Which model—free-market democracy or central planning and managed economies—would bring them the rapid gains they needed to fill hungry mouths and stave off unrest? The United States then boasted the world’s number-one economy, with an enviable standard of living.\footnote{101 ANGUS MADDISON, \textit{THE WORLD ECONOMY: A MILLENNIAL PERSPECTIVE} 131 (2001).} But the Soviet Union had seemingly come out of nowhere, successfully completing
one five-year plan after another and developing its agriculture, factories, and infrastructure in impressive fashion.\textsuperscript{102} Beginning from near-feudal conditions only a half-century earlier and enduring setbacks in the form of two world wars that visited famine, destruction, and many millions of deaths, the Soviets, by dint of careful planning and coordinated effort, had made impressive gains.\textsuperscript{103} Its citizens were by and large happy and well fed, even if they often had to stand in long lines for bread and potatoes. The Russians invited Third World students to attend their world-class universities\textsuperscript{104} and delegations of unionists and ordinary citizens to visit their factories and cities to admire their counterparts’ housing, material possessions, and access to high culture, opera and ballet.\textsuperscript{105}

It was time for America to show that it, too, could mobilize its entire citizenry and integrate everyone into the workforce. It could enable them to live in decent houses (even Levittown) and attend decent schools regardless of the color of their skin. The South, particularly, seemed stuck in a time warp, with segregated cities, schools, and workplaces impeding the region’s social and economic progress.\textsuperscript{106} The country needed a boost in morale and a

\textsuperscript{102} See R.W. DAVIES, SOVIET ECONOMIC DEVELOPMENT FROM LENIN TO KHROUSHCHEV (1998) (describing how central planning enabled the country to evolve from an agrarian society with a subsistence economy to a major industrialized power). See also ROBERT C. ALLEN, FARM TO FACTORY: A REINTERPRETATION OF THE SOVIET INDUSTRIAL REVOLUTIONS 153 (2003) (deeming the Soviet program largely successful).

\textsuperscript{103} DAVIES, supra note 102, at 4; ALLEN, supra note 102.


\textsuperscript{105} The Soviet economy grew faster than that of the U.S. during the period 1950 to 1960. See MADDISON, supra note 101, at 274-75, 298. By 1970, it was about 60 percent the size of its American counterpart. See MARK HARRISON, ACCOUNTING FOR WAR: SOVIET PRODUCTION, EMPLOYMENT, AND THE DEFENSE BURDEN 145 (1996).

\textsuperscript{106} SHARING THE PRIZE, supra note 7 (showing how black activism and federal action—and not slow, inevitable economic modernization or population growth—transformed the South from a backward region to one with a vibrant economy and an integrated workforce). Management, local attitudes, and the feelings of white workers all combined to mire the South in a discriminatory pattern of maintaining
renewed commitment to a common struggle. It needed an enlarged, integrated workforce and Army. The South needed pressure from above—specifically, from Washington—to dislodge itself from the miasma in which it found itself.107

In such an atmosphere, the Act passed relatively easily.108 And the hoped-for gains ensued. The post-war economy soared, especially in the South.109 Unemployment and poverty, particularly among blacks, dropped.110 Black students’ school attendance, graduation rate, and scores on standardized tests improved.111 Housing markets desegregated slightly.112

all-white workforces even when this was detrimental to a company’s profitability. E.g., id. at 33-34, 53-57, 101, 124.

107 Id. at 65 (noting that “The vast majority of white southerners had a vision of economic progress in which blacks had no more than a subordinate role” and that during the 1950s, urban businesses across a wide range hired no blacks as clerks, bank tellers, firefighters, automobile mechanics or anything else), 101 (noting that prior to this time, many southern businessmen found themselves “locked into a low-level equilibrium,” even if “they did not see it that way themselves”), 92-104 (noting that federal pressure provided the key to change across a host of industries and services). See also Kathleen O’Toole, Economist Says Civil Rights Movement was Economic Success, STANFORD NEWS SERVICE (Jan. 26, 2000), http://news.stanford.edu/pr/00/000126CivilRightsEcon.html (noting that even modern businessmen in the South were worried about maintaining white patronage). Only coercion, emanating from above, could show white supervisors that desegregation was tolerable, and the owners that their customers would not flee if a black or two were working in the store as clerks. See SHARING THE PRIZE, supra note 7, at 106-14, 262.

108 SHARING THE PRIZE, supra note 7, at 22-25.

109 Id. at 27-29.

110 See id. at 16-17 (noting that prior to the Act, segregation was practiced not just in rural backwaters, but had “originated... in urban settings, in an attempt by leaders who considered themselves progressive to adapt the racial order to the modern world”). See also id. at 26, 106-15, 240-49, 234-35 (noting that in the wake of the Act, poverty, unemployment, and other indicators of black misery improved).

111 See SHARING THE PRIZE, supra note 7, at 26, 128, 150-66, 260 (noting that school desegregation arrived, but more slowly than it did with employment and public accommodations); Impact of the Civil Rights Laws U.S. DEPARTMENT OF EDUCATION, OFFICE OF CIVIL RIGHTS (1999), at http://www2.ed.gov/about/offices/list/ocr/docs/impact.html; Schenkkan, supra note 6.

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Many stores, hotels, and businesses that formerly did not serve blacks began doing so. Southern sheriffs shielded their batons—at least while the press was looking. Colleges and universities relaxed barriers to black and Jewish students and, within a few years, adopted affirmative action, which produced even more gains. All these measures, predictably, yielded more minorities in the professions, Congress, corporate suites, and among the officer ranks in the military.

In the face of serious competition from the Soviet Union’s planned economy, the United States was showing a little muscle of its own. The 1964 Civil Rights Act was a prime instrument of this economic revival. In particular, as Gavin Wright convincingly shows, a centralized show of force was the only measure that could dislodge the South from a host of economically and socially backward folkways, habits, and presuppositions that were holding it back.

(noting that this trend was in effect even before the Act arrived because of common law doctrines such as an innkeeper’s duty to shelter travelers).

113 SHARING THE PRIZE, supra note 7, at 259. Prior to this time both craft and unskilled white workers felt certain that the repression of black economic opportunities operated to their advantage and should not be relaxed. Most whites in the South believed in economic progress, to be sure—but of a form that would continue to relegate blacks to a subordinate role. Id. at 65, 77, 90-104.


115 HARDING, supra note 71.

116 ROSENBERG, supra note 41, at 162-69.

117 SHARING THE PRIZE, supra note 7, at 2, 25, 32-150 (describing racism’s “iron grip” on the region in the days before the civil rights revolution). Civil rights laws disrupted trends that showed no signs of abating and turned the South in a direction in which it would never have faced without outside force. Id. at 74-138.

A dirt-poor region made rapid advances in literacy, economic development, education, and wealth disparities. Id. African Americans gained entry to jobs formerly denied them, including some of the most desirable. Id. at 116-26, 129-35. Many returned home from the North, where they had moved to escape racial oppression. Id. at 142-46, 249. Whites and blacks alike benefited; black gains did not come at the expense of whites. Id. at xi, 9, 26-30, 146-213. But the South had
B. THE SPACE RACE

The intelligence establishment had known for some time that the Soviets were on the verge of a major breakthrough in the area of space.\textsuperscript{118} When Sputnik showed the world in 1957 that the Russians were indeed outstripping the West in this area,\textsuperscript{119} American political leaders were taken aback.\textsuperscript{120} The Russians actually seemed to have edged into the lead. What would all those Third World countries, who were closely comparing the two systems and deciding which one to emulate, think?\textsuperscript{121}

Within a few years, national leaders produced the 1964 Civil Rights Act, which, in turn, provided a shot-in-the-arm to the economy by enabling blacks to find more productive work than shining shoes and picking cotton.\textsuperscript{121} With a labor force now potentially ten percent larger, the economy grew, demonstrating to uncommitted onlookers that the West had a few aces up its sleeve.\textsuperscript{122} One of those aces was a multiracial workforce with workers playing their parts, producing and buying cars, TV sets, and other consumer goods that kept the economy humming.\textsuperscript{123}

The Act also boosted the military by enabling it to fill its ranks with recruits of color, thus allowing the United States to field a larger army in Indochina and elsewhere,\textsuperscript{124} all the while its scientific establishment labored mightily to bring the U.S. up to par with the Soviet Union in the space race. It did so, of course, with an American satellite in 1958 and, years later, a

\begin{itemize}
\item to be forced by the federal government to act, in effect, in its own economic self-interest. \textit{Id.} at 75, 110.
\item Indeed, it appears that the Soviets, in a show of cooperative spirit, asked their American counterparts to supply a piece of scientific equipment for the satellite they were building. See Paul Dickson, \textit{Sputnik's Impact on America}, PBS (Nov. 6, 2007), http://www.pbs.org/wgbh/nova/space/sputnik-impact-on-america.html.
\item See id. (noting that the satellite, which the Soviets launched on October 4, 1957, prompted frantic concern among both ordinary citizens and national leaders). \textit{See also} PAUL DICKSON, \textit{SPUTNIK: THE SHOCK OF THE CENTURY} (2001).
\item Dickson, \textit{supra} note 118 (deeming the impact “enormous and unprecedented”).
\item E.g., O'Toole, \textit{supra} note 107, at 101, 258-66.
\item \textit{Sharing the Prize}, \textit{supra} note 7, at 101-02, 259-60; O'Toole, \textit{supra} note 107.
\item The U.S. during this period was engaged in two proxy wars with the communist camp, namely Korea, 1950 to 1953, and Vietnam, 1955 to 1975.
\end{itemize}
manned flight to the moon. These accomplishments mitigated embarrassment over being overshadowed by the Soviet Union in space and the military, while the price of competing with the U.S. cost the Russians dearly, ultimately bankrupting its economy. When, years later, the Soviet intelligence establishment learned that President Ronald Reagan was secretly preparing to launch an expensive “star wars” program that would negate the Soviets’ missile force, the Soviets admitted defeat. Despite having advanced from a backward, near-feudal culture to a modern industrialized one in just two generations, they could not match the West’s combined might. The Berlin Wall fell in November 1989. The Soviet Union began breaking apart. And the world was free from the specter of international communism. A few Third World countries, such as Cuba, hung onto the socialist ideal, but the game was largely over.

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126 By the end of the arms race with the United States, the Soviet Union was devoting nearly one third of its total output to the military. See ROBERT STRAYER, WHY DID THE SOVIET UNION COLLAPSE 127-30 (1998).
The West won. In 1954, with Brown v. Board of Education, it had gained a remarkable victory in the war of appearances. And it would soon win the war of economic competition, with the Civil Rights Act piling on pressure, by continuing to inflict defeat after defeat on the Soviet economy for 25 years until it cried uncle.

But the story of might and accomplishment has a dark side. When the Soviets, their economy and empire in tatters, finally admitted defeat in 1989, the Civil Rights Act and other gains of the sixties were no longer needed. Without overseas competition, the U.S. economy no longer needed blacks so badly, either as cannon fodder or for their labor. A conservative Supreme Court obliged by gutting the Act with a series of decisions that rendered it toothless. Retreats on affirmative action soon followed. Today, black participation in the workforce is low, with almost as many black men languishing in prison as attending college. The nation’s public schools are nearly as segregated as they were in the days of formal segregation.

The racial situation in the United States has reverted, both quantitatively and in terms of discourse, to one reminiscent of much earlier times. And with Latinos, it is worse than it has been for some time. But economic leadership and the space race were not only background features “in the air” that led to the 1964 Act by a kind of cultural osmosis. Instead, policymakers wrote and spoke of them specifically and by name, both then and later.

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131 See text and notes 26-36 supra.
132 See Desegregation as a Cold War Imperative, supra note 27, at 61.
133 See supra note 81 and accompanying text.
136 See UCLA CIVIL RIGHTS PROJECT, supra note 45.
137 As happened earlier, these regressions are beginning to attract the world’s attention. See Richard Delgado, Four Reservations on Civil Rights Reasoning by Analogy: The Case of Latinos and Other Nonblack Groups, 112 COLUM. L. REV. 1883, 1905-09 (2012).
C. IDENTIFYING NATIONAL SELF-INTEREST AS A DETERMINANT OF THE 1964 CIVIL RIGHTS ACT

A few influential figures specifically identified economic or scientific competition with foreign adversaries as having enabled Congress to enact the 1964 Civil Rights Act. For example, Joseph Stiglitz, reflecting on the postwar period, asked:

So why has America chosen these inequality-enhancing policies [deregulation and a low corporate income tax]? Part of the answer is that as World War II faded into memory, so too did the solidarity it had engendered. As America triumphed in the Cold War, there didn’t seem to be a viable competitor to our economic model. Without this international competition, we no longer had to show that our system could deliver for most of our citizens.139

Other writers credit economic incentives and the search for profits even more expressly. Historian Gavin Wright, for example, highlights the financial underpinnings of much of the civil rights movement, including the 1964 statute, noting that without it the South would not have developed as rapidly as it did.140 Earlier, Lyndon Baines Johnson reportedly supported the Act not merely because it was the right thing to do but out of the belief that “racial discrimination was . . . damaging the economy of his beloved South and that the area would have to abandon its racist attitudes to gain economic prosperity.”141 For Wright, the Civil Rights Act not only benefited the South, “expanding economic opportunity was an important motivation for the . . . movement from its earliest days.”142

140 SHARING THE PRIZE, supra note 7, at 4, 6, 11, 13-15, 19-23, 84, 156-63, 97-101, 116-21; O’Toole, supra note 107.
141 See Lyndon Johnson, HISTORY LEARNING SITE (2005), http://www.historylearningsite.co.uk/Lyndon_Baines_Johnso n.htm.
CONCLUSION

Derrick Bell wrote that if you want to understand the zigs and zags of racial history, you need to pay attention to interest convergence. Racial progress for blacks came, he wrote, when such progress also lay in the best interest of elite whites. When it ceased to be so, retrenchment and reversal of fortune would set in.

Examining the passage of the 1964 Civil Rights Act and its eventual demise 25 years later, one sees a similar path. One could, of course, insist that the primary drivers were idealist in nature: When things improved it was because we wished them so (and marched and demonstrated and preached and prayed) and because good-natured men and women in high places finally relented and agreed to do the right thing. Then, when things predictably deteriorated a little later, one would look for the same sort of explanation and find it in some supposed loss of faith, lack of energy, or bad luck with leaders.

But this way of interpreting events is strained and cannot explain anomalies such as the deterioration of Latino fortunes at a time of fervent marching, speech-making, and importuning. It also cannot explain the end of the civil rights era at a time when the community of color needed and stridently demanded new programs, better education, a continuation of affirmative action, and relief from racial profiling and excessive incarceration.143

Material considerations can explain these turns of fortune. They can help explain why the 1964 Act arrived when it did and went into retreat when it did. They can explain why African American fortunes across many fronts waxed in the mid- and late 1960s, when the Soviet economy was threatening to outshine ours in the eyes of the developing world. They can explain why this country discarded blacks and black programs in the eighties, with the Reagan revolution, Star Wars, and the fall of the Berlin Wall. As Derrick Bell once told us, racial justice may from time to time “count[] among the interests” that courts and policymakers deem important.144 But when it does, a search inside the cave is apt to discover a fire—elite white self-interest—that is responsible for the activity outside. And when the interests of whites and blacks do not align, “as with abolition, the number who will act on morality alone [will generally be] insufficient to bring about the desired . . . reform.”145

144 Interest-Convergence Dilemma, supra note 3, at 523.
145 Id. at 525.
TITLE VII AT 50: 
CONTEMPORARY CHALLENGES FOR 
U.S. EMPLOYMENT DISCRIMINATION LAW

Trina Jones

INTRODUCTION

In June 2003, Jennifer Lu and eight other young adults of color filed a lawsuit against Abercrombie & Fitch (A&F) alleging that the clothing retailer had engaged in race, color, and national origin discrimination by refusing, among other things, to hire qualified African Americans, Latinos/as, and Asians to work on its sales floors as “Brand Representatives.” The plaintiffs allegedly did not have the “A&F Look,” a “virtually all-white image” that Abercrombie used to market its clothing. When the company did hire people of color, the plaintiffs asserted that A&F “channel[ed] them to stock room and overnight shift positions and away from visible sales positions, keeping them out of the public eye.” Over time, the lawsuit expanded as other A&F applicants and employees across the United States joined the original plaintiffs. As a result of work done by the Equal Employment Opportunity Commission, private law firms, and a coalition of civil rights groups, in November 2004, the lawsuit settled with A&F agreeing: (1) to pay $50 million dollars in damages and fees; and (2) to implement a variety of measures designed to diversify its workforce and to end the company’s discriminatory practices.

1 Professor of Law, Duke University School of Law. Research for this essay was supported in part by a gift to the Duke Law School from the Eugene T. Bost, Jr. Research Professorship of the Cannon Charitable Trust No. 3.
3 Id.
4 Id.
Had Jennifer Lu and her fellow plaintiffs sought employment with Abercrombie & Fitch or a similar retailer forty years earlier, they would have been without legal options under U.S. federal law. In 1963, policies like Abercrombie & Fitch’s were prevalent in the United States, and employers were free to exclude women and people of color from employment opportunities at will. Indeed, people of color and women were discouraged from even applying for employment in some sectors of the economy due to the ubiquitous presence of employment ads, often found in classified sections of newspapers, seeking individuals of a specific race or gender.

This state of affairs changed on July 2, 1964, when in the midst of Freedom Summer and at the height of the Civil Rights Movement, the U.S. Congress enacted the Civil Rights Act of 1964 (CRA of 1964). If Brown v. Board of Education had removed the first pillar in the fortress of Jim Crow by invalidating the doctrine of separate but equal, then the CRA augured its ultimate destruction. The civil rights legislation was hard won, requiring the courageous efforts of Presidents Kennedy and Johnson, Dr. Martin Luther King, Jr. and the Southern Christian Leadership Conference, the National Women’s Party, and countless other organizations and individuals whose sacrifice should not be forgotten. The Act passed after three contentious months of debate in the U.S. Senate, including a 54-day filibuster, and with sizable opposition from southern representatives who feared the effects of racial integration. This fear was illustrated in U.S. Senator Richard Russell’s (GA) infamous statement that “[w]e will resist to the bitter end any measure or any movement which would have a tendency to bring about social change.”

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8 Freedom Summer refers to a famous campaign undertaken during the summer of 1964 in the Deep South to eliminate laws and other tactics designed to deny African Americans the right to vote. James Chaney (an African American from Mississippi), Andrew Goodman and Michael Schwerner (two northerners of Jewish heritage) were killed by members of the Ku Klux Klan for their protest activity during Freedom Summer.
10 Jim Crow refers to that era in U.S. history, from approximately 1876 through roughly 1964, which was defined by laws and social practices mandating racial segregation in most aspects of American life.
equality and intermingling and amalgamation of the races in our (Southern) states,"\textsuperscript{12} and U.S. Senator Strom Thurmond’s (SC) observation that these so-called Civil Rights Proposals, which the President has sent to Capitol Hill for enactment into law, are unconstitutional, unnecessary, unwise and extend beyond the realm of reason. This is the worst civil rights package ever presented to the Congress and is reminiscent of the Reconstruction proposals and actions of the radical Republican Congress.\textsuperscript{13}

At the time of its enactment, the Civil Rights Act of 1964 was the most comprehensive piece of civil rights legislation in U.S. history. The Act was wide-ranging, prohibiting discrimination in voting, public accommodations, public facilities, education, employment, and federally assisted programs. A centerpiece of this landmark legislation was Title VII,\textsuperscript{14} which bars discrimination in employment on the basis of race, color, religion, sex, and national origin.\textsuperscript{15}

Over the years, Title VII has been, in some ways, interpreted broadly by the U.S. Supreme Court. Yet, in many respects, interpretations of the statute have not kept pace with the changing nature of discrimination in the modern workplace. This essay examines the evolution of Title VII and three contemporary challenges to U.S. employment discrimination law. Part I briefly describes several ways in which the statute has been expanded. Part II then turns to three issues that underscore conceptual limitations with recent interpretations of Title VII and with U.S. anti-discrimination law more generally: (1) sexual orientation and gender identity discrimination; (2) implicit bias, structural discrimination, and the requirement of intent; and (3) formalism. Examination of these matters demonstrates how U.S. courts have addressed three highly contested issues with which all legal systems must contend: (1) what constitutes discrimination; (2) upon what basis does one determine which classes or groups are protected; and (3) what are the ultimate goals of anti-discrimination law. I conclude that although there has been progress, recent cases touching upon these issues pose considerable

\textsuperscript{12} Id.
challenges for the pursuit of corrective and distributive justice in the United States.

I. TITLE VII’S EXPANSION

Title VII forms the heart of U.S. employment discrimination law. The statute bars intentional discrimination targeted at specific individuals and groups as well as the use of neutral criteria that disparately affect protected groups. For example, Title VII would render illegal a city’s refusal to promote a woman to police chief if that refusal were based upon a belief that police officers will not follow or respect a female chief. Title VII would also prohibit a policy requiring that police officers possess a four-year college degree (i.e., a neutral criterion that might produce a disparate impact on racial minorities) unless the police department can show that having advanced educational credentials is necessary to perform the job.

Over the years, Title VII has been, in some ways, interpreted expansively by the U.S. Supreme Court to cover forms of discrimination that may not have been anticipated by or within the contemplation of Congress at the time the CRA of 1964 was enacted. For example, Title VII’s prohibition against sex discrimination initially focused on the wholesale exclusion of women from the workplace or their segregation within certain occupations. Title VII challenged those who believed that a woman’s place was solely in the home or that women could be teachers, librarians, nurses, and waitresses, but not police officers, firefighters, doctors, lawyers, and mechanics. As Title VII opened up employment spaces that were previously off limits to women and people of color, second generation discrimination emerged, including sexual and racial harassment and more nuanced forms of racial and gender stereotyping. Thus, while women and people of color were allowed into previously segregated spaces, once there they were frequently subject to

21 See generally id. (examining internal workplace structures and norms that serve to exclude women and people of color).
hostile and abusive treatment, denied opportunities for advancement, and required to perform their race or gender in certain prescribed ways.

Fortunately, due to the groundbreaking work of scholars like Catharine MacKinnon, “sex” in Title VII has been read to include prohibitions against sexual harassment and to embrace, to some extent, gender stereotyping. Thus, not only are women no longer automatically excluded from certain workplaces, they are also no longer forced to suffer (without some legal recourse) the indignity of unwelcome sexual demands at work or to endure workplaces permeated with sexually demeaning language and images. In addition, confident and assertive women need not fear that they will be told to “walk more femininely, talk more femininely, and enroll in charm school” in order to be considered for promotion. This is not to say that women are no longer subject to discriminatory workplace restrictions and hostility. They are. The above interventions, however, have enabled more women to seek redress in these circumstances.

In addition to arguing for a broad interpretation of “sex” under Title VII, since 1964 U.S. scholars have also pressed the courts to acknowledge and to accept that individuals may be subject to discrimination on multiple bases. For example, an employer may treat an Asian woman differently from a White woman or an Asian man because the Asian woman is both a woman and a person of color. Thus, she may be subject to stereotypes to which White women and Asian men are immune. Prominent U.S. legal scholars such as

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24 Id. at 235 (recognizing claim of a woman who was told that her chances of being promoted to partnership would increase if she would “take a course at charm school” and “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry”).

25 For example, Asian women are sometimes stereotyped as “passive, repressed, naïve lotus blossoms; sexually exotic or seductively mysterious geisha; or devious and wicked dragon ladies.” Neither Asian men nor White women are generally subject to these stereotypes. Trina Jones, Intra-Group Preferencing: Proving Skin Color and Identity Performance Discrimination, 34 N.Y.U. REV. L. & SOC. CHANGE 657, n. 41 (2010) (citing Virginia W. Wei, Asian Women and Employment Discrimination: Using Intersectionality Theory to Address Title VII Claims Based on Combined Factors of Race, Gender and National Origin, 37 B.C. L. REV. 771 (1996)).
Kimberlé Crenshaw and Angela Harris\(^{26}\) have argued persuasively that such intersectional claims ought to be acknowledged. Still other scholars have urged courts to consider the ways in which persons are differently situated within protected categories and how intra-group differences, like skin color or various identity performances, may be used to harm subsets of workers. Thus, employers who hire African Americans but prefer lighter-toned African Americans over darker-toned African Americans may find their decision-making subject to challenge under Title VII’s prohibition against color discrimination.\(^{27}\) Similarly, employers who prefer people of color who consciously or subconsciously cloak or downplay their racial identity as opposed to highlighting it, or women who embrace conventional notions of femininity as opposed to those who reject such notions, may also find themselves on the wrong end of a lawsuit.\(^{28}\) All of these claims,\(^{29}\) and


\(^{28}\) See generally DEVON W. CARBADO & MITU GULATI, *ACTING WHITE?: RETHINKING RACE IN POST-RACIAL AMERICA* (2013); KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* (2006). Thus, employers may prefer African Americans with racial performances more similar to that of President Obama than that of Al Sharpton or Jesse Jackson. Indeed, Senator Harry Reid and Vice President (then Senator) Joe Biden’s observations about President Obama’s appeal during the 2008 Democratic primaries lend support to the salience of identity performance. Few will forget Biden’s statement, “I mean, you got the first mainstream African-American who is articulate and bright and clean and a nice-looking guy… I mean, that’s a storybook, man” or Senator Reid’s observation that the United States was ready to embrace a Black presidential candidate, especially Obama who was a “light-skinned” African American “with no Negro dialect, unless he wanted to have one.” JOHN HEILEMANN & MARK HALPERIN, *GAME CHANGE: OBAMA AND THE CLINTONS, MCCAIN AND PALIN, AND THE RACE OF A LIFETIME* 36 (2010) (recording Reid’s comments); Jason Horowitz, *Biden Unbound: Lays into Clinton, Obama, Edwards*, N.Y. OBSERVER (Feb. 5, 2007, 12:00 AM), http://observer.com/2007/02/biden-unbound-lays-into-clinton-obama-edwards (documenting Biden’s comments).

\(^{29}\) As noted earlier, even in areas where Title VII has been interpreted broadly, there has been pushback. Harassing practices that many women find hostile and offensive are still too commonly viewed by men as appropriate. See Gary Langer,
employment discrimination lawsuits in general,\textsuperscript{30} are incredibly difficult for plaintiffs to win. These theoretical developments in U.S. anti-discrimination law are nonetheless important because they reflect a recognition, on some level, of both the complexity of social identities and the nuanced ways in which discrimination occurs.

Although Title VII’s development has been slow, and not necessarily linear, the statute, coupled with the Equal Pay Act,\textsuperscript{31} the Pregnancy

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\textit{One in Four U.S. Women Reports Workplace Harassment}, ABCNEWS.GO.COM (Nov. 16, 2011), http://abcnews.go.com/blogs/politics/2011/11/one-in-four-u-s-women-reports-workplace-harassment/. Plaintiffs who assert intersectional claims based upon multiple factors are likely to be accused of whining. And proving intra-group claims will likely be difficult as employers may successfully argue that they are not discriminating, for example, on the basis of race if they hire some African Americans (even if those who are hired have a preferred skin tone or racial performance). For additional examination of these issues, see Trina Jones, \textit{Intra-group Preferencing: Proving Skin Color and Identity Performance Discrimination}, 34 N.Y.U. REV. L. & SOC. CHANGE 657 (2010) (examining difficulties faced by plaintiffs alleging intra-group discrimination). However, with at least a doctrinal basis for bringing these claims, one hopes and expects that over time material and normative changes will occur.

\textsuperscript{30} A voluminous literature documents both plaintiffs’ low success rates in these cases and explores possible reasons for these outcomes. See, e.g., Kevin M. Clermont & Stewart J. Schwab, \textit{How Employment Discrimination Plaintiffs Fare in Federal Court}, 1 J. EMPIRICAL LEGAL STUD. 429 (2004) (finding that employment discrimination cases settle less often than other types of cases and that plaintiffs in employment discrimination cases are less likely to win than other plaintiffs); Kevin M. Clermont, Theodore Eisenberg & Stewart J. Schwab, \textit{How Employment Discrimination Plaintiffs Fare in the Federal Courts of Appeals}, 7 EMP. RTS. & EMP. POL’y J. 547, 566 (2003) (showing that employment discrimination plaintiffs fare poorly on appeal, with a 7 percent reversal rate when defendants win at trial compared to a 42 percent reversal rate when plaintiffs win at trial); Michael Selmi, \textit{Why Are Employment Discrimination Cases So Hard to Win?}, 61 LA. L. REV. 555, 560-61 (2001) (showing that plaintiffs in employment discrimination cases win only 18.7 percent of the time in bench trials, compared with success rates of 43.6 percent and 41.8 percent for insurance and personal injury cases, respectively); Memorandum from Joe Cecil & George Cort, Fed. Judicial Ctr., to Hon. Michael Baylson, Estimates of Summary Judgment Activity in Fiscal Year 2006 (June 15, 2007) (showing that in 2006 the national average for summary judgment grants resulting in termination of cases was 70 percent in civil rights cases and 73 percent in employment discrimination cases—the highest for federal civil cases).

Discrimination Act, has produced considerable change in the United States over the last fifty years. These statutory interventions, and the normative shifts to which they have contributed, have led to workplaces and employment standards that look very different from what U.S. workers experienced five decades ago. In 1960, 37.7 percent of women participated in the U.S. labor force. In 2012, that number had risen to 57.7 percent. In addition, the percentage of doctors, lawyers, accountants, professors, U.S. senators, representatives, governors, and Forbes 500 CEOs who are female has increased significantly. In 1960, nearly two-thirds of women in the U.S. workforce held clerical, service, or sales positions and only 13 percent held professional positions. In 2010, 40.6 percent of employed women held managerial and professional positions. In addition, in 1963, women earned 59 cents on the dollar compared to what a White man earned. Today, that figure is about 80 cents.

The above advances are critically important as employment is essential to the economic well-being and dignity of employees and their families. Yet, considerable obstacles remain to equality of opportunity. Indeed, the glass and marble ceilings have yet to shatter. Although more women are in managerial and professional positions than in the past, they are still underrepresented in the highest echelons of business. Moreover, racial

\[34\] NATIONAL EQUAL PAY TASK FORCE, Fifty Years After the Equal Pay Act: Assessing the Past, Taking Stock of the Future 10 (June 2013).
\[36\] NATIONAL EQUAL PAY TASK FORCE, supra note 34, at 6.
\[38\] NATIONAL EQUAL PAY TASK FORCE, supra note 34, at 6.
\[40\] See Claire Cain Miller, An Elusive Jackpot: Riches Come to Women as CEOs, but Few Get There, N.Y. TIMES (June 7, 2014),
and sexual harassment are continuing problems and disturbing levels of job segregation remain not only by gender, but by race. For example, while 34.8 percent of employed White men hold managerial or professional positions, the same is true for only 15.3 percent of employed Latino men and 23.5 percent of employed Black men. The percentages by race of employed workers in managerial or professional positions are similarly stratified for women: 41.5 percent of White women compared to 24.1 percent of Latina women and 33.8 percent of Black women. The unemployment rate of African Americans has also been consistently double that of Whites.

II. CONTEMPORARY CHALLENGES

As demonstrated in Part I, Title VII has evolved over the last five decades and has improved the employment experiences of covered groups.

http://www.nytimes.com/2014/06/08/business/riches-come-to-women-as-ceos-but-few-get-there.html?_r=0 (noting that women represent only 5.5 percent of the 200 highest paid CEOs in the United States); Bryce Covert, The Record-Breaking Number of Women in CEO Jobs is Still Pretty Pitiful, THINK PROGRESS (Sept. 22, 2014), http://thinkprogress.org/economy/2014/09/22/3570450/women-ceo-highest-share/ (noting that while women hold 5 percent of CEO positions at Fortune 500 companies, that number is still “very small when compared to women’s 47 percent share of the overall workforce and 38 percent share of management jobs”).


42 Id. In addition to workforce stratification by race, gender divisions continue to exist. See NATIONAL EQUAL PAY TASK FORCE, supra note 34, at 6 (noting that in 2012, women were still “much more likely to enter occupations where the majority of workers [were] female, including healthcare, education and human service fields” and that “over half of all women continue[d] to be employed in lower-paying sales, service and administrative support positions”).

43 See Drew Desilver, PEW RESEARCH CENTER, Black Unemployment Rate is Consistently Twice that of Whites (Aug. 21, 2013), http://www.pewresearch.org/fact-tank/2013/08/21/through-good-times-and-bad-black-unemployment-is-consistently-double-that-of-whites/; UNITED STATES DEP’T OF LABOR, BUREAU OF LABOR STATISTICS, Economic News Release, Table A-2. Employment Status of the Civilian Population by Race, Sex, and Age, available at http://www.bls.gov/news.release/empsit.t02.htm (noting that in December 2014, the unemployment rate for Whites was 4.6 percent, for African Americans it was 10.2 percent, and for Asians it was 4.2 percent). See also UNITED STATES DEP’T OF LABOR, BUREAU OF LABOR STATISTICS, Economic News Release, Table A-3. Employment Status of the Hispanic or Latino Population by Sex and Age, available at http://www.bls.gov/news.release/empsit.t03.htm (noting that in December 2014, the unemployment rate for Hispanics was 6.4 percent).
But challenges remain and efforts to address some of these challenges may be hampered by the failure of U.S. law to keep pace conceptually with the changing nature of discrimination in the modern workplace. This Part examines three areas that highlight ways in which that law has lagged: (1) LGBTQ44 rights; (2) implicit bias, structural discrimination, and the requirement of intent; and (3) formalism. It then briefly considers why U.S. anti-discrimination law has, in some areas, seemingly reached a standstill.

A. Sexual Orientation and Gender Identity

Despite substantial advocacy for the rights of lesbian, gay, bisexual, transgender, and queer (LGBTQ) persons, neither U.S. constitutional law nor U.S. statutory law afford adequate protection to these individuals.45 In the realm of U.S. constitutional law, there has been incremental progress since 1986, when the U.S. Supreme Court in Bowers v. Hardwick upheld the constitutionality of a Georgia law that criminalized certain sexual acts between same-sex individuals.46 In a 5-4 opinion, the Court stated that the U.S. Constitution conferred neither “a right of privacy that extends to homosexual sodomy” nor a “fundamental right to engage in homosexual sodomy.”47 In reaching this determination, the justices in the majority observed that they were not “inclined to take a more expansive view of [the Court’s] authority to discover new fundamental rights imbedded in the Due Process Clause,” noting that “[t]he Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.”48

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44 Although I reference lesbian, gay, bisexual, transgender, and queer persons through use of the acronym LGBTQ, it is important to note that the analysis herein focuses primarily on sexual orientation. Sexual orientation, in the simplest sense of the term, means the gender to whom a person is sexually and/or romantically attracted. Sexual orientation should not be confused with gender identity, which broadly refers to a person’s internal sense of being male, female, or somewhere else along a gendered continuum and the expressive activity or behavior that may accompany that person’s sense of identity.

45 Although this essay focuses primarily on statutory protections in the employment arena, it is important to keep trends elsewhere in the law in mind as they may affect the development and scope of statutory protections. The analysis in this section is therefore not limited to Title VII and employment.


47 Id. at 190-91.

48 Id. at 194.
In 2003, however, the U.S. Supreme Court reversed this stance in *Lawrence v. Texas.* In that case, the Court invalidated a Texas sodomy law that criminalized same-sex sexual activity. The Court noted:

> [this case] involve[s] two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. “It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.” The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.

In 2013, the Supreme Court again decided a case involving the rights of sexual minorities in *United States v. Windsor.* In that case, the Court


50 Id. at 578 (internal citations omitted). In a sharp turnaround from *Bowers,* the Court recognized that constitutional principles are not fixed, but rather evolve, observing:

> [those] who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment ... knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

51 133 S. Ct. 2675 (2013). In 2013, the U.S. Supreme Court also decided *Hollingsworth v. Perry,* a case challenging a ballot initiative (Proposition 8) which provided that only marriages between a man and a woman would be valid and recognized in California. Hollingsworth v. Perry, 133 S. Ct. 2652 (2013). In *Perry,* the lower courts had found Proposition 8 to be illegal. The Supreme Court declined to decide the case on its merits, finding that the parties who were appealing the lower court rulings lacked “standing” to pursue the case before the Supreme Court. The effect of the Court’s ruling was to reinstate the lower courts’ determinations that Proposition 8 was invalid.
considered key provisions of the Defense of Marriage Act (DOMA), a federal statute that defined marriage as a union between a man and a woman and, in effect, rendered same-sex couples ineligible for certain federal benefits. In invalidating parts of DOMA, the Court determined that

the principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage. This requires the Court to hold, as it now does, that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.52

Importantly, in *Windsor*, instead of banning all state-imposed prohibitions on same-sex marriage, the Court merely extended protection to those same-sex couples whose marriages were legal under their state’s laws. Thus, the Court declined to address whether a constitutional right to same-sex marriage existed, leaving that issue for another day.

That day came on June 26, 2015, when, in one of the most positive developments for the rights of sexual minorities to date, the U.S. Supreme Court announced its decision in *Obergefell v. Hodges*.53 In *Obergefell*, the Sixth Circuit Court of Appeals had upheld Ohio’s prohibition against same-sex marriage, thus creating a split in the circuit courts regarding the power of states to ban same-sex marriages (and to refuse recognition of same-sex marriages performed elsewhere).54 On review, the Supreme Court found such

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52 *Windsor*, 133 S. Ct. at 2696. The Court also noted that “the liberty protected by the Fifth Amendment’s Due Process Clause contains within it the prohibition against denying to any person the equal protection of the law.” *Id.*


54 The Court granted certiorari in three other cases decided by the Sixth Circuit which raised the same legal issues: Tanco v. Haslam, 135 S. Ct. 1040 (involving a Tennessee ban); Deboer v. Synder, 135 S. Ct. 1040 (involving a Michigan ban); and Bourke v. Beshear, 135 S. Ct. 1041 (involving a Kentucky ban). The Court consolidated the four cases and limited its review to the following questions: (1) “Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex?” and (2) “Does the Fourteenth Amendment require a
bans unconstitutional and also held that states may not refuse to recognize same-sex marriages performed in other states.55 The Court noted:

…the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality. Here the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them.

These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.56

While Lawrence, Windsor, and Obergefell were significant steps forward and were heralded by civil rights advocates, they do not extend the same protection to LGBTQ persons that U.S. constitutional law offers other groups. As things currently stand, the Court has never found sexual orientation (or gender identity) to be a suspect or a quasi-suspect classification, which would subject distinctions on this basis to the highest level of constitutional review or at least intermediate review. Under strict scrutiny, the most demanding level of review, a governmental classification must serve a compelling state interest and the means employed to achieve

state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?” See Obergefell v. Hodges, 135 S. Ct. 2584, 2593 (2015).
55 135 S. Ct. at 2605, 2607-08.
56 135 S. Ct. at 2604. The Court articulated four reasons why marriage is a fundamental right and noted that these reasons apply with equal force to same-sex and opposite-sex couples: (1) the “right to personal choice regarding marriage is inherent in the concept of individual liberty;” (2) the right to marry “supports a two-person union unlike any other in its importance to the committed individuals;” (3) marriage “safeguards children and families;” and (4) marriage is a “keystone of our social order.” 135 S. Ct. at 2599-2602.
that interest must be narrowly tailored. Under intermediate scrutiny, the challenged decision must further an important governmental interest and utilize means that are substantially related to that interest. Instead of employing strict or intermediate scrutiny in Lawrence and Windsor, the Court applied a sort of “heightened” rational basis level of review (the lowest level of review with a bit of added bite). Under that standard, the government merely has to set forth a rational basis for its decision to treat a class of citizens differently, which in Lawrence and Windsor it could not do.

In Obergefell, while the Court found that state bans on same-sex marriage violate both due process and equal protection principles secured by the Fourteenth Amendment, the Court did not clearly set forth the governing standard or framework that it employed in reaching this result. In other words, it did not clarify what level of scrutiny applies to decisions based on sexual identity. In addition, the opinion is narrowly focused on marriage equality and does not address the pervasive and ongoing discrimination that LGBTQ persons continue to face in other areas.

These omissions are important because, without protected class status, LGBTQ persons remain vulnerable to discriminatory actions by governmental actors (particularly at the state level) in a variety of settings, including employment, interactions with the criminal justice system, and the provision of goods and services. To be sure, the Court is making progress in the area of LGBTQ rights. But, like the Court’s “with all deliberate speed” approach in the second Brown v. Board of Education decision, the present

59 Windsor, 133 S. Ct. at 2696; Lawrence, 539 U.S. at 594.
60 Justice Kennedy hints at the possibility that such bans may be an unlawful form of sex-based discrimination, but he does not explicitly endorse this view. See 135 S. Ct. at 2603 (noting that “sex-based classifications in marriage remained common through the mid-20th century” and that “[t]hese classifications denied the equal dignity of men and women”).
62 In Brown I, decided in 1954, the Supreme Court invalidated the principle of separate but equal that had been established roughly six decades earlier in Plessy v. Ferguson. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (holding that
Court has, at least until Obergefell, seemed satisfied taking an incremental approach regarding the constitutional rights of LGBTQ persons.63

On the statutory front, the rights of LGBTQ persons also continue to be inadequately protected. Strong arguments can be made that discrimination against lesbian, gay, and bisexual individuals64 on the basis of sexual orientation is a form of normative gender stereotyping (e.g., men should not love men) and is per se based on sex (e.g., a woman who loves a man is not penalized in the same way as a man who loves a man).65 Yet, U.S. courts have not generally included discrimination on the basis of sexual orientation within Title VII’s prohibition against sex discrimination.66 Courts have relied

segregation in public education violated the plaintiffs’ equal protection rights); Plessy v. Ferguson, 163 U.S. 537, 551-52 (1896) (upholding a Louisiana statute mandating separate railway cars for Whites and Blacks). However, a year later, in Brown II, the Court stated that implementation of a remedial plan for the constitutional violation it had recognized in Brown I should occur “with all deliberate speed”—rather than immediately—given the need to deal with varied local conditions. Brown v. Bd. of Educ., 349 U.S. 294, 300-01 (1955).

63 To be sure, there may be advantages to this approach. Changes in public opinion and the trend in the lower courts in favor of sexual equality may have influenced the Court’s ruling in Obergefell. Interestingly, in Obergefell, Justice Kennedy may have signaled that the time for “all deliberate speed” was over with regard to the rights of LGBTQ persons. In response to the Sixth Circuit’s argument that it would be “appropriate … to await further public discussion and political measures before licensing same-sex marriage,” Justice Kennedy notes that “there has been far more deliberation than this argument acknowledges.” 135 S. Ct. at 2605. He goes on to point out that “when the rights of persons are violated, ‘the Constitution requires redress by the courts,’ notwithstanding the more general value of democratic decisionmaking… This holds true even when protecting individual rights affects issues of the utmost importance and sensitivity.” Id.; but see 135 S. Ct. 2584, 2612 (Roberts, C.J., dissenting (arguing that “stealing this issue from the people will for many cast a cloud over same-sex marriage, making a dramatic social change that much more difficult to accept”)).

64 I omit transgender and queer here in order to avoid conflating the diverse concerns and in some cases differing challenges faced by members of LGBTQ communities. See supra note 44.

65 For analogous reasoning in a case involving interracial relationships, see Parr v. Woodmen, 791 F.2d 888 (11th Cir. 1986) (finding employer’s refusal to hire the plaintiff because he had a spouse of a different race to be a form of prohibited race discrimination under Title VII).

upon a textual analysis, noting that Title VII does not explicitly include sexual orientation in its list of protected classifications and that “sex” for purposes of Title VII means biologically driven differences between men and women.67 Courts have also relied upon legislative history, concluding that Congress did not intend to protect sexual orientation when Title VII was initially enacted.68 (This argument is of course analytically flawed given that courts have read Title VII to include sexual harassment and gender stereotyping claims, neither of which, arguably, was contemplated by Congress in 1964.)69 Although Congress has come increasingly closer to enacting the Employment Non-Discrimination Act (ENDA),70 with the Senate voting to pass this Act in 2013, few expect this or similar legislation to pass the House of Representatives and to make it to President Obama’s desk, particularly given the Republican Party’s control of both the House and the Senate through 2016. This lack of statutory protection for LGBTQ persons exists despite the efforts of gay rights advocates and despite the increasing acceptance of LGBTQ persons by non-LGBTQ Americans, particularly younger Americans.71

67 See, e.g., Ulane v. Eastern Airlines, Inc., 742 F.2d 1081, 1087 (7th Cir. 1984) (holding that Title VII does not protect transsexuals, and noting that “[i]f the term sex as it is used in Title VII is to mean more than biological male or biological female, the new definition must come from Congress.”).

68 See, e.g., id. at 1086; see also DeSantis, 608 F.2d at 329 (holding that Congress did not intend “sex” in Title VII to include “sexual orientation”).

69 See Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107 (2d Cir. 2004) (recognizing gender stereotyping claim); see also Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 79 (1998) (noting that “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed”).

70 The Employment Non-Discrimination Act (ENDA) would prohibit discrimination based upon sexual orientation, among other things, and has been introduced several times in Congress. To date, this legislation has failed to pass both houses of Congress. For an overview of ENDA’s history, see Amanda Terkel, ENDA Vote: Senate Votes to Outlaw LGBT Workplace Discrimination, HUFFINGTON POST (Nov. 7, 2013), http://www.huffingtonpost.com/2013/11/07/enda-vote_n_4228502.html (discussing the Senate’s most recent action on ENDA, but predicting difficulties in the House); Human Rights Campaign, Employment Non-Discrimination Act: Legislative Timeline, available at http://www.hrc.org/resources/entry/employment-non-discrimination-act-legislative-timeline.

71 See Lydia Saad, In U.S., 52% Back Law to Legalize Gay Marriage in 50 States (July 29, 2013), available at http://www.gallup.com/poll/163730/back-law-
To be sure, there has been notable progress within the executive branch. For example in July 2014, President Obama signed Executive Order 13672, which amends previous executive orders and prohibits discrimination on the basis of gender identity as well as sexual orientation. In December 2014, the Department of Justice announced that its position in future litigation would be that “Title VII … extends to claims of discrimination based on an individual’s gender identity, including transgender status.” And, in July 2015, the Equal Employment Opportunity Commission (EEOC) took a major step forward in protecting the rights of LGBTQ persons by ruling that discrimination on the basis of sexual orientation is a form of sex discrimination under Title VII. In *Baldwin v. Department of Transportation*, the EEOC found that “sexual orientation is inherently a ‘sex-based consideration,’ and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII.

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74 Baldwin v. Dep’t of Transp., EEOC Appeal No. 0120133080 (July 15, 2015), available at http://www.eeoc.gov/decisions/0120133080.pdf. The Equal Employment Opportunity Commission (EEOC) had already taken the position that Title VII prohibits discrimination on the basis of transgender identity. The EEOC had also previously stated that discrimination against lesbian, gay, and bisexual workers based on sex stereotypes (e.g., beliefs that men should love only women or that women should love only men) is a form of sex discrimination under Title VII. See U.S. Equal Employment Opportunity Commission, *What You Should Know: EEOC and Enforcement Protections for LGBT Workers*, available at http://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm; Macy v. Dep’t of Justice, EEOC Appeal No. 0120120821 (Apr. 20, 2010) (accepting Title VII transgender identity claim), available at http://www.eeoc.gov/decisions/0120120821%Macy%20v%20DOJ%20ATF.txt; Veretto v. United States Postal Serv., EEOC DOC 0120110873 (July 1, 2011) (accepting Title VII sexual orientation claim), available at http://www.eeoc.gov/decisions/0120110873.txt.
The Commission reasoned that sexual orientation discrimination is sex discrimination because “it involve[s] treatment that would not have occurred but for the individual’s sex; because it [is] based on the sex of the person(s) the individual associates with; and/or because it [is] premised on the fundamental sex stereotype, norm, or expectation that individuals should be attracted only to those of the opposite sex.”

The President’s actions and those of the DOJ and the EEOC grant greater protection to LGBTQ persons who are employed by the federal government or by federal contractors. Although private employers are not technically bound by these actions, these developments are nonetheless significant for plaintiffs in private sector cases. For example, one can expect that some courts will defer to the EEOC’s interpretation of Title VII in cases involving private employers. In addition, plaintiffs desiring to sue private employers can now expect that the EEOC will more likely find cause in cases alleging sexual orientation discrimination and that the EEOC may choose to litigate some of these claims.

These developments are indeed positive. However, the lack of explicit statutory protection under Title VII (or a statute like ENDA) and the absence of protected class status for constitutional purposes leave LGBTQ persons

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76 Id. at 14.
77 Baldwin applies to federal employee claims as the case involved the Commission’s review of a federal agency determination. The case was brought by a Federal Aviation Administration (FAA) employee who alleged that he had been discriminated against because he was gay. After the FAA dismissed the complaint, the employee appealed to the EEOC. Id. at 1.
78 To be sure, some courts may disagree based upon an absence of Congressional intent. That is, some courts may read Congress’ failure to pass ENDA as evidence that Congress does not intend to prohibit discrimination based on sexual orientation in federal statutory law. See Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 261 (3d Cir. 2001). Indeed, the weakest part of the EEOC’s reasoning in Baldwin is on this point. The Commission argues that “the Supreme Court has ruled that ‘[c]ongressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change.’” Baldwin, EEOC Appeal No. 0120133080, at 13. The problem with this reasoning is that this is not an area where Congress has failed to act by doing nothing. Congress considered ENDA and the Act’s sponsors were unable to secure enough votes to pass the legislation (although they came very close the last time around). This suggests that far from being neutral or agnostic on the issue, Congress (at least a Republican-controlled Congress) does not want to protect against discrimination based upon sexual orientation.
vulnerable to discriminatory acts by state-level governmental employers and private employers. Importantly, an impediment for both constitutional and statutory law appears to be a general reluctance to expand the number of protected classifications in U.S. anti-discrimination law. This reluctance is heightened by a belief among some policy makers that sexual orientation is different from race, color, religion, sex, and national origin. Historically, U.S. courts have relied upon four factors as gatekeepers to protected status: (1) immutability; (2) visibility; (3) relevancy; and (4) a pervasive history of discrimination. Although the appropriateness of employing some of these factors has been persuasively challenged, their continued use demonstrates an unwillingness to depart from previous analytical models once these models have become entrenched, and a reluctance to engage in the sort of context-specific analysis required to root out various forms of discrimination. These factors may influence popular and judicial understandings of sexual orientation as many Americans still seem to believe that sexual orientation is not innate and others maintain that it does not have to be rendered visible—thus, in their minds, differentiating sexual orientation from other protected classifications such as race and gender.

The poverty of these arguments is readily apparent. For example, and as others have noted, immutability should be abandoned as a gatekeeper to protected status. To be sure, few would contest the unfairness of penalizing persons for traits they cannot change. The immutability theory, however, implies that decisions based on mutable traits are somehow less pernicious and therefore merit less attention, presumably because groups can escape harm by electing to change the trait. Yet, as Professor Kenji Yoshino has observed, “Jews generally can change or conceal their religion, while blacks

79 However, as the EEOC points out in Baldwin, treating sexual orientation discrimination as sex discrimination does not require an expansion of protected categories. Baldwin, EEOC Appeal No. 0120133080, at 14.
80 Here, I focus only on sexual orientation to avoid conflating discrimination based on sexual orientation and discrimination based on gender identity. See supra note 44.
82 Analytical inflexibility and shortcuts may also be used as convenient covers for animus and hostility toward marginalized groups.
generally cannot change or conceal their race. This surely does not make anti-Semitic legislation more legitimate than racist legislation.84

Even assuming arguendo that lesbian, gay, and bisexual persons could change their orientation,85 it does not follow that they should do so. Indeed, the suggestion that sexual minorities should change or hide their orientation to avoid discrimination violates what has been referred to as the “new immutability,” a theoretical approach that would protect traits that “society deems too important to ask anyone to change,86 or to conceal.

B. Implicit Bias, Structural Discrimination, and the Requirement of Intent

In addition to failing to provide adequate protection for LGBTQ persons, U.S. anti-discrimination law has focused on proof of intent in order to establish a discrimination claim. Yet, as U.S. society has come to embrace an anti-discrimination norm (in theory), such proof is increasingly difficult to find as individuals either cover their motives or are driven by subconscious or implicit bias.87 A focus on intent, and an approach that views

84 Yoshino, supra note 83, at 505.
85 Importantly, the majority in Obergefell seemed to accept that sexual orientation is immutable. 135 S. Ct. 2584, 2596 (2015) (noting “[o]nly in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable”). Some within the scientific and broader community, however, continue to challenge this conclusion. See, e.g., David Masci, PEW RESEARCH CENTER, Americans Are Still Divided On Why People Are Gay (Mar. 6, 2015), available at http://www.pewresearch.org/fact-tank/2015/03/06/americans-are-still-divided-on-why-people-are-gay/.
86 Elizabeth F. Emens, Compulsory Sexuality, 66 STAN. L. REV. 303, 377-78 (2014); see also Susan R. Schmeiser, Changing the Immutable, 41 CONN. L. REV. 1495, 1412-19 (2009) (examining the “new immutability”). In short, the immutability analysis misses the mark because the ability or inability of a group to avoid negative action reveals little about whether that action is legitimate and whether a group merits protection. As the “new immutability” theorists posit, the immutability analysis also ignores the costs of conversion, or changing one’s status. As Professor Yoshino notes, change or conversion may not be a real option for those who will see the loss associated with a change of status as greater than the gains from escaping discrimination. Yoshino, supra note 83, at 510. Thus, any suggestion that LGBTQ persons should change or cover their identity, if that were indeed possible, includes an implicit, perhaps unconscious, belief that their current identity lacks value or positive meaning, which is untrue.
87 See generally MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE (2013) (examining the development and application of implicit biases); IMPLICIT RACIAL BIAS ACROSS THE LAW 25, 45, 61
discrimination as individually motivated, isolated acts, also fails to address embedded structural barriers and mechanisms that produce disparate employment outcomes along lines of race and gender.

In early Title VII cases, the U.S. Supreme Court seemed to acknowledge the difficulties inherent in an intent-based model when it allowed plaintiffs to establish a prima facie case of discrimination by showing a statistically significant disparity between an employer’s workforce and the relevant labor market. In *Hazelwood School District v. United States* and *International Brotherhood of Teamsters v. United States*, the Court allowed an inference of intentional discrimination to be drawn from such disparities. In *Griggs v. Duke Power Company*, the Court went even farther by declining to require that plaintiffs establish intent. In that case, the employer utilized a high school diploma requirement and intelligence tests that produced a disparate impact on racial minorities. In invalidating these requirements, the Court observed that Title VII “proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.” Further, the Court stated that “intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as ‘built-in headwinds’ for minority groups and are unrelated to measuring job capability…Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.” Thus, facially neutral criteria that produce a disparate impact on protected groups were prohibited if they were not job-related and were not consistent with an employer’s legitimate business needs.

In the Civil Rights Act of 1991, Congress cleared up any uncertainty about whether Title VII embraced disparate impact theory by adding specific language to the statute codifying the theory. Yet, disparate impact claims are still subject to question and debate. To be sure, the Supreme Court has long held that a showing of impact alone is insufficient to establish a constitutional violation. Thus, plaintiffs bringing equal protection challenges against state actors must offer additional proof to show intentional discrimination. In recent years, however, members of the Court have

(Justin D. Levinson & Robert J. Smith eds., 2012) (examining the impact of implicit biases in various areas of the law).

91 401 U.S. at 431-32.
92 *Id.* at 432.
displayed skepticism about whether Title VII’s statutory inclusion of disparate impact theory can survive constitutional challenge.

This point was made most clearly in the 2009 case of *Ricci v. DeStefano*. In that case, the city of New Haven, Connecticut, administered a test to determine who, among its firefighters, would be eligible for promotion to the position of lieutenant or captain. When the test produced a disparate impact on minority firefighters, the city threw out the results. Seventeen White firefighters and one Latino firefighter, all of whom had passed the test, then sued the city alleging that they had been subject to intentional discrimination because the city had relied upon race in deciding not to utilize the test results. The city acknowledged in its defense that it had tossed the test because of its impact on minority firefighters and because the city feared that, had it used the test, the city would have been subject to a claim of disparate impact discrimination. Thus, the U.S. Supreme Court was called upon to resolve the question of whether an employer is liable under Title VII’s prohibition of intentional discrimination if the employer refuses to use the results of a screening device that produces a disparate impact on a protected group. The Court, in a 5-4 split opinion, responded that an employer would not be liable if it had a strong basis in evidence to believe that a disparate impact claim would be brought against it. Because New Haven lacked such a basis, the Court found for the plaintiffs. Significantly, Justice Scalia wrote a separate concurring opinion in which he stated that the Court’s “resolution of this dispute merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII ... consistent with the Constitution’s guarantee of equal protection?” He noted that “the war between disparate impact and equal protection will be waged sooner or later, and it behooves us to begin thinking about how—and on what terms—to make peace between them.”

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96 Id. at 562.
97 Id.
98 Id. at 563.
99 Id. at 570.
100 Id. at 585. The dissenting justices argued that the “strong basis in evidence” standard would eviscerate voluntary efforts at compliance with Title VII by in effect requiring employers to prove that they had engaged in disparate impact discrimination before being allowed to discontinue use of a device with a disparate impact. Id. at 608.
101 Id. at 592.
102 Id. at 594 (Scalia, J., concurring).
103 Id. at 594-96 (Scalia, J., concurring).
constitutionally invalid, even within the statutory realm, given that they do not require that plaintiffs establish intentional discrimination.

In June 2015, in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, the Court, in another 5-4 split opinion, seemed to breathe new air into disparate impact theory, as least regarding claims under the federal Fair Housing Act. Relying on the logic of *Griggs* and other Title VII cases, the Court recognized the continuing viability of disparate impact theory under the FHA. The Court, however, placed a number of restrictions on its use, noting that disparate impact theory may raise “serious constitutional questions,” for example, if “liability were imposed based solely on a showing of a statistical disparity.” To guard against such concerns and to “protect potential defendants against abusive disparate-impact claims,” the Court held that a racial imbalance, without more, would be insufficient to support a claim. The Court instructed lower courts to carefully scrutinize disparate impact claims in the early stages of a lawsuit and to ensure that plaintiffs have established a causal connection between the challenged practices and the identified disparate effects. In addition, the Court stated that remedial orders should “concentrate on the elimination of the offending practice” through the use of “race-neutral means” should additional measures be required.

The above limitations came from the majority opinion. Writing in dissent, Justice Alito echoed many of the sentiments set forth by the majority and by Justice Scalia in *Ricci*. Relying on the statutory phrase “because of” (which also appears in the main prohibition of Title VII), Justice Alito argued that a disparate impact alone cannot give rise to liability under the Fair Housing Act. Justice Thomas, in a separate dissent, went even farther, chastising the majority for its reliance on *Griggs v. Duke Power Company*,

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105 135 S. Ct. 2513 (“[t]he question presented for the Court’s determination is whether disparate-impact claims are cognizable under the Fair Housing Act”).
106 135 S. Ct. 2516-19 (discussing the Court’s prior interpretation of Title VII in *Griggs v. Duke Power Co.* and *Smith v. City of Jackson*).
107 Id. at 2522.
108 Id.
109 Id. at 2524.
110 Id. at 2523.
111 Id.
112 Id.
113 Id. at 2532 (Alito, J., dissenting).
114 Id. at 2533-35.
noting that “[w]e should drop the pretense that *Griggs*’ interpretation of Title VII … was legitimate.”

These developments are dire and alarming. The importance of disparate impact theory cannot be overstated. If employers in a police department, automobile manufacturing facility, or construction company, among others, do not believe that women ought to be employed in their organizations, they are unlikely to post signs saying “women need not apply” or to express such sentiments in documents, emails, or texts. Even if these employers do not consciously desire to exclude women, they may be influenced by unconscious beliefs and biases—those shared ideas and attitudes about groups that are tacitly conveyed through our common history and cultural heritage. In a world where many persons with animus against certain groups will hide their prejudice and employ sophisticated means to cloak it, or be unaware that it exists, statistical disparities are an effective way to smoke out discreet or unconscious discriminators. Even if no conscious or unconscious motive exists, to the extent that a goal of anti-discrimination law is to ensure the inclusion of groups that have too long suffered on the periphery of opportunity by eliminating systems and structures that produce grossly unequal outcomes without apparent justification, then disparate impact theory is necessary. Unfortunately, in the United States, a substantive equality or results-oriented approach to opportunity seems to be at odds with a capitalist economic system that depends upon hierarchy, and appears to be antithetical to a social ideology founded on the American Dream and widely held beliefs that individuals control their own destinies more than, in fact, they do.

C. Formalism

The reluctance to redress sexual orientation and gender identity discrimination fully and the apparent retreat from disparate impact theory pose considerable ongoing challenges for anti-discrimination advocates in the United States. Yet, another problem has also emerged which has considerable implications for corrective and distributive justice. Over the last fifty years, U.S. anti-discrimination law has embraced a theory of formal equality, where the goal is to treat everyone (men and women, people of color and whites, religious majorities and minorities) the same. Any deviation from this formalism appears to be immediately suspect.

To be sure, a commitment to formal equality is a good starting point and has led to some progress. Indeed, one could argue that formalism produced the result in *Obergefell v. Hodges* (i.e., that same-sex marriage must

115 Id. at 2526 (Thomas, J., dissenting).
be treated the same as opposite-sex marriage). Yet, formalism alone may be insufficient. As the Supreme Court pointed out as early as *Griggs v. Duke Power Company*, treating differently situated people the same does not necessarily produce equality of opportunity or equity. Unfortunately, for some formal equality has become both the starting point and the ending point of contemporary discrimination analyses, as demonstrated by Chief Justice Roberts in a recent case in which the Court found that the use of race by school districts seeking to integrate public schools was unlawful. In his plurality opinion, Justice Roberts stated that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” In another case, involving affirmative action, Justice Clarence Thomas took a similarly formalistic view. In rejecting the use of race-based affirmative action measures, Justice Thomas stated that “[i]n [his] mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. In each instance, it is racial discrimination, plain and simple.” Thus, in the minds of these justices, not only is the dissimilar treatment of racial groups per se unlawful, but the justifications for such dissimilar treatment are (at least for Justice Thomas) seemingly irrelevant.

Justice Stevens has pointed to limitations inherent in reasoning of this kind. In *Adarand*, he noted:

> [t]he Court's concept of "consistency" assumes that there is no significant difference between a decision by the majority to impose a special burden on the members of a minority race and a decision by the majority to provide a benefit to certain members of that minority notwithstanding its incidental burden on some members of the majority. In my opinion that assumption is untenable. There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination. Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority. Remedial race-based preferences reflect the opposite impulse: a

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116 Obergefell v. Hodges is discussed supra at pages 12-13.


desire to foster equality in society. No sensible conception of the Government's constitutional obligation to "govern impartially," should ignore this distinction.\textsuperscript{120}

The rigid adherence to formal equality, which is both ahistorical and acontextual,\textsuperscript{121} has been used not only to thwart affirmative action measures and measures designed to foster greater racial integration; it has also been used to undermine initiatives that would lead to greater participation by

\textsuperscript{120} \textit{Id.} at 243 (Stevens, J., dissenting). Justice Stevens went on to observe:

The consistency that the Court espouses would disregard the difference between a "No Trespassing" sign and a welcome mat. It would treat a Dixiecrat Senator's decision to vote against Thurgood Marshall's confirmation in order to keep African Americans off the Supreme Court as on a par with President Johnson's evaluation of his nominee's race as a positive factor. It would equate a law that made black citizens ineligible for military service with a program aimed at recruiting black soldiers. An attempt by the majority to exclude members of a minority race from a regulated market is fundamentally different from a subsidy that enables a relatively small group of newcomers to enter that market. An interest in "consistency" does not justify treating differences as though they were similarities.

\textit{Id.} at 245.

\textsuperscript{121} Justice Stevens has also pointed to the importance of contextual analysis. In \textit{Parents Involved}, he criticized Chief Justice Roberts' characterization of \textit{Brown v. Board of Education}, noting:

The first sentence in the concluding paragraph of [Justice Roberts'] opinion states: "Before \textit{Brown}, schoolchildren were told where they could and could not go to school based on the color of their skin." This sentence reminds me of Anatole France's observation: "[T]he majestic equality of the law, . . . . forbid[s] rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread." The Chief Justice fails to note that it was only black schoolchildren who were so ordered; indeed, the history books do not tell stories of white children struggling to attend black schools. In this and other ways, The Chief Justice rewrites the history of one of this Court's most important decisions.

\textit{Parents Involved}, 551 U.S. at 799 (Stevens, J., dissenting) (internal citations omitted).
women in the workforce. For example, a commitment to formalism has been employed to counter efforts to require that employers make necessary adjustments for workers experiencing complications from pregnancy.\(^\text{122}\) This was demonstrated recently in \textit{Young v. United Parcel Service}, a case involving a UPS employee who requested a workplace accommodation in order to avoid lifting heavy items during her pregnancy.\(^\text{123}\) The employer accommodated some nonpregnant workers with similar limitations, but not all such workers. In interpreting the Pregnancy Discrimination Act, which amended Title VII to include pregnancy within the definition of sex discrimination,\(^\text{124}\) the U.S. Supreme Court held that while Title VII requires equal treatment (i.e., that employers accommodate pregnant women to the extent that they accommodate nonpregnant workers with similar restrictions), such accommodation is not required if the employer refuses to accommodate pregnant workers and some subgroup of nonpregnant workers for nondiscriminatory reasons.\(^\text{125}\) In other words, the statute did not require that

\(^{122}\) See, e.g., Stout v. Baxter Healthcare Corp., 282 F.3d 856 (5th Cir. 2002); Troupe v. May Dep’t Stores Co., 20 F.3d 734 (7th Cir. 1994); Marafino v. St. Louis Cty. Circuit Court, 707 F.2d 1005 (8th Cir. 1983); see also California Fed. Sav. & Loan Ass’n v. Guerra, 479 U.S. 272, 284-89 (1987) (finding that Title VII allows, but does not require, the preferential treatment of pregnant workers).


\text{the terms ‘because of sex’ or ‘on the basis of sex’ include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes … as other persons not so affected but similar in their ability or inability to work…}.

\(^{42}\) U.S.C. § 2000e(k). In \textit{Young}, the Court was asked to interpret the second clause of section 701(k) in a context where the employer accommodated many, but not all, workers with nonpregnancy-related disabilities. 135 U.S. at 1344. Thus, the question arose as to which “other persons” pregnant women were to be compared. \(^{125}\) Importantly, the Court also found that neutral justifications offered to explain a failure to accommodate pregnant women could be challenged, noting,

\text{[w]e believe that the plaintiff may reach a jury on this issue by providing sufficient evidence that the employer’s policies}
pregnant women be afforded “most favored nation status” or that they be treated better than those nonpregnant workers who were not accommodated.  

Oddly enough, formalism has produced other interesting claims in recent years, including assertions by workers without children that they are subject to discrimination—or a new form of parental status discrimination—because of the presence of family-friendly workplace policies (e.g., alternative work arrangements, leave policies, and dependent-care and other benefits designed to appeal to parents). In short, these workers are asserting that they are being forced to work longer hours (e.g., overtime, holidays, and weekends) for less pay and fewer benefits than their colleagues with children, and that this violates the principle of equal treatment, or equal pay for equal work. Significantly, only an overly formalistic and acontextual approach would give these arguments any resonance.

impose a significant burden on pregnant workers, and that the employer’s ‘legitimate, nondiscriminatory’ reasons are not sufficiently strong to justify the burden, but rather—when considered along with the burden imposed—give rise to an inference of intentional discrimination.... The plaintiff can create a genuine issue of material fact as to whether a significant burden exists by providing evidence that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers.

135 S. Ct. at 1354.

126 Id. at 1349-50.

127 Such policies would include part-time, flextime, and compressed work weeks; maternity, paternity, and other forms of family leave; and on-site childcare centers, vouchers to subsidize childcare costs, and tuition benefits, among other things.

128 For additional discussion of parental status discrimination from the viewpoint of childfree persons, see TRINA JONES, Single and Childfree! Reassessing Parental and Marital Status Discrimination, 46 ARIZ. ST. L.J. 1255 (2014). In short, I argue that if one accepts anti-subordination as a key objective of anti-discrimination law, then merely treating childless workers differently from parents does not lead inexorably to the conclusion that discrimination is occurring. While the argument of childless workers seems persuasive at first glance, one must evaluate the purposes being served by the policies about which childless workers complain before advocating for their abolishment. To be sure, policies and practices based on generalized assumptions about the benefits of parenting should not go unchallenged. To the extent, however, that employer actions are implemented to eliminate the continued subordination and marginalization of women in the workplace, they should be maintained. Practices that serve legitimate public ends
In summary, the analysis in this section reveals that U.S. courts have developed a rather limited understanding of discrimination and that doctrinal analysis has, in some cases, veered dangerously off course. This essay maintains that discrimination is not simply treating individuals differently. By the same token, equal opportunity may not be satisfied merely by treating everyone the same. One must always ask the additional question of why dissimilar treatment is occurring or is required. Asking this question necessarily invites an important and critical conversation about the goals of anti-discrimination law—a discussion that involves corrective and distributive justice. Unfortunately, on the fiftieth anniversary of the CRA, it is that conversation that many Americans, including some members of the judiciary, seem no longer interested in having.

D. Why Are We Here?

In reflecting on the last fifty years, one might ask: why has U.S. anti-discrimination law lost much of its forward momentum, and what are possible implications for the future? A partial response to the first question may be the intractability of deeply-rooted norms, which include embedded beliefs about the desirability and inherent capabilities of various groups. But part of the answer may also be temporal. The United States is fifty years from a system of de jure segregation and in-your-face discrimination. The passage of time renders it more difficult for the U.S. public, whose median age is 37, to see and to understand the ways in which modern discrimination happens. Arguments based on numerical disparities inevitably encounter America’s social ideology, which is based upon rugged individualism and the American Dream. The idea is that with individual effort anyone can pull herself up by her bootstraps and achieve economic prosperity. The fact that socio-economic mobility and the American Dream are largely unobtainable for masses of people is, of course, ignored or dismissed.

Another related response to the question of why U.S. anti-discrimination law is at a standstill is that Americans want to believe that we are post-race, post-sex, and post-everything else. This is an understandable impulse given this country’s messy and extensive history of discrimination. It is simply more pleasant and easier all around to think that we are, or have obtained, our better selves, than to continue the hard and challenging work of grappling with our continuing imperfections.

may have adverse effects for subsets of workers (i.e., workers without children). These effects can be minimized by hiring additional workers, by making certain benefits available to all workers, and by paying workers additional compensation or offering comparable time off when they are required to do extra work.
And finally, there is a question of power. Real inclusion—like accepting the browning of America—means that, inevitably, those with the strongest hold on existing power structures will face competition and a potential diminution of their influence. History, not just in the U.S. but around the world, has shown that power is rarely voluntarily relinquished. Moreover, power that is threatened, whether materially or psychologically, often strikes back.

In this climate, “discrimination fatigue,” or an unwillingness to be receptive to existing claims of discrimination or to an expansion of protected classifications, is understandable, though thoroughly unacceptable. An embrace of formal equality, which has some value but does not go far enough in bridging opportunity gaps, is also understandable, though ultimately inadequate.

CONCLUSION

In many ways, the U.S. workplace in 2015 is very different from the workplace in 1964. Although Title VII has not eradicated all discrimination, it has affected employee demographics and influenced the ways in which Americans conceptualize the roles and capabilities of women and people of color. For these reasons, Title VII and the legions of courageous plaintiffs, lawyers, policy makers, and other activists who worked tirelessly to implement its promise deserve to be celebrated. Yet, Americans should be careful not to become blinded by celebratory zeal. While it is appropriate, and indeed desirable and encouraging, to look back and to acknowledge the slow and steady progress Title VII has produced, Americans must recognize that there is still much work to be done before full equality of opportunity is realized. As this essay has demonstrated, anti-discrimination advocates must continue to struggle against those who would refuse to extend full legal coverage to LGBTQ persons. They must resist the use of analytical techniques that fail to recognize the ways in which groups are differently situated and the discreet and subtle ways in which discrimination is practiced. Above all, they must continue to press for greater discussion and a more complex understanding of the differences between equality and equity, and dissimilar treatment and discrimination.
THE CIVIL RIGHTS ACT OF 1964 AND THE FULCRUM OF PROPERTY RIGHTS

Alfred L. Brophy

During the fiftieth anniversary of the Civil Rights Act of 1964, much of the discussion is about the origins of the Act in the ideas and actions of the African American community and of the future possibilities of the Act. This essay returns to the Act to look seriously at those who opposed it and at their critique of the Act’s effect on property rights. That is, this looks at the property law context of the Act and the criticism that the Act would dramatically affect property rights. In contrast to those who favored the Act and, thus, wanted to make the Act look as modest as possible, this retrospective suggests that, in fact, the Act had an important effect on property rights in the United States. That is, it was part of democratizing property and rebalancing the rights of property owners and of non-owners in ways that are long-lasting and important.

The supporters of the Civil Rights Act of 1964’s guarantee of equal treatment in public tried to make it look like a modest extension of principles that had existed from time out of mind. Yet, the Act’s requirement of equal access to public accommodations brought outcries, in particular from its opponents, that it would dramatically restrict the right to exclude from private property. Legal historians who have assessed the long history of the

1 Judge John J. Parker Distinguished Professor, University of North Carolina – Chapel Hill. Contact the author at abrophy@email.unc.edu or 919.962.4128. I would like to thank the Alabama Civil Rights & Civil Liberties Law Review for its invitation to participate in the discussion of the Act and also Anthony Cook, Richard Delgado, Bryan Fair, Mitu Gulati, Trina Jones, Utz McKnight, Donna Nixon, Gregory Parks, Gregg Polsky, Tiffany Ray, Dana Remus, Meredith Render, Jasmine Gonzales Rose, and Jean Stefancic for their comments and help.


3 See, e.g., VIRGINIA COMMISSION ON CONSTITUTIONAL GOVERNMENT, CIVIL RIGHTS AND LEGAL WORONGS: A CRITICAL COMMENTARY ON THE PRESIDENT’S PENDING “CIVIL RIGHTS” BILL OF 1963 1 (1963); VIRGINIA COMMISSION ON CONSTITUTIONAL GOVERNMENT, CIVIL RIGHTS AND FEDERAL POWERS: A FURTHER CRITICAL COMMENTARY UPON THE PENDING OMNIBUS CIVIL RIGHTS BILL 9 (1963) (“Title II . . . is the section that would attempt through the force of federal law to desegregate every restaurant, soda fountain, lunch counter, and boarding house in the nation. . . . Our concern is the attempt to reach an essentially
Rights Movement have tended to agree that the Act was a fulcrum moment on the move towards civil rights—in fact, one of the most important assessments of the Civil Rights Movement makes the Act, not Brown v. Board of Education, the centerpiece of the movement. This essay returns to the conservative opponents of the Act’s public accommodations provision and takes their writing seriously. It considers the possibility that the Act was radical, as its critics contended, and that it marked a fulcrum in property rights as well as civil rights.

social and political end through means that flagrantly violate the Constitution.

REPORT OF THE COMMITTEE ON COMMERCE, UNITED STATES SENATE, S. Rep. No. 88-872, at 62-65 (views of Senator Strom Thurmond on “the right of private property and due process of law considerations”).

4 347 U.S. 483 (1954); see, e.g., MICHAEL KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 367 (2004) (arguing that Brown worked in conjunction with other variables—such as the Civil Rights Act—to move support for integration into mainstream thought and law).

5 In taking conservative arguments seriously in Southern legal history, this essay draws methodology and inspiration from the literature that relocates conservative ideas to the center of study because they were so important and because they controlled the terms of the debate, if not the outcome, for so much of our nation’s (and region’s) history. See, e.g., MICHAEL O’BRIEN, INTELLECTUAL LIFE AND THE AMERICAN SOUTH, 1810-1860: AN ABRIDGED EDITION OF CONJECTURES OF ORDER (2010); Alfred L. Brophy, The World Made by Laws and the Laws Made by the World of the Old South, in SIGNPOSTS: NEW DIRECTIONS IN SOUTHERN LEGAL HISTORY 219-39 (Sally E. Hadden & Patricia Hagler Minter eds., 2013); ANDERS WALKER, THE GHOST OF JIM CROW: HOW SOUTHERN MODERATES USED BROWN V. BOARD OF EDUCATION TO STALL CIVIL RIGHTS (2009).

1. THE POSSIBILITIES OF FEDERAL REGULATION OF PRIVATE PROPERTY RIGHTS

Title 2 of the Civil Rights Act promised “all persons shall be entitled to the full and equal enjoyment of the goods, service, facilities, privileges, advantages, and accommodations of any place of public accommodation ... without discrimination or segregation on the ground of race, color, religion, or national origin.” 7 Supporters justified this as part of a longstanding common law tradition. 8 This linking of common law doctrine with the prohibition on discrimination stretched back to the discussion over the 1875 Civil Rights Act.9 Justice Harlan, in dissent in the Civil Rights Cases, listed a number of situations in which inn keepers and railroads were not permitted to discriminate in the provision of services. 10 The Senate Commerce Committee’s report pointed out that some states had legislation requiring equal treatment in public accommodations. 11 Oddly, as recently as 1954 Louisiana had repealed its statute that required the provision of public accommodations without regard to race and, in 1959, Alabama had repealed its similar statute.12 In fact, over several pages, the Senate’s Commerce Committee Report discussed precedents dating back to the seventeenth century that prohibited innkeepers from discriminating against classes of guests because the availability of inns is a matter of public interest.13 And, in fact, when it turns to the Supreme Court’s decision in the Civil Rights Cases, which struck down federal legislation outlawing private

7 Title VI of the 1964 Civil Rights Act, Pub. L. No. 88-352, § 201(a)(b), 78 Stat. 241, 243-44 (1964) (defining “public accommodation” and providing a list of establishments covered by the Act). The original bill appears at 1 LEGISLATIVE HISTORY OF THE CIVIL RIGHTS ACT OF 1964 PUBLIC LAW 88-352, at 1 (1964). The final Bill had an exemption for small innkeepers, which the original Bill did not have, but it also included people who were not themselves involved immediately in interstate travel. See S. REP. NO.8- 872, at 2 (referring to changes between Bill as introduced and the final Bill).
8 See, e.g., 88 CONG. REC. 2, 387 (1963).
10 See 109 U.S. 3, at 37-41. Justin Harlan referred, for instance, id. at 41, to New Jersey Steam Navigation Co. v. Merchants' Bank, 47 U.S. 344 (1848), which held that a common carrier is "in the exercise of a sort of public office, and has public duties to perform, from which he should not be permitted to exonerate himself without the assent of the parties concerned." He also referred to Justice Joseph Story’s treatise on Bailments §§ 475-476. 109 U.S. at 43 (“If an innkeeper improperly refuses to receive or provide for a guest, he is liable to be indicted therefor . . .[t]hey (carriers of passengers) are no more at liberty to refuse a passenger, if they have sufficient room and accommodations, than an innkeeper is to refuse suitable room and accommodations to a guest.”).
11 S. REP. NO. 88-872, supra note 2, at 10.
12 Id.
13 Id. at 9-11.
discrimination, it noted that the decision was made a decade before the southern states enacted their Jim Crow statutes.\textsuperscript{14} This is a recognition of the argument of C. Vann Woodward’s \textit{The Strange Career of Jim Crow} that discriminatory statutes were enacted in the wake of Reconstruction.\textsuperscript{15} That is, the system of state-mandated segregation was created after the Civil War and in an attempt to re-establish and entrench white supremacy. \textsuperscript{16} This insight that Woodward popularized also appeared in the fictional literature of the 1950s, which recorded so well American attitudes towards race.\textsuperscript{17} For instance, Ralph Ellison’s \textit{Invisible Man} looked back to the era when the Invisible Man’s grandfather gave up his gun during Reconstruction (or actually at the end of Reconstruction, which one might call the period of “Deconstruction”), which was then followed by Jim Crow. \textsuperscript{18} Similarly, William Faulkner’s mediation on history \textit{Requiem for a Nun} refers to an African American janitor who had served as a United States marshal during Reconstruction and then lost his job when Reconstruction came to a conclusion.\textsuperscript{19} The particular relevance of this man, known as Mulberry, was that he had once held a position of authority but had been reduced to a janitor, which provided a living connection to the days of Reconstruction.\textsuperscript{20} He was a living reminder of how much things had changed—for the worse in this case—even as there were other changes afoot that ignored—“overcame” is not quite the right word—the past.\textsuperscript{21} Thus, supporters tried to link the Bill to previous generations of case law and to the secondary literature on how Jim

\textsuperscript{14} Id.
\textsuperscript{16} See WOODWARD, supra note 15, at 22-29. \textit{See also} Civil Rights – A Reply, \textsc{New Republic} 24, (August 31, 1963) (listing as the first justification for the Civil Rights Act that it gave national enforcement to the ancient common law restriction against discrimination in public accommodations).
\textsuperscript{17} \textit{See, e.g.,} RALPH ELLISON, \textsc{Invisible Man} 16 (2d Vintage International ed., 1995); WILLIAM FAULKNER, \textsc{Requiem for a Nun} 242 (1951).
\textsuperscript{18} ELLISON, supra note 17, at 16 (“Son, after I’m gone I want you to keep up the good fight. I never told you but our life is a war and I have been a traitor all my born days, a spy in the enemy’s country ever since I give up my gun back in the Reconstruction.”).
\textsuperscript{19} WILLIAM FAULKNER, \textsc{Requiem for a Nun} 242 (1951).
\textsuperscript{20} Id.
\textsuperscript{21} Id.
Crow had developed in ways that seem reminiscent of the seventeenth century lawyers’ rediscovery of the Ancient Constitution, where certain obscure threads of history were pulled together to create an intellectual world that matched their aspirations for law, even if it did not quite match the reality of the law. Sometimes in that sort of myth-making, we do remake the world. The Civil Rights Act of 1964 may be yet another of those instances.

Fiction may be necessary to bridge one era to another; however, neither fiction nor a sense of inevitability or natural progression should obscure the reality that the Civil Rights Act was radical and rebalanced the line between public and community rights and private rights. Even though supporters turned to Lord Hale and Blackstone, there are a lot of cases where courts distinguished the public accommodations mandate. Supporters of the Act, like Paul Freund at Harvard Law School, added that the Act was not just grounded in ancient precedents on the duties of common carriers and innkeepers to take all comers. It also fit alongside more recent cases, such as labor cases that permitted occupation of private property. There was other precedent that supporters could have pointed to as well to buttress the argument that the Act’s public accommodations requirement was in keeping with well-established property rights.

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22 See S. REP. NO. 88-872, supra note 2, at 65-75.
24 Cf. Ellison, supra note 17, at 439 (referring to the lies used by the keepers of power). Ellison was, of course, referring to a different set of myth-makers, those who were in power and wanted to maintain it. Woodward debunked the myth that Jim Crow had always been with us, which had served so long to support the idea that there had to be a strict line separating African American and white people. See Alfred L. Brophy, Introducing Applied Legal History, 31 LAW & HIST. REV. 233, 235-36 (2013). The nineteenth century was filled with a host of myths promulgated by historians about the inferiority of people of African descent and the impossibility of ending slavery. Those ideas often washed over to legal thought. See Alfred L. Brophy, When History Mattered: Law’s History: American Legal Thought and the Transatlantic Turn to History, 91 TEX. L. REV. 601, 604-06 (2013) (discussing proslavery histories and their connection to post-war historical thought in context of review of David Rabban, Law’s History: American Legal Thought and the Turn to Transatlantic Legal History (2014)). My suggestion here is that the origin myths may be used to serve a great many different purposes, which is one of the reasons the understanding of the past is so contentious and has been for so long.
25 See S. REP. NO. 88-872, supra note 2, at 65-75.
26 Id.
27 Id. at 82-92.
Regulation of private property had been increasing throughout the twentieth century with such decisions as *City of Euclid v. Ambler Realty Company*. That decision, written by the staunch supporter of property rights Justice Sutherland, had rejected a challenge to regulations that were alleged to be depriving landowners of as much as 75 percent of their value. Lest anyone think that Justice Sutherland was soft on property rights, one need only recall that in his dissent in *Blaisdell* he argued that the Constitution was designed to protect the rights of property owners and, citing *Dred Scott*, that the original intent of the Constitution mattered. And then there were other traditions, even more hidden in some ways, that might have been drawn upon to suggest that courts and legislatures had rebalanced property rights between owners and non-owners at critical times in American history. For instance, during the Anti-Rent movement along New York’s Hudson River Valley, the New York courts and legislature took action to require owners of feudal rights to sell those rights to their “tenants.”

Despite those other precedents, when it came to constitutional background, supporters justified the Bill on two bases. First, and most fully, it was advanced as an exercise of the Commerce Clause. Even its detractors acknowledged Congress’ power. Supporters also suggested that the Bill might be based on the Fourteenth Amendment. The report expressed skepticism about the continuing validity of the Civil Rights Cases’ requirement of state action. Either the Court, the report surmised, would overturn or distinguish the Civil Rights Cases. There were sustained skepticism about the continuing validity of the Civil Rights Cases’ requirement of state action. Either the Court, the report surmised, would overturn or distinguish the Civil Rights Cases. There were sustained

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28 Id.
30 Id. at 384.
31 Home Building & Loan Ass’n v. Blaisdell, 290 U.S. 398, 458 n.3 (1934) (Sutherland, J., dissenting) (citing CHARLES BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION 31, 33 (1913)). I am grateful to Daniel Hulsebosch for pointing this out.
32 Id. at 450.
33 See ALFRED L. BROPHY, ALBERTO LOPEZ, & KALI MURRAY, INTEGRATING SPACES: PROPERTY LAW AND RACE 54-59 (2011).
34 S. REP. NO. 88-872, supra note 2, at 12.
35 Id. at 13 (questioning “how far Congress wants to go under the authority of the commerce provision of the Constitution,” not whether it can act).
36 Id. at 13.
37 S. REP. NO. 88-872, supra note 2, at 12. This was, of course, strenuously contested by individual senators. See, e.g., SENATE REPORT, supra note 2, at 54, 67-69 (reporting views of individual senators on Congress’ lack of power under the Fourteenth Amendment and the continuing validity of the state action doctrine). Herbert Wechsler, however, thought that state action doctrine could not be
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challenges to state action doctrine as the Supreme Court interpreted more action as state rather than as private action. In the post-World War II era there was a line of cases that shifted to the rights of individuals against private property owners. In *Marsh v. Alabama* the Supreme Court in essence turned private property into public property for the purposes of First Amendment protections of protesters. And in *Shelley v. Kraemer* in 1948 the Supreme Court took away the right of neighbors (the holders of the dominant estate in an equitable servitude) to prevent African Americans from occupying property that the African Americans owned. That is, *Shelley* limited the rights of holders of a dominant estate to use their right to exclude; the Supreme Court did this by converting the use of the courts to enforce the exclusion into state action, much as *Marsh* had turned the private company’s exclusion of protesters into state action.

Some litigants still tried to use the Civil Rights Act of 1875, which had been ruled unconstitutional in the nineteenth century. They met with no success. In order to find a prohibited discrimination there had to be some state action. They found it in 1961 when a municipally owned parking garage in Wilmington, Delaware, leased space to a coffee shop that discriminated. And while Congress was considering the Civil Rights Act of 1964, there was a growing sense that enforcement of trespass statutes themselves might constitute state action. Jerre Williams, then a University

stretched as the majority hoped. His testimony was used by a dissenting Senator. See id. at 48.


41 *Shelley*, 334 U.S. at 4.

42 See generally id.

43 18 Stat. 335-337. It provided that all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement, subject only to the conditions and limitations established by law and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.


47 S. REP. No. 88-872, *supra* note 2, at 12 (“There is a large body of legal thought that believes the Court would either reverse the earlier decision if the question were again presented or that changed circumstances in the intervening 80 years would make it possible for the earlier decision to be distinguished.”).
of Texas law professor and later a judge of the United States Court of Appeals for the Fifth Circuit, argued in an article with the illuminating title, “Twilight of State Action,” that the state action requirement was, indeed, declining.48

Thus, as Congress was debating further action, protests in the streets were also moving along, as were cases in the courts. The sit-in cases were in front of the United States Supreme Court in 1964, presenting the question of whether the enforcement of a neutral trespass statute involved state action.49

As supporters were trying to make this look normal, they also recognized the importance of the demonstrators to the movement.50 Something was brewing that was remaking property rights.51 There were protests in the streets and, even among those who were not in the streets, there was a growing sense of the injustice of Jim Crow.52 In 1960 both Democrats and Republicans included in their platforms a call for elimination of racial discrimination.53 In the words of the Senate report, “the Negro revolution of 1963” brought a realization of the need to “remove a daily insult from our fellow citizens.”54 President Kennedy referred to such protests when he said in February 1963 that:

this is a daily insult which has no place in a country proud of its heritage—the heritage of the melting pot, of equal rights, of one nation and one people. No one had ever been barred on account of his race from fighting or dying

49 See, e.g., Bell v. Maryland, 378 U.S. 226 (1964). This case was decided June 22, 1964, just after the Civil Rights Act of 1964 was passed. It was remanded for further investigation of whether the convictions were justified because subsequent Maryland legislation outlawed discrimination in public accommodations.
51 Id.
52 See, e.g., id.; H. Timothy Lovelace Jr., Making the World in Atlanta’s Image: The Student Nonviolent Coordinating Committee, Morris Abram, and the Legislative Committee of the United Nations Race Commission, 32 LAW & HIST. REV. 385 (2014). And there was, of course, a growing opposition to those protests. But, c.f., 7 LEG. HISTORY OF THE CIVIL RIGHTS ACT OF 1964, supra note 2, at 8663-64 (showing growing opposition to those protests through complaints about CORE’s confrontational street protests). See also id. at 8644 (1964) (discussing the growth of Jim Crow).
53 See S. REP. NO. 88-872, supra note 2, at 8.
54 Id.
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for America—there are no “white” or “negro” signs on the foxholes or graveyards of battle. Surely in 1963, 100 years after emancipation, it should not be necessary for any American citizen to demonstrate in the streets for the opportunity to stop at a hotel, or to eat at a lunch counter in the very department store in which he is shopping, or to enter a motion picture house, on the same terms as any other customer.55

Even as supporters were trying to make the Act look moderate, they recognized that there were more fundamental issues at stake over private property.56 Here, they advanced the idea that has subsequently been so central to the progressive property movement,57 that property rights “exist[] for the purpose of enhancing the individual freedom and liberty of human beings.”58 This was a theme that reverberated in the press. James Reston of the New York Times, for instance, wrote about the conflict between property and human rights in June 1963.59

Such ideas had deep, though often obscured, roots in American thought about property. In the nineteenth century, during the Age of Jackson, there was talk of the conflict between people and property.60 In the twentieth

55 Id. at 8-9.
56 S. REP. NO. 88-872, supra note 2, at 22 (discussing property rights).
58 S. REP. NO. 88-872, supra note 2, at 22. It continued that property “assures that the individual need not be at the mercy of others, including government, in order to earn a livelihood and property, from his individual efforts.” Id.
60 See, e.g., GEORGE BANCROFT, AN ORATION DELIVERED BEFORE THE DEMOCRACY OF SPRINGFIELD AND NEIGHBORING TOWNS, JULY 4, 1836 11 (1836)
century the talk of human rights versus property rights was popularized by Theodore Roosevelt and carried onward by Woodrow Wilson in the context of foreign relations, then down to Hubert Humphrey. Sometimes that conflict appeared in the Supreme Court in the early twentieth century as well. While what we hear most about in American property law are such concepts as the right to exclude, there are some other common law fragments that help to rebalance the right to regulate, to force the transfer of rights to neighbors, and even in some cases to require landowners to allow others onto their property. The Senate report recognized the dispute (focusing on the differences between Whigs and Democrats in their approach towards property, democracy, and humanity).

61 See Harold Howland, Theodore Roosevelt and His Times 114 (1921) (“Ordinarily, and in the great majority of cases, human rights and property rights are fundamentally and in the long run identical; but when it clearly appears that there is a real conflict between them, human rights must have the upper hand, for property belongs to man and not man to property.”). Often in the legal literature the idea of a distinction between human rights and property rights was criticized and property rights were robustly supported. See, e.g., J.W. Gleed, Human Rights vs. Property Rights, B. Ass’n of Kan. Proc. 57-66 (1912) (referring to Theodore Roosevelt, but arguing against the distinction); Silas H. Strawn, Human Rights vs. Property Rights, 9 State Bar J. Calif. 319-28 (1934).


66 See, e.g., Overbaugh v. Patrie, 8 Barb. 28 (N.Y. Sup. Ct. 1852) (limiting the rights of a holder of equitable servitude over those bound by the servitude); United States v. Platt, 730 F. Supp. 318 (D. Ariz. 1990) (permitting Zuni Tribe a prescriptive easement over property they have used for generations). See also Alfred L. Brophy, Re-Integrating Spaces: The Possibilities of Common Law
between human dignity and property rights. 67 “Slaves were treated as items of private property, yet surely no man dedicated to the cause of individual freedom could contend that individual freedom and liberty suffered by emancipation of the slaves.” 68

Of course in Alabama we need to be particularly cognizant of the ways that direct protest affected the movement. As Rick Pildes has reminded us in relation to Alabama’s central place in the evolution of voting rights, one could write our nation’s history of civil rights largely out of Alabama’s history. 69 The racial conflicts in the Black Belt counties of Perry and Dallas that set off the famed Selma to Montgomery march and then the Voting Rights Act of 1965 were still nearly a year away when the Civil Rights Act of 1964 was being debated. But the Alabama civil rights movement was well underway. 70 The state was nearly a decade past the 1955 Montgomery Bus Boycott 71 and, as noted in the title of Glenn Askew’s book But for Birmingham, the events there in 1963 helped catalyze public opinion in favor of a broader civil rights act. 72 Bull Conner’s fabulously lousy political behavior reminds us once again that violence is often counter-productive.

2. THE PROPERTY RIGHTS AND LIBERTARIAN CHALLENGE TO THE CIVIL RIGHTS ACT

The supporters of the Bill added to their argument that it was moderate that it was also necessary and humane. 73 Witnesses explained how African Americans were routinely denied public accommodations. 74 The supporters were able to make the moral case for action. It was President Kennedy who explained in February 1963 the multiple reasons for the Act:

Race discrimination hampers our economic growth by preventing the maximum development and utilization

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68 Id. at 22.
71 Id. at 20-21.
72 Id.
73 Id.
of our manpower. It hampers our world leadership by contradicting at home the message we preach abroad. It mars the atmosphere of a united and classless society in which this Nation rose to greatness. It increases the costs of public welfare, crime, delinquency and disorder. Above all, it is wrong.

Therefore, let it be clear in our own hearts and minds that it is not merely because of the Cold War, and not merely because of the economic waste of discrimination, that we are committed to achieving true equality of opportunity. The basic reason is because it is right.75

Yet despite the evidence that many states already protected civil rights, that there were common law origins of the right, and that discrimination was morally wrong, there was still a deep sense among opponents that the Act was radical.76 In opposition to Senator Hubert Humphrey’s argument that the Bill was in keeping with the common law,77 there were claims that the Bill was socialist, if not communist.78 Sometimes

75 Id. at 14.
76 Id.
77 Civil Rights Act of 1963, CONGRESSIONAL RECORD 6307, 6318 (March 30, 1964), in 3 LEG. HIST., supra note 7, at 6307, 6318 (“[W]e are not proposing anything radical. Blackstone is not known as a radical. In fact he was quite a conservative man. ... [T]his provision of title II is not a machination of a radical, evil mind. Title II is in the tradition of Anglo-Saxon common law.”). See also id. at 6317 (maintaining that the Act is not a taking of property in violation of the Fifth Amendment violation, only a narrow regulation of property).
78 For references to communism or socialism (or both), see 2 LEG. HIST., supra note 7, at 1848 (“It is first, foremost, and always most important to safeguard the individual's right to own and operate his personal property as he sees fit. This, of course, is government by men and interpretation by men, not government by law. This violates the Constitution, the principles of capitalism, and the basic common denominator of the United States of America. At the time when communism, socialism, and capitalism are locked in a life-or-death struggle, with the right to own property as the principal ingredient of that struggle, and we here abandon our constitutional right to own and operate property, we endanger our whole system of society. How tragic and how unnecessary, in the name of preserving civil rights. This section on public accommodations throws American civil rights right out the window.”); 3 LEG. HIST., supra note 7, at 5401; 3 LEG. HIST., supra note 7, at 4906; 3 LEG. HIST., supra note 7, at 6219 (Senator Thurmond, referring to title 6) (“This is pure socialism. It is Government control of the means of production and distribution and that is socialism.”); 6 LEG. HIST., supra note 7, at 10924; 9 LEG.
opponents just referred to it as communist; at other times, there was an explanation as to how.79 In some cases, for example, it was said that it would lead to other claims for rights.80

We can conceive that there is a possibility that this great declaration of individual liberty might be distorted into support for the advocacy of extreme socialism, such as the right to food, housing, medicine, etc. If, however, the amendment should be used by either the legislative or judicial branches of our Government as the basis of such a public right, then it would be taken out of its natural meaning and setting. The individual Bill of Rights would be distorted into a public bill of rights.81

Or, as Senator Robertson phrased it, “What is communism but socialism raised to the nth power, the central government taking everything over, and a dictatorship administering the government?” 82 This is how opponents characterized the bill.

The attacks on the Bill as communism reveal a wrinkle in the interpretation of Brown and the federal government’s support of the civil rights movement as a product of the Cold War.83 While this is not the place for an extended discussion of the critical question of what causes fundamental legal change, the anti-communist statements made by Southern members of Congress invite some further explanation. Perhaps the references to the Cold

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79 3 LEG. HIST., supra note 7, at 6219.
80 5 LEG. HIST., supra note 7, at 8472.
81 Id.
82 88 CONG. REC. 5085 (1964).
War during the debates over school integration and the Civil Rights Act of 1964 are what one might think of as an excuse rationale. They are arguments used to justify what is being done on other grounds. In the case of the Civil Rights Act of 1964, the support may have had more to do with the moral case made by demonstrators and leaders of the Civil Rights movement than with the defeat of communism. If it was about the defeat of communism, the opponents who claim the Act was inspired by communism and would result in a further slide to communism did not understand the role of the Act in winning the Cold War.

Sometimes the claim was not that the bill would lead to communism, but simply that it was an extreme interference with the property rights of businesses. Sometimes they said it violated the Fifth Amendment’s protection of taking of property without compensation. Harper Lee’s novel Go Set a Watchman, set in rural, southern Alabama in the 1950s, captured the sense of many white southerners that the civil rights revolution was an attack on property rights and the established order. Atticus Finch’s brother told Jean Louise Finch (presumably the stand-in for Ms. Lee), that respect for property rights had declined:

The time-honored, common-law concept of property—a man’s interest in and duties to that property—has become almost extinct. People’s attitudes toward the duties of a government have changed. The have-nots have risen and have demanded and received their due—sometimes more than their due. The haves are restricted from getting more. You are protected from the winter winds of old age, not by yourself voluntarily, but by a government that says we do not trust you to provide for yourself, therefore we will make you save.

Atticus Finch, the hero of To Kill a Mockingbird in the 1930s, is by the 1950s a representative of a backward-looking constitutional law. He is representative of the deep opposition to civil rights among the white families in the fictional town of Maycomb. Atticus was against protection of African

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85 88 CONG. REG. 5073-74 (1964).
86 Id.
American voting rights and integrated schools. The robust protection of property rights was central to that vision. It is easy to imagine that Atticus Finch would have been a staunch opponent of the Civil Rights Act.

At other times the bill was just portrayed as a bad idea. At other times the bill was just portrayed as a bad idea.88 “The bill is one illustration of how unfortunate it would be if we permitted the Federal government to control this kind of private property under the specious claim that if a man from New York sits down at a hotdog stand in Virginia the hotdog stand is in interstate commerce,” said one Southern representative.89 “That is the purest tommyrot.”90

It was not just that the Act went well beyond the common law. The Act put into statute the protections of Shelley v. Kraemer.91 The Virginia Constitutional Commission, a commission established by the Virginia legislature in the 1950s to defend the proposition of states’ rights,92 published several pamphlets attacking the Act. One of them, Civil Rights and Federal Powers, attacked the Act’s extension of equal protection principles to private action:

The pending civil rights bill would uproot from our law these “firmly embedded” constructions of the Fourteenth Amendment. Under this bill, private acts of discrimination would be prohibited if they were (1) carried on under color of any custom or usage, or were (2) "required, fostered, or encouraged by action of a State or a political subdivision thereof." The three verbs, coupled with the earlier reference to discrimination "supported" by State action, demand the closest scrutiny. ... But what exactly is meant by “fostered, encouraged, or supported”?

The framers of this bill know full well what these rubbery words are intended to embrace. They envision a

88 88 CONG. REG. 5073-74 (1964).
89 Civil Rights Act of 1964, CONGRESSIONAL RECORD, at 4092, 4906, in 3 LEG. HIST., supra note 7, at 4092, 4906 (comments of Senator Robertson).
90 Id.
situation in which the proprietor of a lunch counter or soda fountain refuses to serve potential customers by reason of their race. The unwanted customers refuse to leave. The proprietor summons police to arrest them for trespass. Under this bill, the action of the police and of the criminal courts in preventing and punishing trespass upon essentially private property is to be construed as State action “fostering, encouraging, or supporting” discrimination in an affected establishment.93

Such an extension was, in the view of the Virginia Constitutional Commission, a radical attack on property rights:94

In theory this approach has a certain pretty appeal. To embrace this concept, it is necessary only that one discard 10,000 years of property rights and 150 years of government under a written Constitution. One must prepare his mind for the obliteration of freedoms that have ranked among our most cherished rights. One must abandon the principle that governments are instituted among men to make men's rights secure, for no right is more ancient than man's right to hold, manage, and control the use of his property. If a citizen no longer may call upon the police and the courts to make that right secure, the whole concept of property rights is diminished. And we earnestly submit that no right is more important to every American citizen, regardless of race, than his right to property. None of the other familiar rights—the rights of free press, free speech, free religion, freedom to bear arms, the right of jury trial, the protection against excessive bail or cruel and unusual punishments—none of these cherished constitutional rights approaches, in terms of day-by-day living, the right to hold, manage, and control one's own property. The

93 VA. COMM. ON CONSTITUTIONAL GOV’T, CIVIL RIGHTS AND FEDERAL POWER, supra note 2, at 14-15. See also id. at 24 (“Six members of the House Judiciary Committee, in their able minority report, termed the bill ‘revolutionary.’ In the very deepest meanings of the word, reaching to the changes this law would work in our federal system and in the immense accretions of power here contrived, it is a fair word for a very bad bill.”).

94 Christopher W. Schmidt, Defending the Right to Discriminate: The Libertarian Challenge to the Civil Rights Movement, in SIGNPOSTS: NEW DIRECTIONS IN SOUTHERN LEGAL HISTORY, supra note 5, at 417-46.
The Civil Rights of 1964 and the Fulcrum of Property Rights

right is vital to poor man and rich man alike. It has surrounded the humblest citizen every hour of the day. There is no “human right” more precious. And this bill, in the name of a social objective for which many persons have sympathy, would fatefuly undermine it.  

In Congress, just as in the pamphlets distributed by the Virginia Constitutional Commission, there were charges that the Bill would upend individuals’ and businesses’ rights of property. One Congressman explained that:

Ours is a society of free enterprise based upon private ownership of property and exercising of individual liberties. The American system of business was founded on the principle of individual choice: One can buy from whom he wishes to buy and sell to people of his choosing. When one buys a home, he chooses a home in a neighborhood containing the environment which he desires. Some people like to live in a country club atmosphere; some in a city apartment house; some on a farm; some in neighborhoods of $30,000 homes; and some in an area that is predominated by people of their own class, economic status, race, or religion. Hundreds of our fraternities and social organizations have been founded by people of a particular group whose endeavors many times have been the furthering of their own kind. In our society, we have always been able to make an individual choice.

The rhetoric was extreme; the bill was “vicious” and it had the “authority to destroy the character of American free enterprise.” It would, quite simply, “enslave our economic system.”

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95 VA. COMM. ON CONSTITUTIONAL GOV’T, CIVIL RIGHTS AND FEDERAL POWER, supra note 2, at 14-15.
96 The Virginia Commission Report was praised during the debates. See 3 LEG. HIST., supra note 7, at 5690.
97 3 LEG. HIST., supra note 7, at 5853-54.
98 Id. at 5853.
99 Id. at 5854.
100 Id. For some reason the imagery of slavery was invoked with frequency by those who opposed anti-discrimination legislation. See also 5 Leg. Hist., supra note 7, at 8458-66 (reprinting Alfred Avins, Freedom of Choice in Personal Service Occupations: Thirteenth Amendment Limitations on Antidiscrimination
One should not expect deep analysis in Congressional debates, so there is no reason to expect a careful parsing of what the charges of communism and socialism meant. They were general allegations that the bill would restrict the rights of owners to exclude people from their property.\textsuperscript{101} Yet, at certain points opponents explained in more detail the philosophy behind the charges.\textsuperscript{102} For instance, they reprinted in the \textit{Congressional Record} one lengthy critical analysis of Title 2.\textsuperscript{103} That analysis, in turn, spent substantial space explaining the shift in property rights from the nineteenth century—a highpoint of individual rights, where owners presumably could exclude others at will and decide what they wanted to do with their property free from interference by the state—to the twentieth century’s increasing regulation of property.\textsuperscript{104} That study rested in large part on \textit{In Defense of Property}, a book of political theory published in 1963 by a Johns Hopkins University professor Gottfried Dietz.\textsuperscript{105} The book was self-consciously a brief lamenting the “tragedy” of the decline of property rights.\textsuperscript{106}

The fullest and most famous exploration of these issues is Robert Bork’s op-ed in the \textit{New Republic}, “Civil Rights – A Challenge.”\textsuperscript{107} Bork challenged the Act as an infringement on personal freedom.\textsuperscript{108} Harvard Law School professor Mark DeWolf Howe had written that the Act was a response to the South’s effort “to preserve the ugly customs of a stubborn people.”\textsuperscript{109} Bork turned the reference to ugly customs into an attack on the bill, however.\textsuperscript{110} He thought that the “principle of such legislation is that if I find your behavior ugly by my standards ... and if you prove stubborn about adopting my views of the situation, I am justified in having the state coerce


\textsuperscript{101} \textit{Id.}

\textsuperscript{102} \textit{Id.}

\textsuperscript{103} See \textit{A Critical Analysis of Title II of the H.R. 751 – The Public Accommodations Section of the Civil Rights Act}, in 8 LEG. HIST., supra note 7, at 12,882-907. See also \textit{ALFRED AVINS, OPEN OCCUPANCY VS. FORCED HOUSING UNDER THE FOURTEENTH AMENDMENT: A SYMPOSIUM ON ANTI-DISCRIMINATION LEGISLATION, FREEDOM OF CHOICE, AND PROPERTY RIGHTS IN HOUSING} (1963).

\textsuperscript{104} \textit{Id.}

\textsuperscript{105} \textit{GOTTFRIED DIETZ, IN DEFENSE OF PROPERTY} (1963).

\textsuperscript{106} \textit{Id.} at 7. See also \textit{A Critical Analysis of Title II of the H.R. 751 – The Public Accommodations Section of the Civil Rights Act}, in 8 LEG. HIST., supra note 7, at 12903 (quoting Dietz, supra note 105, at 7).


\textsuperscript{108} \textit{Id.} at 10870.

\textsuperscript{109} \textit{Id.} (quoting Howe in an unlocated source).

\textsuperscript{110} \textit{Id.}
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you into more righteous paths.” That led to a conclusion that was probably Bork’s most famous line—and one that was the subject of intense focus during his United States Supreme Court confirmation hearing—“That is itself a principle of unsurpassed ugliness.” Bork, likewise, attacked the distinction that some supporters drew between human rights and property, for he thought that “if A demands to deal with B and B insists for reasons sufficient to himself he wants nothing to do with A,” both are claiming “human rights.”

Opponents used their belief that the bill was unconstitutional to warn of another “tragic era” that would follow the enactment. This was a reference to the Claude Bower’s history of Reconstruction—now thoroughly discredited as the distorted fantasy wrought by white supremacy—that referred to the period as a tragic era that left Southerners without the protection of the Constitution. One member of Congress entered the chapter on Andrew Johnson from Claude Bower’s Tragic Era into the Congressional Record. Such sentiments reached Tuscaloosa, Alabama, where lawyer Charles Block addressed the Alabama bar in 1963 and labeled the constitutional and legislative changes of the Civil Rights Movement as “the second tragic era.”

Amidst the many celebrations of the fiftieth anniversary of the Civil Rights Act of 1964 that took place in law schools around the country, much of the talk was about the future—the work left to be done and the possible new directions in legislation and litigation. Sometimes there were

111 Id.
112 Id.
113 88 CONG. REC. 11232 (1964).
114 Id. (referring to James Reston’s distinction between property rights and human rights, supra note 43). See also 88 CONG. REC. 13373 (1964) (“We are dealing today with property rights. The only question is: who shall have those property rights? Shall it be the man who has earned or the man who has coveted that which he has not earned? The only ‘human rights’ involved are the rights of some humans against the claims of other humans.”).
116 88 CONG. REC. 2791 (1964).
117 88 CONG. REC. 5445 (1964).
This essay has looked backwards to the property rights debate before and during the debate over the Act to suggest that its focus on human rights and human dignity was grounded in debates and in legal decisions that had been going on for decades. But it also is worth taking the conservatives’ views seriously and asking whether the Act was part of remaking of American property law and Americans’ attitudes towards the right to private property. If those opponents were correct, we should be talking about the Act’s contribution to human rights more generally. This may be yet another instance in which the African American freedom struggle contributed additional rights to the entire country, as it had with the Reconstruction-era amendments in the nineteenth century and in the equal protection revolution in the twentieth century.

It may very well be that the Act legitimized the discussion of the ways that “property rights serve human values,” as Justice Maurice Pashman of the New Jersey Supreme Court wrote in the much-discussed 1972 case State v. Shack. Or maybe those changes, such as the implied warranty of habitability for residential tenants that has swept state legislatures since the 1960s, and Section 2 of the Civil Rights Act, draw on a common core of cultural values that support those who are not property owners. But whether the Act was an impetus for subsequent changes in property rights or merely a gauge of those changing values, the balance of the rights of property owners with those of the community changed during the 1960s.

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DIVERSITY AND THE HIGH-TECH INDUSTRY

Dorothy A. Brown*

“Here is the thing about these [high-tech] companies: When something is a priority, they move fast and break things.”

Rachel Sklar1

INTRODUCTION

This symposium asks us to look at race and gender inequality fifty years after the Civil Rights Act of 1964. The twenty-first-century battle lines will not be about eliminating “Blacks need not apply” advertisements, or making obsolete separate drinking fountains. Given how that type of public and explicit discrimination is rarely tolerated, racism and sexism have mutated into subtler and more socially acceptable forms that may be eradicated, in part,2 when we address implicit or unconscious bias.3 Laws that were effective at eradicating explicit racism have proven to be quite ineffective at combating unconscious bias.

*Professor of Law, Emory University. The views expressed herein are solely mine and do not represent the views of Emory University. I would like to thank Tressie, Cottom, A. Mechele Dickerson, Charles Shanor, and Claire Sterk for helpful comments and assistance on an earlier draft. JD (Georgetown); LLM (tax) (New York University). I also thank Ms. Baylie M. Fry for providing excellent research assistance. I also thank the participants at the Alabama Civil Rights & Civil Liberties Law Review symposium. © 2013


2 I say in part, because one of the biggest domains where that explicit and public racist behavior is accepted is with anonymous Internet comments. No amount of training will help here as the users generally remain anonymous. For an example of a cyberspace bully where the tables were turned see Nancy Leong’s experience. Nancy Leong, Anonymity and Abuse, FEMINIST LAW PROFESSORS (Nov. 19, 2013), http://www.feministlawprofessors.com/2013/11/anonymity-abuse/.

3 Dorothy A. Brown, Fighting Racism in the Twenty-First Century, 61 WASH & LEE L. REV. 1485, 1489–90 (2004) (“Given that it is no longer acceptable to be overtly racist, the bulk of racism has gone underground. Unconscious racism is today’s enemy.”). See also infra Part II.B.1.


Recent newspaper accounts have highlighted the lack of Blacks and Latinos/as working in high-tech firms as well as serving on boards of directors based on the firms’ self-disclosure of such data. Not surprisingly, those articles reach the same conclusion because they are based upon the

7 When Twitter was criticized for lack of gender diversity on its board of directors, the CEO tweeted what many considered a dismissive response and was roundly criticized. See Sam Biddle, Twitter CEO Takes Fire Over All-Male Board of Directors, VALLEY WAG (Oct. 7, 2013), http://valleywag.gawker.com/twitter-ceo-takes-fire-over-all-male-board-of-directors-1441983747.

8 See infra Part I describing workforce statistics.
same bleak facts: a majority of workers in the high-tech industry are White and male, as are the majority of those in executive or other leadership positions, or sitting on boards of directors.9 As a general proposition, the executives of the high-tech companies express distress at their diversity employment data, and all desire to improve in the future.10 They acknowledge the “pool problem” and the racial skills gap, both of which become obvious when looking at college graduates with the technical skills required by the industry. The industry argues that the pool of applicants with the requisite technical skills overwhelmingly comprises White males, which leads to very few Black and Latino/a graduates or White women who can code or have other skills that the high-tech firms need.11 That, in turn, leads to non-diverse hiring pools for open positions, which merely perpetuates the lack of racial and gender diversity in the workforce.

What much of the commentary misses, however, is the fact that there is no pool problem when it comes to Asians. Nevertheless, Asians are still underrepresented in leadership positions. While Asians make up five percent of the United States workforce population, they represent almost thirty percent of employees at Google, Facebook, Yahoo, LinkedIn, and Twitter.12 Yet none of those companies has Asians in leadership or board member


11 *Cf.* A similar “pool problem” argument is often made by elite law firms. In that instance the pool problem starts in law school with the limited numbers of Black and Latino/a law students on law review as well as at the top of the class with respect to grades.

12 *See infra* Table 1.2.
positions in anywhere near that proportion. I argue that this is primarily due to the unconscious bias and stereotypes held against Asians. They are believed to be good at math but lacking in personality and therefore not ideal as leaders – including chief executive officers or board members.

One study\(^{13}\) showed that Whites viewed Asian Americans as being suboptimal litigators because they are lacking in personality, uncomfortable taking the lead, shy, and have difficulty speaking English.\(^{14}\) The study is equally applicable to the high-tech industry when we discuss leadership traits. As Asians attempt to move up the promotion ladder they run into a brick wall of unconscious bias. Internal solutions are required. The high-tech industry does not need to wait for states and local governments to solve the K-12 problem, or colleges to improve Black and Latino/a recruitment – all events outside the high-tech industry’s control. While increasing the number of Blacks and Latinos/as in the high-tech industry is a laudable goal, it will require a multi-layered approach and can only be tackled in the long term with intentional and deliberate actions. The short-term solution would be to exercise leadership to retain and promote the Asians and Asian Americans already working in the industry.

Part I of this Article begins by discussing overall United States workforce composition by race and gender and shows the lack of a pool problem when it comes to Asian and Asian American workers (not true for Asian and Asian American women). It then provides information on the workforce composition of the following five high-tech companies: Facebook, Google, LinkedIn, Yahoo, and Twitter. In addition, Part I discusses board composition by race and gender for several high-tech companies in Silicon Valley. Workforce composition has recently become easier to obtain because several companies have voluntarily disclosed the data. Corporate board membership data was more difficult to obtain. Part I will conclude with the high-tech industry’s varied responses to the published data and describe initiatives undertaken to make the high-tech industry a more inclusive environment. Part II describes how racism operates in the twenty-first century, namely, through unconscious or implicit bias. It then shows how the lack of Asian and Asian American workers in the executive suite is due to stereotypes and beliefs held about Asians and Asian Americans. Part III describes the extent of the problem concerning Black and Latino/a workers in the high-tech industry. It argues that focusing attention solely on Blacks and Latinos/as is really support for maintaining the status quo. The article concludes by noting that, if the high-tech industry capitalized on the racial


\(^{14}\) See infra Part II.B.2.
diversity currently existing in its workforce. Its published numbers would tell a completely different story – a success story.

I. SELECTED EMPLOYMENT STATISTICS

Recent press accounts discussed the lack of race and gender diversity in the high-tech industry when several companies, including Facebook, Google, LinkedIn, Twitter, and Yahoo, released workforce data. As the data show, none of the high-tech firms are doing well on race and gender inclusion. There is a lot of hand-wringing and expressed sorrow, but with little real progress likely to occur.

Beginning with United States workforce data, Whites represent sixty-four percent, Hispanics represent sixteen percent, Blacks represent twelve percent, and Asians represent five percent of the labor force. Next, we examine the individual workforce data for Facebook, Google, LinkedIn, Twitter, and Yahoo. As you consider the data, they may paint an even more

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16 See Table 1.1, infra.


18 Without voluntary disclosure, this data is very hard to obtain. One enterprising reporter for the San Jose Mercury News, Mike Swift, requested information in 2008 from the Department of Labor on the region's 15 largest local employers. Mike Swift, Blacks, Latinos/as and Women Lose Ground at Silicon Valley Tech Companies, SAN JOSE MERCURY NEWS (Feb. 10, 2010, 4:00 PM), http://www.mercurynews.com/ci_14383730. His inquiry sparked a two-year legal battle. Id. He eventually received dated information on ten of the companies he targeted. Id. Five companies – Google, Apple, Yahoo, Oracle and Applied Materials – successfully blocked the request by arguing that releasing the data would infringe on their trade secrets. Mike Swift, Five Silicon Valley Companies
optimistic picture than is warranted. To the extent the EEO-1 forms provided were completed with a liberal interpretation of leadership positions, the data may not be consistent with what is actually happening in the various workforce environments.

Table 1.1 United States Workforce Data for Select High-Tech Companies\(^{19}\)

<table>
<thead>
<tr>
<th>Company</th>
<th>White Workforce %</th>
<th>White Leadership %</th>
<th>Asian Workforce %</th>
<th>Asian Leadership %</th>
</tr>
</thead>
<tbody>
<tr>
<td>Facebook</td>
<td>57</td>
<td>74</td>
<td>34</td>
<td>19</td>
</tr>
<tr>
<td>Google</td>
<td>63</td>
<td>67</td>
<td>29.5</td>
<td>27</td>
</tr>
<tr>
<td>LinkedIn</td>
<td>53</td>
<td>71</td>
<td>39</td>
<td>23</td>
</tr>
<tr>
<td>Twitter</td>
<td>59</td>
<td>72</td>
<td>29</td>
<td>24</td>
</tr>
<tr>
<td>Yahoo</td>
<td>54</td>
<td>79</td>
<td>37</td>
<td>15</td>
</tr>
</tbody>
</table>

For each company depicted above, Table 1.1 reveals that there is a lower percentage of Asian workers in leadership positions than in the overall workforce. The smallest gaps are found at Google and Twitter. The largest gap is found at Yahoo, followed by LinkedIn, then Facebook. LinkedIn has just under forty percent of its workforce being Asian, yet less than a quarter of the leadership positions are filled by Asian workers. Alternatively, White workers are always represented in higher numbers in the leadership positions than they are in the workforce. Here, the greatest disparity is found in Yahoo with a twenty-five percentage point advantage for Whites, followed by LinkedIn (nineteen percent), then Facebook (seventeen percent), then Twitter (thirteen percent). Google has the lowest preferential for being White at four percentage points.\(^{20}\)


\(^{20}\) See Table 1.1.
Facebook and Twitter did not disclose their workforce data by race and gender, however Google, LinkedIn, and Yahoo each did. The gender data released by Twitter was of global employees, not United States employees – something no other company did. None of the high-tech companies that have released workforce data have failed to provide gender data for their United States workforce.

Table 1.2 United States Workforce Data of Select High-Tech Companies by Race and Gender

<table>
<thead>
<tr>
<th>Company</th>
<th>White Workforce Male</th>
<th>White Workforce Female</th>
<th>Asian Workforce Male</th>
<th>Asian Workforce Female</th>
<th>Asian Leadership Male</th>
<th>Asian Leadership Female</th>
</tr>
</thead>
<tbody>
<tr>
<td>Facebook</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Google</td>
<td>46%</td>
<td>17%</td>
<td>58%</td>
<td>8%</td>
<td>20%</td>
<td>9%</td>
</tr>
<tr>
<td>LinkedIn</td>
<td>34%</td>
<td>19%</td>
<td>53%</td>
<td>18%</td>
<td>26%</td>
<td>13%</td>
</tr>
<tr>
<td>Twitter</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Yahoo</td>
<td>36%</td>
<td>18%</td>
<td>62%</td>
<td>17%</td>
<td>25%</td>
<td>12%</td>
</tr>
</tbody>
</table>

LinkedIn and Yahoo have similar percentages of White women in the workforce and in leadership positions. In contrast, Asian women’s representation at LinkedIn and Yahoo is significantly lower in leadership positions compared with their workforce percentages. Particularly for Yahoo, the percentage difference is a hefty one, reporting almost three times as many

21 The data they did provide raised more questions, especially concerning women by race. How do White women fare when compared with other women of color? When compared with White men? Was the data not disclosed because it is even worse than we imagine?
22 See Claburn, supra note 15; see also Diversity Data Shows, supra note 15; Facebook Mirrors Tech Industry’s Lack of Diversity, supra note 15.
24 See Claburn, supra note 15; Diversity Data Shows, supra note 15; Facebook Mirrors Tech Industry’s Lack of Diversity, supra note 15.
Asian women in the workforce as are represented in leadership or management positions.

Moving to Google, the percentage of White women in leadership positions is almost half of the percentage of White women in the workforce. Regarding Asian women, the data are even bleaker. While nine percent of Google’s U.S. workforce is made up of Asian women, there are none in leadership positions. Additionally, the Asians that are in leadership positions are men. However, the percentages of Asian men in leadership positions are far greater than their workforce participation representation.

Comparing this data with data obtained from the Department of Labor for the top-ten Silicon Valley firms, however, it seems our five companies may be doing better than some of their peers. In the Labor Department data, sixty-three percent of the workforce is White and eighty-three percent of the top managers are White. Twenty-five percent of the workforce is Asian and thirteen percent are top managers. What the top-ten data does not provide is a company-by-company basis of who is doing better than twenty-five percent, which company still has zeroes in senior management, and how women are being treated.

To summarize the data, White men are consistently overrepresented in senior management and Asians are consistently underrepresented, except at Google. Asian women seem to have a much harder time breaking through the glass ceiling of senior management than men, although both Asian men and Asian women seem to have to contend with different glass ceilings. This may not be that surprising, given how race and gender interact in the workforce.

Even before making the data public, many leaders in the high-tech industry were aware of the lack of diversity and expressed interest in making progress. Twitter’s Chief Technology Officer, Adam Messinger, said, “Half our customers, more or less, are women, and we want to have empathy for our customers, and part of that is having a wide variety of opinions in-house. … It’s also something a lot of people here think is the right thing to do.”

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25 Contrast with Black men, who represent less than 1 percent of the US workforce at Google (.85) yet hold 2.77 percent of the leadership positions.
26 They are: Apple; Google; Oracle; Cisco Systems; Intel; Gilead Sciences; eBay; Facebook; Hewlett-Packard; and VMware. See Josh Harkinson, Silicon Valley Firms are Even Whiter and More Male Than you Thought, MOTHER JONES (May 29, 2014), http://www.motherjones.com/media/2014/05/google-diversity-labor-gender-race-gap-workers-silicon-valley.
27 Id.
28 Id.
29 Miller, supra note 1.
But he adds, “There is definitely a supply-side problem.” Sheryl Sandberg, Chief Operating Officer of Facebook, has called the lack of diversity in companies “pretty depressing.” She also said, “Lean in means we should all lean in for equality.”

Twitter released the data in a blog post and acknowledged that “it makes good business sense… to be more diverse as a workforce – research shows that more diverse teams make better decisions.” In addition, the post added, “companies with women in leadership roles produce better financial results. … [W]e are joining some peer companies by sharing our ethnic and gender diversity data.” The Twitter representative went on to state: “[a]nd like our peers, we have a lot of work to do.” “We are keenly aware that Twitter is part of an industry that is marked by dramatic imbalances in diversity – and we are no exceptions.”

Facebook’s representative released the diversity figures on the “Facebook Newsroom.” In this post, Facebook conceded that “diversity is essential to achieving [its] mission.” Additionally, “[r]esearch . . . shows that diverse teams are better at solving complex problems and enjoy more dynamic workplaces.” However, the Facebook representative acknowledged that they “have more work to do” and “a long way to go” to achieve greater diversity.

Yahoo’s representative released the diversity figures through the “Yahoo Tumblr.” The Yahoo representative stated that Yahoo is “in the business of building products for hundreds of millions of users worldwide

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30 Id.
32 Id.
34 Id.
35 Id.
36 Id.
38 Id.
39 Id.
40 Id.
and that starts with having the best possible talent — a Yahoo team that understands and reflects our diverse user base.”

Despite recognizing that diversity is paramount to success, unlike its peers, Yahoo’s representative did not acknowledge that they “have a lot of work to do.”

Google released its employment diversity data on its website. Google stated, “Having a diversity of perspectives leads to better decision-making, more relevant products, and makes work a whole lot more interesting.” Additionally, Google admitted its statistics are “not where we want to be when it comes to diversity. And it is hard to address these kinds of challenges if you’re not prepared to discuss them openly, and with the facts.” However, Google noted, “[a]ll of [its] efforts, including going public with these numbers, are designed to help [the company] recruit and develop the world’s most talented and diverse people.”

Through a LinkedIn blog post, the LinkedIn representative released the diversity figures and stated, “We’ve experienced tremendous growth and have become a truly global company, but in terms of overall diversity, we have some work to do.” Further, “[t]rue inclusion is something that can only be achieved through a workforce that reflects the rich diversity of our member base, and this is something we strive to do in all of our hiring efforts.” LinkedIn affirmed that it would “consistently measure [itself] and look for ways to improve.”

By and large the “solutions” have been to work on improving the pipeline for White women as well as Blacks and Latinos/as in order to expand the pool of qualified applicants. I was unable to find a single high-tech

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42 Id.
43 Id.; Van Huysse, supra note 23; Williams, supra note 37.
45 Id.
46 Id.
47 Id.
48 Pat Wadors, LinkedIn’s Workforce Diversity, LINKEDIN (June 12, 2014), http://blog.linkedin.com/2014/06/12/linkedins-workforce-diversity/.
49 Id.
50 Id.
51 Van Huysse, supra note 23. Twitter responses to the bleak data include: the creation of affinity groups for employees who are women, people of color, and LGBTQs. Id. They say they will recruit at women’s colleges and historically Black colleges and universities (HBCUs). They have also supported Girls Who Code (where the Chief Technology Officer Adam Messinger sits on their board), hosted summer immersion programs, hired interns from Year Up, hosted Girl Geek Dinners, sponsored conferences, provided bias mitigation training throughout the
company that announced programs to increase the number of Asians in the pipeline.

**BOARD OF DIRECTORS INFORMATION**

Throughout Silicon Valley, start-ups tend to have all-male boards of directors because board members are generally the venture capitalists who invested in the start-up.\(^{52}\) According to National Venture Capital Association, eighty-nine percent of venture capitalists are men.\(^{53}\) Regarding race and ethnicity, eighty-seven percent are White, nine percent are Asian, two percent are African American or Latino/a, and two percent are of mixed race.\(^{54}\) Venture capital professionals who had been in the industry less than five years were more racially and ethnically diverse – although that did not hold true for gender diversity. In that subset, seventy-seven percent were White, seventeen percent were Asian, three percent were African American or Latino/a and three percent were of mixed race.\(^{55}\)

One 2013 study of high-tech companies provided the following data:\(^{56}\)

<table>
<thead>
<tr>
<th>Company Name</th>
<th>Ratio Female-to-Male Board Members</th>
<th>Non-White Board Members</th>
</tr>
</thead>
<tbody>
<tr>
<td>Airbnb</td>
<td>0-4</td>
<td>1</td>
</tr>
<tr>
<td>Amazon</td>
<td>2-9</td>
<td>0</td>
</tr>
<tr>
<td>AOL</td>
<td>3-9</td>
<td>1</td>
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<tr>
<td>Apple</td>
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<td>1</td>
</tr>
<tr>
<td>eBay</td>
<td>1-11</td>
<td>1</td>
</tr>
<tr>
<td>Fab.com</td>
<td>0-6</td>
<td>2</td>
</tr>
</tbody>
</table>

organization, and supported other initiatives aimed at helping women in STEM fields. *Id.*

\(^{52}\) Miller, *supra* note 1.

\(^{53}\) *Id.*


\(^{55}\) *Id.*

\(^{56}\) Nitasha Tiku, *The Boards Are All White: Charting Diversity Among Tech Directors*, VALLEYWAG (Oct. 8, 2013, 3:56 PM), http://valleywag.gawker.com/the-boards-are-all-white-charting-diversity-among-tech-1442532538. The study noted that Apple, Amazon, Google, and eBay did not respond to repeated fact-checking requests, and Yahoo did not comment. *Id.*
If you look at the racial composition of our five companies’ Board of Directors, we see that Facebook, Yahoo, and Twitter have no people of color and hence, no Asians on their boards.58 Google59 and LinkedIn60 each have a single member of color out of seven, which, if those members are Asian, would represent fourteen percent, less than even their very low representation in leadership positions.

Often when a company goes public, it faces pressure for the first time to add a woman to its board.61 Facebook and Zynga, among others, added their first women to their boards either within a year before going public or within the first year after going public.62 Another example was Twitter. Last fall, when Twitter went public, it was revealed that its board was all White and all male.63 Twitter CEO Dick Costolo was pummeled – ironically enough – on Twitter.64 In early December, Twitter appointed its first woman director: Marjorie Scardino, former chief executive of Pearson, a British publishing

58 Tiku, supra note 56.
59 Id. (noting K. Ram Shriram is the board member).
60 Id. (noting David Sze is the board member).
61 Miller, supra note 1.
62 Id.
63 Id.
Diversity and the High-Tech Industry

and education company.65 There are still no racial or ethnic minorities on Twitter’s board.66

While Sheryl Sandberg is currently a member of Facebook’s Board of Directors, that was not always the case. When Facebook first went public, its board of directors was all White and all male.67 It was not until about a month after going public that Facebook appointed Sandberg to the board.68

In 2011, when Ken Auletta asked Mark Zuckerberg why his five-member board had no women, he replied: “We have a very small board. . . I’m going to find people who are helpful, and I don’t particularly care what gender they are or what company they are. I’m not filling the board with check boxes.”69

The next board member he added was another White man.70

“Everyone is trying for diversity, both gender and ethnic diversity, on boards and in operating positions,” said Rick Devine, chief executive of TalentSky, a Silicon Valley recruiting firm.71 Additionally, he stated, “The issue isn’t the intention, the issue is just the paucity of candidates.”72

However, Twitter (along with other high-tech companies) overlaps with other industries, such as media, entertainment, and advertising, with a much more diverse pool, and one of its recently appointed directors was Peter Chernin, a White, male, former president of News Corporation.73

Many of the companies contacted cited a “pipeline problem.” There were simply not enough minorities and women graduating with technical degrees, they say, so companies are not able to choose from a diverse applicant pool. “The workplace begins to look like the classrooms for those majors: filled with men and not as many women.”74

65 Tsukayama, supra note 57.
66 Id.
67 See, e.g., Miller, supra note 1; Tiku, supra note 56.
69 Id.
70 Id.
71 Miller, supra note 1 (quoting Rick Devine, Chief Executive of Talent Sky, a Silicon Valley recruiting firm).
72 Id.
73 Id.
Based on the actual employment data, we should see a lot more Asians in high-tech industry leadership positions and serving on tech-industry corporate boards, but we don’t. There may be a pipeline issue for Blacks and Latinos/as, but there is none regarding Asians in high-tech industries. As far as that group is concerned, there isn’t the pool problem that the executives would have us believe.

Given the bleak numbers provided earlier, if these same companies tackled other problems this way on a regular basis, they would file for bankruptcy protection or, at the very least, a number of senior employees would be unemployed. Think about it: you have a goal but you never meet it, and all you do is wring your hands or become defensive. Yet many think these answers are acceptable. And as we’ve seen, there is no pool problem excuse regarding the pipeline of Asian workers and the industry knows it, which is why they are not engaging in outreach to Asian communities. Increased Asian presence on corporate boards and in upper management could change tomorrow — if existing leaders in the high-tech industry exercised some political will and leaned into equality. What the high-tech companies should do will be the focus of the next section.

II. MAKING DIVERSITY WORK

A. WHAT WORKS?

Dr. Robin Ely, renowned expert on organizational behavior and diversity, has stated that there is very little empirical evidence “to support the idea that if you bring a diverse group together you will necessarily get performance benefits from that group.”\(^{75}\) There are two competing theories about how diversity impacts workplace group performance.\(^{76}\) One is optimistic and one is pessimistic.\(^{77}\)

The optimistic view is that diversity increases the pool of available resources, whether we are talking about social networks, skills, and/or insights, in order to enhance the group’s creative and problem solving abilities.\(^{78}\) The pessimistic view says that diversity leads to social comparisons between in-groups and out-groups, with people having a preference for members of their particular in-group.\(^{79}\) The latter can lead to


\(^{76}\) *Id.*

\(^{77}\) *Id.*

\(^{78}\) *Id.*

\(^{79}\) *Id.*
stereotyping, miscommunication, and polarization – all of which create performance losses and not gains.\textsuperscript{80}

More empirical studies support the pessimistic view, however. The few studies that do support the optimistic view have generally been simulations conducted in laboratories and not in the workplace.\textsuperscript{81} Therefore, Dr. Ely (and her co-author) decided to study a real-life company with the goal of identifying when performance benefits occurred as a result of workplace diversity – with a specific emphasis on racial diversity.\textsuperscript{82}

Companies tend to take one of the following three perspectives about diversity:

1. Discrimination and fairness perspective. The work groups aspire to being color blind, so conversations around race are limited…. They believe there is no connection between race and the work, but racial bias can end up being destructive in the work group.
2. Access and legitimacy perspective. There is diversity only in certain parts of the organization. People are effectively shunted onto segregated career tracks and told, ‘This is what you’re good at.’
3. Integration and learning perspective. Group members are encouraged to bring all relevant insights and perspectives to bear on their work.\textsuperscript{83}

The discrimination and fairness perspective is really about assimilation. In other words, race is not an issue and everyone should get along because there are no differences based upon race. The organization does not see color. The employee of color who thinks race matters and raises it will be thought of as playing the “race card” because race is irrelevant. It’s all about the work, and if you work hard everything will work out well for you. The employee of color is expected, perhaps required, to say that this is a colorblind workplace. Stated differently, the employee of color (and White peers who think similarly) are forced to conform and keep different views to themselves if they want to succeed and be promoted.

\textsuperscript{80} Id.
\textsuperscript{81} Id.
\textsuperscript{82} Id.
\textsuperscript{83} Id.
The access and legitimacy perspective is about recognizing that race matters – but only in limited spheres. For example, if a company has (or is seeking to improve) a market share in a certain racial or ethnic community, a person of that same race or ethnic background would be the company’s representative to that community. The employee’s skill set beyond race and/or ethnicity is neither valued nor acknowledged.

The integration and learning perspective recognizes that race matters in the workplace and outside of the workplace. This perspective means that employees bring “the whole person to work.” Martha Lagace noted that “[o]penly discussing and learning from differences made it possible for the groups to create psychological safety.” The article continues and observes that “[t]he integration and learning perspective is a way of managing the fact of racial discrimination in the larger culture.”

Neither of the first two perspectives results in performance gains for the organization. When dealing with racial diversity, there are significant performance benefits, but only when groups actively acknowledge and engage the differences in a way that “fosters learning,” which is only found in the third perspective. While that perspective may also have more conflict along the way to creating performance benefits, it is the only way to get there. Ely and Thomas concluded from their study that “when work groups actively acknowledge and engage with their different members in a way that fostered learning, they performed better as well.”

The study shows that racial diversity in the workforce does not magically translate into better outcomes. In order for a racially diverse workforce to result in “measurable performance benefits,” leadership must be intentional and create a workplace where employees affirmatively chose to learn from their peers’ differences rather than “ignore or suppress them.”

Assuming an organization decides that it wants to embrace the learning and effectiveness paradigm, what should its next steps be and who should lead the change management efforts? A recent study suggests that it should not be White women or people of color.
The study finds that “[n]onwhite and women leaders who engage in diversity-increasing behaviors in the highest organizational ranks are systematically penalized with lower performance ratings for doing so.”92 The study’s authors suggest “that nonwhite and women leaders may increase their own chances of advancing up the corporate ladder by actually engaging in a very low level of diversity-valuing behavior.”93 The notion that when people of color get into positions of authority they may not engage in behavior designed to help other people of color is supported by the research of law professors Devon Carbado and Mitu Gulati.94 In their article Race to the Top of the Corporate Ladder: What Minorities Do When They Get There, they posit that the likely response is to not engage in that behavior.95 Given the lack of commitment by their White peers, one would expect many people of color (as well as White women), once they arrive in senior leadership, to not be outspoken in terms of including others who look like them for fear of not being considered a team player or part of the inner circle.96

The research points to one solution: namely, that White males should play a larger role in diversifying the workplace and should be at the forefront of leading the changes necessary to make the workplace more welcoming of the whole self of every employee.97

92 Id.
93 Id.
95 Id. at 1646.
96 Id. at 1654 (“Our central claim is that the corporation both selects for and produces racial types to win multiround promotion tournaments. These racial types, we contend, are unlikely to be invested in facilitating the promotion of other nonwhites. We should be clear to point out that this lack of investment does not derive from a normative commitment on the part of senior people of color to disidentify with other racial minorities. The disinvestment exists because of the institutional rewards of racial disidentification and institutional costs of perceived racial group association.”).
97 ACAD. MGMT., Diversity Study, supra note 91.
B. CHANGE MANAGEMENT AND THE HIGH-TECH INDUSTRY – NEXT STEPS

Two preliminary but crucial decisions need to be made. First, the high-tech industry needs to embrace the integration and learning perspective for all the reasons described above. In order to get performance benefits, each employee must be allowed to bring their whole selves to work. Second, the industry’s White male leadership needs to decide that this is their issue and should take responsibility for implementing the approach. After those important decisions are made, the next steps must be considered.

Each organization has its own unique culture, which must be at the forefront of any change management; however, there are several steps that should be included or that can be adapted in some manner to fit the organizational culture. They are: (1) unconscious bias training for the entire workforce; (2) executive leadership training; (3) leadership development programs; and (4) valuing inclusion as part of the annual performance review process.

1. Unconscious Bias Training

First, unconscious bias training is a necessity. We do not live in a post-racial society, and the integration and learning perspective has, at the forefront, the notion that race does still matter and affects our experiences in society and the workplace. Duke sociologist Eduardo Bonilla-Silva writes in his seminal work, *Racism Without Racists*:

Nowadays, except for members of white supremacist organizations, few whites in the United States claim to be ‘racist.’ Most whites assert they ‘don’t see any color, just people’; that although the ugly face of discrimination is still with us, it is no longer the central factor determining minorities’ life chances; and, finally, that, like Dr. Martin Luther King Jr., they aspire to live in a society where ‘people are judged by the content of their character, not by the color of their skin.’

As a result, the workforce may very well include many Whites who think we are living in a post-racial society. The unconscious bias training will need to occur to help each employee understand that they have biases, too. Perhaps as part of the training, each employee should be required to take (or encouraged to take) the Race Implicit Association Test (Race IAT).

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99 See, e.g., Implicit Association Test, PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/ (last visited Aug. 8, 2014); see also
Almost seventy-five of those who take the Race IAT reveal an automatic White preference. The Race IAT shows that Asian participants (consistent with the majority of test takers) have an implicit preference for White people over Black people. Roughly half of Black participants have a preference for White people over Black people. The point of the Race IAT is to make the invisible visible. Once bias is acknowledged, steps can be taken to address the problems that stem from it, but the first step is to acknowledge that one has a problem.

2. Executive Leadership Training

Second, Executive Leadership Training should be created for the mainly White, male leadership with a focus on how stereotypes associated with Asians may prevent the advancement of roughly a third of the workforce. Professor Neil Gotanda argues that there are three primary stereotypes of Asian Americans: (i) foreignness; (ii) Model Minority; and (iii) 9-11 terrorist. The latter does not really play a role here. However, the
Asian American as foreigner stereotype, which has a long history, and the Model Minority stereotype, which is a more recent vintage, are both stereotypes that will need to be addressed if the integration and learning perspective has any hope of taking hold.

The foreignness stereotype is relatively obvious. If management sees a person as a foreigner, management will be less likely to see that person as a leader of “their” company. Consider the following hypothetical question and answer between two strangers. Stranger A asks: where are you from? Stranger B responds: Texas. Stranger A asks a follow-up question: no really, where are you from? Stranger B again responds: Texas, and this time explains that she was born and raised in Texas. It is inconceivable to Stranger A that Stranger B, who happens to be Asian American, could be American. That is an example of the foreignness stereotype that allows people to look at Asian Americans and decide they are not real Americans, or not American enough. A similar and very recent example comes from Congressman Curt Clawson (R-Fla) who mistook two senior United States Government officials as being representatives of the Indian government.

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105 Gotanda, supra note 103, at 39-40 (“The Chinese racial category is also posed in opposition to a culturally superior White nation. But the direction of the rationale—foreignness—is directed less at inferiority than at expulsion. The Chinese are inassimilable and therefore to be excluded from the body politic if not physically deported from the nation. This new racial category is therefore not a simple ‘add-on’ to White and Black. Although the Chinese racial category was based upon descent from original Chinese bodies (just as the Negro or Black racial category was based upon descent from original African bodies), the ascribed racial identities for Blacks differ sharply from the ascribed identities for the Chinese. The different racial profiles have very different qualities in relation to the American nation. Blacks are clearly part of the American nation, though in a subordinate relationship. The Chinese, by contrast, are only provisionally present on U.S. soil. Their foreignness makes them politically and socially suspect, and at best, tolerable economic participants as workers or traders. The Chinese are therefore ultimately excludable from the nation.”).

The model minority stereotype “portrays [Asian Pacific Americans] as superminorities. According to the myth, [Asian Pacific Americans] are racial minorities that have succeeded through education and hard work and whose income and wealth match or exceed that of White Americans. The model minority myth emphasizes the success of [Asian Pacific Americans], especially as compared to other people of color.”

While it may seem favorable at first glance, like all racial stereotypes this one similarly hurts Asian Pacific Americans. Since the assumption is that Asian Pacific Americans are doing so well, when an issue arises pointing out their need for assistance, it falls on deaf ears.

Perhaps this is one potential explanation for why the newspaper articles have ignored the lack of Asian participation in senior level of management and board service given their high participation rate in the high-tech industry and have focused instead on Blacks and Latinos/as.

I am reminded of an encounter that I had with a White, male colleague regarding law school faculty hiring and whether it was appropriate to engage in affirmative action for Asian Americans. The colleague said to me that Asian Americans didn’t need affirmative action in law school hiring because they were doing so well in society. I responded that, given that our faculty at the time had zero Asian Americans, it seemed to me that Asian Americans weren’t doing so well on our faculty. After a few moments of awkward silence, the colleague walked away.

The model minority stereotype hurts in additional ways. Consider how traits such as ambition, assertiveness, and competitiveness are associated with White professionals, specifically White males.

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108 Id.

significantly from characteristics associated with Asian Americans. Typical stereotypes associated with Asian Americans perceived as the “model minority” include: an orientation towards math and technical academic achievement. Characteristics that are not associated with Asian Americans, however, are those previously described: “ambition, assertiveness, competitiveness, dominance, eloquence, and extraversion.” On the contrary, Asian Americans are typically “perceived to be quiet and deferential.” “Asian Americans are seen as cooperative and oriented toward interpersonal harmony, not dominance.” “Asian Americans are perceived as having difficulty with English.”

“In general, Asian Americans are stereotyped as being deficient in interpersonal and social skills,” which are the precise skills that you would expect to see in those being groomed as managers, executives, and board members. The stereotyping of Asian Americans is one potential explanation for why we see Asian Americans in technical jobs in high-tech companies but not moving up the corporate ladder or moving into board positions. Those in leadership positions need to become familiar with this problem in order to break down barriers that may be keeping the next generation of talented leaders of the industry.

3. Leadership Development Programs

Third, Leadership Development programs should be developed for promising Asian workers who are identified by those who have successfully undergone Executive Leadership Training sessions and will now evaluate their Asian workforce through less biased eyes. Within a short period of time, the executive suite should look and feel differently.

110 Id.
111 Id.
112 Id. at 891.
113 Id.
114 Id.
115 Id.
116 Id. While this comparison was made in the context of comparing White litigators to Asian American litigators, many of the traits found in successful litigators are found in successful chief executive officers, board members, and senior managers and it is therefore an appropriate reference point.
4. Valuing the Integration and Learning Perspective

Fourth, the company must include diversity and inclusion as part of the annual review and bonus process. To encourage progress, the company must measure and reward the degree to which people recruit and promote individuals demographically unlike themselves.117 One study made a common sense observation: “Because white men currently hold a clear numerical majority at the highest organizational levels, rewarding such demographic unselfishness would naturally correct the demographic imbalances throughout organizations as members of demographic majorities would tend to hire and promote members of demographic minorities.”118 It is not uncommon in the corporate world to have racial diversity efforts included as part of the calculation of a manager’s bonus. This would not only measure recruitment but retention, which will generally be a function of how well the manager is implementing the integration and learning perspective. How well the manager and the team are functioning under this perspective will also need to be assessed.119 In addition, the input of all of the manager’s direct reports should also be solicited as part of the assessment.

A workforce committed to the integration and learning perspective should be supportive of talented Asian workers being recognized, mentored, and promoted. Those who stand in their way should be looking for new jobs. Those who are successful change managers should be promoted. That is what leaning into equality looks like.

III. THE LONG GAME: BLACKS AND LATINOS/AS IN SILICON VALLEY

The workforce employment data described in Part I was primarily focused on statistical data for Whites and Asians. This section will document how very few Blacks and Latinos/as are currently employed in Silicon Valley and the high-tech industry generally. The greatest need is clearly with those groups. However, for reasons I will show, any company that places its racial and ethnic diversity focus on Blacks and Latinos/as is supporting the status quo for the foreseeable future. That is why in Part II I have argued that the short-term focus on racial diversity and inclusion efforts in Silicon Valley should be directed towards promoting and retaining the Asians currently in

117 ACAD. MGMT., Diversity Study, supra note 91.
118 Id.
119 Given that this perspective will necessarily require dissent and disagreement, perhaps specific examples where a dispute occurred and how the team worked through it would be required to be described in order to ensure that the approach was being implemented in more than a surface manner.
the workforce. This section shows some of the difficulties associated with recruiting more Blacks and Latinos/as to live and work in Silicon Valley. I will begin with the data.

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<thead>
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<th>Facebook(^\text{120})</th>
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<td>2%</td>
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<table>
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\(^\text{120}\) Williams, supra note 37.
\(^\text{121}\) Van Huysse, supra note 23.
\(^\text{122}\) Making Google a Workplace for Everyone, supra note 44.
## Diversity and the High-Tech Industry

<table>
<thead>
<tr>
<th>LinkedIn(^{123})</th>
<th>Workforce by Race/Ethnicity</th>
<th>Senior Level by Race/Ethnicity</th>
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</thead>
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<td></td>
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<tr>
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<td></td>
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<tr>
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<table>
<thead>
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<th>Yahoo(^{124})</th>
<th>Workforce by Race/Ethnicity</th>
<th>Senior Level by Race/Ethnicity</th>
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</thead>
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<td>Male</td>
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<td>.87%</td>
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<td></td>
<td>0%</td>
<td>1.9%</td>
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</table>

The data speak for themselves. Very few Blacks and Latinos/as work in the high-tech industry and even fewer are in positions of leadership. The number of zeros (and near zeros) should be disconcerting to us all. Each of the companies that provided breakdown data for race and gender had categories where there were simply no Black or Latino/a workers. Facebook did not have any zero categories, I suspect because they failed to break out their racial data by gender.

Race and space often go together, and Silicon Valley is no exception.\(^{125}\) Silicon Valley’s 1,854 square miles includes the following

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\(^{123}\) Wadors, supra note 48.

\(^{124}\) Reses, supra note 41.

\(^{125}\) See, e.g., Keith Aoki, *Space Invaders: Critical Geography, the ‘Third World’ in International Law and Critical Race Theory*, 45 VILL. L. REV. 913 (2000);
counties: Santa Clara, San Mateo, Alameda, and Santa Cruz. Silicon
Valley has a population of just under 3 million (2.92 million) as follows: 36
percent White, non-Hispanic; 31 percent Asian, non-Hispanic; 26.5 percent
Hispanic and Latino/a; 2.5 percent Black; and 4 percent other. The racial
diversity leans heavily towards Asians and Latinos/as and against Blacks.
One problem with recruiting Blacks to Silicon Valley may be asking them to
live and work in an area with very few people who look like them. Given
the small percentage of Blacks living in Silicon Valley, outreach efforts
directed towards them will have to take into account the racial isolation they
may feel when they return home from a long day’s work—assuming their
work environment includes many people who look like them, which is
certainly not the case today. If they move to a more racially diverse area, then
they will have a significantly longer commute than their peers. This is a
structural problem that cannot easily be solved by Silicon Valley high-tech
leaders no matter how committed they may be to hiring Blacks and other
underrepresented minorities.

In addition to geography, there are structural pipeline issues as to why
there are not more Black and Latinos/as in the high-tech industry. A greater
percentage of Black and Latino/a students do not graduate from high school
and never make it to college when compared with their White peers. While
the overall dropout rate is 6.6 percent, the White dropout rate is 4.3 percent,
for Blacks it is 7.5 percent, and for Hispanics it is 12.7 percent. Black men
are now six times more likely than White men to be in prison. Just under a
third of Whites have four-year college degrees or higher, compared with just

Dorothy A. Brown, *Shades of the American Dream*, 87 WASH. U. L. REV. 329
(2009).

126 2014 Silicon Valley Index, JOINT VENTURE SILICON VALLEY & SILICON

127 Id.

128 Cf. Brown, *supra* note 125, at 356 (describing how most Black homeowners
like to live in racially diverse neighborhoods with other Blacks).

129 Digest of Education Statistics: Table 219.70, NAT’L CENTER FOR EDUC. STAT.

130 Id.

131 Bruce Drake, *Incarceration Gap Widens Between Whites and Blacks*, PEW RES.
under twenty percent of Blacks. Almost sixty percent of Blacks with four-year college degrees or higher are women. In summary, compared with Whites, Blacks and Hispanics are falling behind in the measures of achievement including: NAEP math and reading test scores; high school completion rates; and college enrollment and completion rates. In addition, the Center for Economic and Policy Research reported on the higher Black unemployment rates when compared with Whites for those with college degrees in engineering, math, and computers. Is this because those Blacks were offered jobs in the high-tech industry and turned them down? I would suspect that is not a likely explanation. There should be something close to a zero unemployment rate for Blacks with these skills; but that is not the case. So to that extent, more could be done even without solving the myriad problems associated with the “pipeline.”

These statistical disparities are just some of the issues requiring solutions if the “pipeline problem” regarding Blacks and Latinos/as in the high-tech industry is to be solved. It would require providing educational access, eliminating the achievement gap, eliminating poverty, and changing the way local schools are funded, to name a few solutions that would be prerequisites to addressing the “pipeline problem.” As long as those problems remain intractable, the high-tech industry can wring its hands, express sincere concern, and, at most, effect change in a very limited way, and only on the margins. Nor do I mean to suggest that high-tech companies should be responsible for taking on this fight. They are ill-equipped to do so, as the recent Facebook/Newark partnership has shown.

By focusing on the dearth of Blacks and Latinos/as in the high-tech industry, attention is diverted away from the fact that the current high-tech workforce is overrepresented (when compared to the population at large) by Asians and Asian Americans. There should be more Asian CEOs and board

133 Id.
members in the high-tech industry, yet there are not. Perhaps the high-tech industry is not the meritocracy the industry would have us believe.

If this were a true meritocracy, one would expect far fewer White males in executive leadership positions in the high-tech industry and far more Asians. We might expect to see a near zero unemployment rate for Blacks with engineering, computer, and math degrees. We would also expect to see a bidding war for those Blacks with technical skills – but maybe not. Recently, Judge Koh rejected a proposed $324 million class action settlement of a lawsuit against high-tech companies who were alleged to have colluded to not “poach” each other’s engineers.\(^\text{137}\) If the market were leaning into equality, perhaps the unemployment rate for Black engineers would be zero and they would be selling their services to the highest bidder.

If the high-tech industry were not unconsciously biased, we might also expect the current leadership to think it is odd that so many of its workers do not look like them, yet the executive suite is largely homogeneous. Returning to my opening quote: why isn’t the high-tech industry moving fast and breaking things to make its workforce more inclusive?

**CONCLUSION**

Much of this Article has focused on the importance of leaders promoting those who do not look like them. In the high-tech industry, we are talking about White leaders becoming champions for Asian workers. I want to conclude with one example from *Lean In* about mentoring – specifically cross-racial mentoring.

When Sheryl Sandberg worked at McKinsey & Company, a client wanted to fix her up with his son and kept talking about it at meetings.\(^\text{138}\) She complained to her supervisor, who told her to ask herself what she was “doing to send these signals.”\(^\text{139}\) She was justifiably upset and took the courageous step to go to her boss’s boss, Robert Taylor.\(^\text{140}\) Here is her description of that conversation:

Robert understood my discomfort immediately. He explained that sometimes those of us who are different (he is African


\(^{139}\) Id.

\(^{140}\) Id.
American) need to remind people to treat us appropriately. He said he was glad I told the client no on my own and that the client should have listened. He then talked to the client and explained that his behavior had to stop. He also spoke with my [supervisor] about his insensitive response. I could not have been more grateful for Robert’s protection.141

Robert Taylor is African American. Sheryl Sandberg should tell that story to her fellow board members and her fellow executives. Facebook’s lack of racial and gender diversity suggests that those in charge of recruitment, retention, and promotion are not protecting their people the way Robert Taylor protected Sheryl Sandberg.

That is not to suggest that this should be Sheryl Sandberg’s fight alone, given her minority status as a White woman in the high-tech industry and the way that White women and people of color who lead the “diversity and inclusion” charge are perceived. If she chooses, she will need to partner with her White male peers in the executive suite and boardroom.

All of senior management, particularly the White males who are the overwhelming majority of senior leaders and board members, should understand that how they are treating their Asian workers is not reflective of how they were generally treated on their way up the corporate ladder. If they had received little to no mentoring, they would not hold the leadership positions they currently hold. That the mentoring in the high-tech industry will have to be cross-racial should not be a barrier or an excuse. It is time for the hand-wringing to end and the action to begin.

141 Id. at 75-76.
COMPLEX CIVIL RIGHTS ORGANIZATIONS:
ALPHA KAPPA ALPHA SORORITY, AN EXEMPLAR

Gregory S. Parks, † Rashawn Ray, ‡ and Shawna M. Patterson*

The narrative about African American organizations and their role in Blacks’ quest for social equality and civil rights in the United States is often a conventional one. Traditional civil rights organizations take center stage, with the efforts that they made and make, as well as the model that they employed and continue to employ, being the exemplar. Take, for example, the National Association for the Advancement of Colored People ("NAACP"). After the civil war, a number of groups and movements attempted to organize and ensure franchise for African Americans.1 From this collection of independent and sometimes fragmented enterprises rose the Niagara group, which held “strategic mass meetings and annual conventions.”2 Simultaneously, a small group of Whites who were concerned with the racial riots of the early 1900s organized a meeting in New York, which began the organization of the future NAACP.3 That group, led by Mary White Ovington and English Walling, sought a larger conference with the Niagara group led by W.E.B. Du Bois.4 The first conference was held on May 30, 1909.5 Within a year, the group was incorporated in New York as the NAACP, with the five incorporators—W.E.B. Du Bois, Oswald Villard, Walter Sachs, John Haynes Holmes, and Mary Ovington.6

Much like the NAACP, the National Urban League (NUL) had its roots in several turn of the century organizations.7 Groups like the

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‡ Assistant Professor of Sociology, University of Maryland, College Park.
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2 Id. at 37.
3 Id. at 40.
4 Id.
5 Id.
6 Id. at 41.
Association for the Protection of Colored Women (1905), the Committee for Improving the Industrial Condition of Negroes in New York (1906), the National League for the Protection of Colored Women (1906), and the Committee on Urban Conditions Among Negroes (CUCAN, 1906) all addressed the plight of workers arriving in the North looking for jobs but finding poverty. By 1911, a National League on Urban Conditions Among Negroes (NLUCAN) federation began operating with delegates from the aforementioned groups. It assumed the NUL name in 1920 for simplicity. The early activities of the organization included putting pressure on businesses that refused to hire Black workers, encouraging the government to include Blacks in New Deal recovery programs, and increasing Black membership in previously segregated labor unions.

By the mid 1950’s, church-led bus boycotts were springing up across the South. When White leaders pressed for negotiations to end the tensions, they found that Black preachers had supplanted Black teachers as the voice of the community. The sudden empowerment of preachers arose, in part, because of their economic independence; professors and teachers could be pressured by their schools, but the preachers were beholden only to their supportive congregations. Additionally, they were directly connected to Black communities in their professional capacity. Without the boycotts, and particularly the Montgomery bus boycott, organizations like the Southern Christian Leadership Conference (SCLC) would not have formed. On January 10, 1957—following the Montgomery Bus Boycott—Martin Luther King, Jr. invited dozens of Black ministers and other leaders to Ebenezer Church in Atlanta, Georgia. Their goal was to form an organization that would coordinate and support nonviolent direct action as a method of

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8 Id. at 4-6.
9 Id. at 34.
10 Id. at 67.
13 Id. at 13.
14 Id. at 14.
15 Id.
16 Id. at 22.
2014] Complex Civil Rights Organizations

desegregating bus systems in the South. That organization would become known as the Southern Christian Leadership Conference (SCLC). 18

Other African American organizations, too, have played a critical role in the civil rights movement. For example, Theda Skocpol and colleagues, as well as Corey D.B. Walker, in their respective works, highlight the contributions that African American secret societies made to Blacks’ struggle for social equality in the United States. 19 In this article, the authors analyze the role that another set of African American fraternal groups have played in African Americans’ civil rights struggle and the challenges, and maybe opportunities, created from the complexity associated with these organizations as they pertain to carrying out this mission. African American collegiate-based fraternities and sororities—also known as Black Greek-letter organizations (BGLOs)—have existed for more than one hundred years. Despite their growth and longevity, critics and commentators have weighed in on these organizations’ efforts, or lack thereof, to contribute to African Americans’ quest for social equality and civil rights. E. Franklin Frazier, noted sociologist and Alpha Phi Alpha fraternity member, described BGLOs as plagued by “conspicuous consumption” rather than a genuine commitment to racial uplift activism. 20 In a 1958 Bennett College speech, Martin Luther King, Jr., also an Alpha Phi Alpha member, noted:

I know…we want to have some of the basic goods of life. We want to have some of the luxuries of life but what I’m saying is, let’s maintain a sense of values. We don’t have time to spend a lot of money on whiskey and big parties and a lot of stuff, and we aren’t giving money to the basic causes that confront us now… It will be an indictment on the Negro if it is revealed that we spend more money on frivolities than we spend on the cause of freedom and justice… I remember one year that a certain fraternity assembled with other fraternities and spent in one week $500,000 on whiskey. That’s what the paper reported. Negroes spend more money...in one week than

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18 Id.
the whole Negro race spent that whole year for the NAACP and the United Negro College Fund.\textsuperscript{21}

Despite BGLOs’ twentieth-century influence, many continue to question their relevance.\textsuperscript{22} For this reason, the authors conceptualize BGLOs as organizations that must come to grips with their own complexity in order to remain sustainable and productive, especially in the realm of civic activism and shaping public policy around issues of race.

Organizational complexity may manifest itself in an organization’s structure,\textsuperscript{23} goals,\textsuperscript{24} strategy,\textsuperscript{25} or identity.\textsuperscript{26} The authors here are most concerned with organizational identity—i.e., what is central, distinctive, and enduring about an organization. According to organizational behavior scholar Y. Sekou Bermiss, within the context of organizational identity, active management is required in order to militate against organizational problems.\textsuperscript{27} For example, identity threat involves environmental forces that may contradict or challenge the legitimacy of an organization’s identity. Conflicts arise when an organization has multiple identities and members may have allegiances to some but not all of those identities, resulting in an organizational identity crisis.\textsuperscript{28}

In this article, the authors explore BGLOs as complex organizations. Specifically, we focus our analysis on one such organization, the first of the BGLO sororities—Alpha Kappa Alpha—as a way to conceptualize organized Black women’s racial uplift activism. In doing so, it is the authors’

\textsuperscript{21} Martin Luther King, Jr., The Bennett College Speech (1958).
\textsuperscript{24} Sendil K. Ethiraj & Daniel Levinthal, Hoping for A to Z While Rewarding Only A: Complex Organizations and Multiple Goals, 20 ORG. SCI. 4 (Jan.-Feb. 2009).
\textsuperscript{25} Robert B. Pojasek, Improving Processes in Complex Organizations, 14 ENVTL. QUALITY MGMT. 85 (Spring 2005).
\textsuperscript{26} Greta Hsu & Michael T. Hannan, Identities, Genres, and Organizational Forms, 16 ORG. SCI. 474 (Sept.-Oct. 2005); M. G. Pratt & P. O. Foreman, Classifying Managerial Responses to Multiple Organizational Identities. 25 ACAD. OF MGMT. REV. 18-42 (Jan. 2000).
\textsuperscript{27} Y. Sekou Bermiss, What We Mean by Organizational Identity, in ALPHA PHI ALPHA: A LEGACY OF GREATNESS, THE DEMANDS OF TRANSCENDENCE 9 (Gregory S. Parks & Stefan M. Bradley eds., 2012).
\textsuperscript{28} Id. at 14-16.
hope that Alpha Kappa Alpha will serve as an exemplar for the challenges and opportunities that face all BGLOs in the area of racial uplift activism. We investigate how challenges within the various constituent features of Alpha Kappa Alpha’s complexity may hamper its racial uplift activism. Racial uplift activism is conceptualized as promoting civic activism and efforts to shape public policy. In the first section, the authors provide a history of the confluence of factors that gave rise to BGLOs generally, and to Alpha Kappa Alpha specifically. In the second section, the authors explore examples of racial uplift activism that Alpha Kappa Alpha performed in the twentieth century. The third section addresses challenges that Alpha Kappa Alpha faces in the twenty-first century as it continues to serve as a conduit for African American racial uplift.

I. THE HISTORY OF BGLOS: A COMPLEX EVOLUTION OF AN ORGANIZATIONAL IDENTITY

Arguably, a confluence of factors gave rise to the founding of Alpha Kappa Alpha, both directly and indirectly. According to Marjorie H. Parker, Alpha Kappa Alpha’s national historian, the sorority’s founding is often associated with the establishment of Alpha Phi Alpha Fraternity’s Beta chapter at Howard University in December 1907. The inspiration for and “moving spirit” of Alpha Kappa Alpha was Ethel Hedgeman’s high school sweetheart (and later husband), George Lyle, a member of the Beta chapter. What follows is a review of the cultural, institutional, and organizational factors that gave rise to Alpha Phi Alpha directly, and to Alpha Kappa Alpha directly in some instances, and indirectly in others.

Cultural-Political Context

In 1865, the Civil War ended and the U.S. Congress passed the Thirteenth, Fourteenth, and Fifteenth Amendments, providing some

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31 Id.
constitutional basis for Black social equality. Subsequently, Blacks witnessed a rise in political and economic power. Within a decade after the end of the Civil War, southern White Democrats began to implement strategies that worked to reverse the gains that Blacks made. Additionally, racial segregation began to spread throughout the United States. This propagated a period that has been described as “The Nadir”—the low point of American race relations. During this period, Blacks witnessed a spike in lynching and disenfranchisement.

As historian Felix Armfield and colleagues indicate, Blacks created a host of institutions out of necessity to resist racial intimidation, exploitation, and oppression. For example, W.E.B. DuBois argued that the “Talented Tenth”—the cadre of Blacks with academic training and resources—should uplift the race. Accordingly, in 1905, he and more than two dozen other activists met during the Niagara Conference—the precursor to the NAACP—to search for approaches to Black freedom. It was within this cultural environment that academic institutions such as Cornell University and Howard University played a role in influencing how the Black fraternal movement unfolded.

**Institutional Effects**

The institutional ideals and factors of race at institutions like Cornell University and Howard University served to influence the form and function of the BGLOs founded on those campuses. In 1865, Cornell University was founded to make education more applicable to the workforce and to "develop

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33 Id.
34 Id.
35 Id. at 29.
36 Id. at 32.
39 Armfield et al., supra note 32, at 40.
40 Id.
the individual man...as a being intellectual, moral, and religious; and to bring the force of the individual to bear on society.” According to Cornell’s Great Seal, written by founder Ezra Cornell and refined by Andrew Dickson White, the university’s first president, “I would found an institution where any person can find instruction in any study.”

Prior to 1900, however, fewer than a dozen Black students were enrolled at Cornell. By 1918, forty-three Black students were attending the university, with their numbers continuing to increase. Despite increased Black enrollment rates at Cornell, these students felt isolated amid the larger, White student population. Thus, Alpha Phi Alpha’s founders sought to organize towards the mutual support and the successful matriculation of Black students.

Prior to the founding of Howard University in 1867, few Blacks had access to a formal education. Freed slaves sought outlets for increasing their education, whether through self-teaching or unrecognized academic programs. Howard University grew to symbolize the growing racial consciousness and desires for equality among the black populace. At its founding, it was one of the few integrated universities to admit comparable numbers of Black and White students. Howard would go on to excel at mobilizing Black students to become involved in racial uplift activism during college and after graduation. As the university shared values of education and social justice, expectations for high-mindedness set the tone for the fraternities and sororities established at Howard. Organizations such as

41 CARL L. BECKER, CORNELL UNIVERSITY: FOUNDERS AND THE FOUNDING 133 (1943).
42 Armfield et al., supra note 32, at 40.
43 Id. at 41.
45 Id.
48 Id. at 6-8.
49 Id. at 4.
50 Id. at 25.
51 LOGAN, supra note 47, at 12.
Alpha Phi Alpha and Alpha Kappa Alpha sought to select members from the social and academic elite.53

Organizational Effects

It was not only the spirit of the times and the accompanying campus environments that informed BGLO founders about what type of organizations to create; these men and women were also inspired by their engagement with a host of other types of organizations—i.e., the Black church, Black secret societies, collegiate literary societies, and White collegiate fraternities.54

The early Black church arose in the 1770s out of the conditions of slavery and, ultimately, racial segregation.55 In fact, “whenever these [religious] societies were organized, they began to protest against White prejudice and neglect, and with the objective of providing not only for religious needs, but for social service, mutual aid and solidarity among people of African descent.”56 The Black church served as the center of social and cultural life in Black communities and influenced BGLOs by providing their founders with guiding principles.57 In fact, a predominant number of BGLO members were active parishioners of local Black churches and viewed BGLO membership as supplemental to their spiritual life.58 Additionally, Black churches lent BGLOs the ideals of brotherhood/sisterhood, community service, and civic action.59

Black secret societies evolved as Blacks sought ways to deepen personal ties, embrace ritualized processes, and deal with exclusion from White secret societies.60 In 1775, Prince Hall founded the Black Freemasonry.61 Throughout the nineteenth century, over sixty other Black

53 Id.
54 Id.
56 Harris & Sewell, supra note 55, at 65.
57 Id. at 63.
58 Id. at 66-67.
59 Armfield et al, supra note 32, at 37.
secret societies were founded.\textsuperscript{62} The first of these societies emerged in response to the oppression Blacks experienced during the American Revolution.\textsuperscript{63} Among these societies were the Grand United Order of Odd Fellows (1843), the Knights of Pythias (1864), and the Improved Benevolent Protective Order of the Elks of the World (1898).\textsuperscript{64} By 1915, roughly two-thirds of prominent Blacks were members of multiple Black secret societies.\textsuperscript{65} Freemasonry’s inherent link to Christianity and emphasis on truth, charity, brotherhood, and community building made it the model of early Black secret societies.\textsuperscript{66} Indeed, early Black secret societies, including Prince Hall Masonry, encouraged members to “respect and help each other, work to end slavery, and show love to all humanity.”\textsuperscript{67}

Black secret societies played three major roles in the development of Black fraternities. First, just as Black secret societies were created to give members “a sense of social relationship and responsibility to one another”\textsuperscript{68} under the theme of racial uplift, Black fraternities were later created in response to racial hostility experienced by Black members of colleges and universities.\textsuperscript{69} Second, Black secret societies provided Black fraternities with an effective organizational structure to carry out their mandates.\textsuperscript{70} Finally, Black fraternities were organized under the same multidimensional purpose of providing mutual support to members and the greater Black community.\textsuperscript{71} The role that Black secret societies played in the development of Black fraternities can be attributed to the fact that many Black fraternity founders were either members of Black secret societies or were connected to Black secret societies through family.\textsuperscript{72}

Literary societies were founded at colleges and universities between 1760 and 1860 in response to the restrictive nature of the American collegiate
They filled the void left in the restrictive curriculum by feeding students’ desires to develop debating, writing, and public speaking skills. Literary societies were on the decline decades before the first Black fraternity was created, yet literary societies indirectly influenced Black fraternities, because they gave rise to White fraternities, another influence on BGLOs. Literary societies existed at Black colleges as early as the mid- to late nineteenth century. They also uniquely contributed to Black fraternities by providing them with a template for a broad sense of intellectualism. Finally, literary societies contributed to the structure of Black fraternities through their use of secret initiation rites, mottoes, and badges to distinguish members.

Though literary societies ultimately lost traction, students who sought to obtain more rights, correct the perceived wrongs of college administrations, and facilitate social outlets developed college fraternities. The first White college fraternity, Phi Beta Kappa, was founded at William and Mary in 1776, and by the 1820’s the fraternity movement had become firmly established at colleges and universities across New York and Virginia. Early fraternities contributed to student life by affording students a social network and engaging them in social activities. In addition to setting goals for individual members, including high academic standards and the pursuit of excellence, fraternities also provided social escapes for students through drinking, card playing, smoking, and womanizing. White fraternities served as the framework for the creation of Black fraternities. For example, Alpha Phi Alpha’s founders used their observation of White

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74 Armfield et al, *supra* note 32, at 34; Torbenson, *supra* note 73, at 37.
75 Torbenson, *supra* note 73, at 38-39, 55.
77 Armfield et al, *supra* note 32, at 34.
79 *Id.*
80 *Id.* at 39.
82 Torbenson, *supra* note 73, at 38.
83 *Id.* at 56.
fraternities to form a similar organization for Black students.\textsuperscript{84} Just as White fraternities provided a social escape for White students, Black fraternities “filled a niche in the college experience” for Black students.\textsuperscript{85}

The Founding of Alpha Kappa Alpha

On December 4, 1906, seven men—Henry A. Callis, Charles H. Chapman, Eugene Kinkle Jones, George B. Kelley, Nathaniel A. Murray, Robert H. Ogle, and Vertner W. Tandy—founded Alpha Phi Alpha Fraternity on the campus of Cornell University as the first continuous intercollegiate African American fraternity.\textsuperscript{86} The fraternity’s Beta Chapter was established by founders Jones and Murray on December 20, 1907 at Howard University. The charter members were Welford W. Wilson, C. Edmund Smith, A. Peyton Cook, John A. McMurray, George A. Lyle, Carl A. Young, J. Oliver Morrison, Moses Alvin Morrison, James R. Chase, Cornelius S. Cowan, J. Russel Hunt, William D. Giles, Robert E. Giles, Daniel W. Bowles, Morris S. Walton, Junius W. Jones, and James E. Hayes.\textsuperscript{87}

High school sweethearts and later husband and wife George A. Lyle and Ethel Hedgeman played crucial roles in expanding Black “Greekdom.”\textsuperscript{88} In the fall of her junior year at Howard, Ethel Hedgeman began discussing with her friends and classmates the idea of creating a Greek-Letter campus sorority.\textsuperscript{89} These colleagues—Beulah Burke, Lillie Burke, Margaret Flagg Holmes, Marjorie Hill, Lucy Slowe, Marie Woolfolk Taylor, Anna Easter Brown, and Lavinia Norman—are credited with creating Alpha Kappa Alpha in accordance with Hedgeman’s vision on January 15, 1908.\textsuperscript{90}

During their first organizational meeting, the students elected Hedgeman as temporary chairwoman, and organized committees to draft a constitution and determine nomenclature and symbols.\textsuperscript{91} Two faculty members, Ethel T. Robinson and Elizabeth Appo Cook-Robinson, agreed to

\textsuperscript{84} Id. at 55.
\textsuperscript{85} Torbenson, \textit{supra} note 73, at 56-57.
\textsuperscript{86} McKenzie, \textit{supra} note 30, at 182-83 (providing an early history of Alpha Phi Alpha).
\textsuperscript{87} Id.
\textsuperscript{88} Id.
\textsuperscript{90} Id. at 3, 40.
\textsuperscript{91} Id.
serve as informal advisors during the sorority’s development.92 The sorority sent Hedgeman and Woolfolk to meet with Howard’s president and deans, and the group was granted permission to proceed with quick approval.93

The sorority decided to proceed under the name “Alpha Kappa Alpha,” because those Greek letters were the first letters of the words contained in the sorority’s motto, “by culture and by merit.”94 The sorority’s symbol was designated as the ivy leaf, and the sisters chose the colors of salmon pink and apple green, which symbolized “abundance of life, womanliness, fidelity, and love.”95

Although Hedgeman was credited with envisioning Alpha Kappa Alpha, the newly adopted constitution required that the organization’s president be a senior, so Slowe was elected as the sorority’s first president.96 To ensure the sorority’s continuity, the group invited seven sophomores to join Alpha Kappa Alpha without initiation: Joanna Berry, Norma Boyd, Ethel Jones, Sarah Meriweather, Alice Murray, Carrie Snowden, and Harriet Terry.97 Alpha Kappa Alpha did not begin formal initiations until the following year.98

Conclusion

Cultural-political context as well as institutional and organizational effects shaped the ideals and identity of Alpha Kappa Alpha. Arguably, it is defined by four elements: (1) scholarship; (2) sisterhood; (3) race consciousness; and (4) organizational commitment. Alpha Kappa Alpha has always displayed a sincere interest in the philosophy of academic achievement for its members.

II. ALPHA KAPPA ALPHA AS A CIVIL RIGHTS ORGANIZATION

In 1938, Alpha Kappa Alpha Founder and Incorporator Norma Boyd proposed a plan for a lobby to the three Washington chapters at the Joint

93 PARKER, supra note 89, at 4.
94 AFRICAN AMERICAN FRATERNITIES AND SORORITIES, supra note 92, at 53.
95 PARKER, supra note 89, at 4.
96 Id.
97 Id. at 5.
98 Id.
Founders’ Day Celebration at Howard University. The “Non-Partisan Lobby for Economic and Democratic Rights, later renamed the National Non-Partisan Council of Public Affairs, aimed to improve conditions for African Americans through opportunities in public service, education, and employment. To accomplish this goal, the Council encouraged the African American community to get fully integrated and increase participation in every aspect of democracy. The Council focused its efforts on making African Americans informed voters by educating them about proposed and pending legislation and encouraging them to communicate with their respective congressmen. It also influenced Congress to pass legislative provisions and programs ensuring “the equitable distribution of funds, facilities, and services” in various communities, and to provide the supervision necessary to make sure such policies remained enforced. Howard University graduate and law student William P. Robinson was appointed as the Council’s first legislative representative. With its headquarters established in Washington, D.C., the Council had great access to both the public and the Nation’s capital. At the time, it was the first national African American women’s organization in America with a “full-time office and a full-time staff devoted entirely to public affairs and paid for by the membership of the organization.” The Council was also the first full-time lobby for the Black community in America.

The Council covered four areas: (1) information; (2) contacts; (3) presentations for Congressional committees; and (4) patronage endorsements. Its initial objectives included eradicating police brutality in the District of Colombia and establishing home rule. It also pushed for

99 Id. at 194.
100 Id. at 195.
102 Id.
104 PARKER, supra note 89.
107 Id.
108 PARKER, supra note 89, at 4.
109 Id.
extending the Public Works Program and setting a minimum wage for women in the laundry industry.\textsuperscript{110} Its office reviewed important bills and sent its findings to Alpha Kappa Alpha chapters and other interested organizations.\textsuperscript{111} Boyd intended for Alpha Kappa Alpha chapters to serve as representatives in their local political networks.\textsuperscript{112} The chapters’ first goal was to strengthen the Council’s capacity for recognition and influence through an effort to register all eligible voters in their communities for the 1940 presidential election.\textsuperscript{113}

The Council continued to grow in size and influence following World War II through such activities as its participation in passing antidiscrimination legislation in Congress in 1941 and its support of the National Recruiting Drive for Negro Women for the war program and the Farm Security Administration Act.\textsuperscript{114} When the Farm Security Administration was at risk of being abolished, the Council helped to save it and prevented thousands of African American Farmers from becoming “hired hands.”\textsuperscript{115} The Council also saw the admission of African American women into the Navy.\textsuperscript{116} As one of the sponsors of the National Wartime Conference, the Council was responsible for bringing in two African American speakers to talk about the lack of opportunities for Black women in the Navy.\textsuperscript{117} These lobbying efforts were successful and led to the admission of Black women in the Women’s Army Auxiliary Corps at a time when the Navy was the only service in the armed forces where Blacks served on an integrated basis.\textsuperscript{118}

The Council made great strides in influencing the Legislature as well as establishing projects to improve the lives of African Americans, and especially women, in the areas of housing, labor, and healthcare. With regard to housing, the Council pressured Congress into upholding the promise made when the Sojourner Truth Housing Project was created and ensured that Blacks officially retain the right to live in the housing project as originally planned.\textsuperscript{119} Regarding the Lucy D. Slowe Housing Project for Defense Workers in Washington, D.C., the Council was able to get the rent lowered

\textsuperscript{110} Id.
\textsuperscript{111} Id.
\textsuperscript{112} Id.
\textsuperscript{113} Id.
\textsuperscript{114} Id. at 196.
\textsuperscript{116} Boyd, supra note 105, at 5.
\textsuperscript{117} Id.
\textsuperscript{118} Boyd, supra note 105, at 6, 8.
\textsuperscript{119} Boyd, supra note 105, at 6.
from $8.85 to $7.00 a week, which led to a savings of more than $12,000 a year for Black women.\textsuperscript{120} In the healthcare and labor arena, the Council obtained a non-discriminatory amendment to the Nurse Training Act, which led to an increase in the funding appropriated for nurse training.\textsuperscript{121} This was the first and only antidiscrimination amendment in that session of Congress, and it allowed for Black nurses in non-segregated areas to have access to training in nearby hospitals.\textsuperscript{122} To protect labor in general, the Council successfully opposed the Austin-Wadsworth Bill or Draft Labor Bill, because it was unnecessarily aimed at conscripting labor during war time, which the Council and other Americans feared would be enforced unfairly.\textsuperscript{123}

The Council was active in making other influential moves vis-à-vis Congress on a range of topics. It supported the Federal Aid to Education Act, which provided a raise in teacher’s salaries in order to ‘reduce the inequalities of educational opportunities’ and to ensure schools remained open.\textsuperscript{124} The Council also successfully lobbied for the passage of the Anti-Poll Tax Act, which prohibited charging a fee of any kind as a requirement for voting as well as an Act that devoted $30,000 “for a shrine at the birthplace of George Washington Carver.”\textsuperscript{125} After aiding in the passage of the Lanham Act, which allotted $300,000 for housing grants and $200,000 for community service, the Council devoted efforts to a study of the Children’s Bureau, which revealed inequities between Black and White children.\textsuperscript{126} The Council also called a conference of representatives, organizations, and agencies to discuss the improvement of community services for Black children by the Children’s Bureau.\textsuperscript{127} Also in the education arena, the Council worked to establish price control for the cost of education and helped with efforts to get a civil rights bill for the District of Columbia.\textsuperscript{128}

The Council cooperated with local and national organizations and agencies whose goals coincided with its own, such as the NAACP, The Urban

\textsuperscript{120} Id.
\textsuperscript{122} Id.
\textsuperscript{123} Boyd, supra note 105, at 7-8.
\textsuperscript{126} Id.
\textsuperscript{127} Id.
\textsuperscript{128} Id.
League, the Congress of Colored Women’s Clubs, the American Federation of Churches, the United Office and Professional Workers of America, the National Association of Graduate Nurses, the Brotherhood of Sleeping Car Porters and Auxiliary, and New York Voter’s League. The Council’s activities included collaborating with local and national organizations and agencies, efforts pushing legislation, distributing publications and information informing Sorority members and others of important social issues, and pursuing national integration through the Department of State, the United Nations, and the United National Educational, Scientific, and Cultural Organization. Along the way, the Council changed structurally. Previously, it had been a lobbyist group; later, a sole member prepared testimony for Congressional hearings and reporting the results back to the group. The Council’s final report was presented at the 1948 Boule in Washington, DC. The Council was successful in forging relationships with other organizations and agencies, especially other Greek organizations; Alpha Kappa Alpha recognized that the Council’s success depended on support from the Sorority, and that it hadn’t provided sufficient support for the continuance of the Council.

Alpha Kappa Alpha Sorority was a founding member of the Leadership Conference on Civil Rights, as well as the American Council on Human Rights (ACHR), to which the Sorority retained active membership for fifteen years. Officially starting in June of 1948, the ACHR came as a direct result of Alpha Kappa Alpha members choosing to expand the Non-Partisan Council on Public Affairs (NPCPA). The sorority invited other member organizations of the Pan-Hellenic council to join in sponsoring a non-partisan lobby program, which the Delta Sigma Theta, Sigma Gamma Rho, and Zeta Phi Beta Sororities and the Alpha Phi Alpha and Phi Beta

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129 PARKER, supra note 89, at 196.
130 Id.
131 Norma E. Boyd, Dear Sorors... IVY LEAF (Alpha Kappa Alpha, Inc. Chicago, Ill.) June 1947, at 18.
132 PARKER, supra note 89, at 196.
133 Id. at 197.
134 Id. at 50.
135 Id.
Sigma (PBS) Fraternities joined. In 1949, the Fraternity Kappa Alpha Psi also joined. The board of directors was composed of three members of each of the affiliated organizations, with Elmer W. Henderson serving as its first director. The participating organizations cooperated in planning programs, providing financial support, and pursuing social initiatives. The operating costs and representation of each organization on the board of directors was divided equally among cooperating organizations.

The organization was divided into three sections: (1) Clearing House, which focused on collecting and disseminating information; (2) Social Action, which focused on planning the organization’s strategy and action, as well as organizing social action campaigns; and (3) Education and Public Relations, through which the organization hoped to expand its understanding and good will as well as participation in and utilization of the program. In her letter to the members of Alpha Kappa Alpha, the Supreme Basileus of Alpha Kappa Alpha and President of the ACHR, Edna Over Gray, asked that all chapters create a local committee “to serve as a connecting link between the central office and the local communities,” and urged “every soror and every chapter to pledge full support to this significant new movement.”

The ACHR’s purpose, like that of the NPCPA, was to extend “civil rights to all Americans, without regard to race, color or religion.”

138 Id.
140 Edna Over Gray, Message of the Supreme Basileus, IVY LEAF (Alpha Kappa Alpha, Inc. Chicago, Ill.) Sept. 1948, at 5. The Board of Directors was as follows: Edna Over Gray (Alpha Kappa Alpha), President; Mae Wright Downs (Delta Sigma Theta), Vice President; Dr. R.O. Johnson (PBS), Recording Secretary; Emma V. Manning (Sigma Gamma Rho), Corresponding Secretary; Esther Peyton (ZPB), Treasurer; Belfor V. Lawson (Alpha Phi Alpha), General Council. Id. Norma Boyd and Beulah Whitby served as Alpha Kappa Alpha’s original representatives. PARKER, supra note 89, at 197–98.
141 PARKER, supra note 89, at 197.
142 Id.
144 Id.
145 Id.
146 Id. President Edna Over Gray admits that, although they could only afford to focus on the United States, the Council “was fully aware of its responsibilities in regard to international problems.” Id.
ACHR’s objectives included: (1) social action for expanding employment opportunities; (2) achieving adequate housing for the underprivileged; and (3) supporting legislation favorable to its values and goals.\textsuperscript{147} ACHR’s plan was to “dedicate itself to a constant urging of the Congress and the Government to correct [the evils of racial discrimination] and through positive action bring into being a fuller realization of the basic principles of American democracy.” \textsuperscript{148} Recognizing that “reasoned argument is not sufficient to get action in Washington,” the Director of ACHR, Elmer W. Henderson, asked that the individual members of the sororities and fraternities making up ACHR \textsuperscript{149} place “constant pressure on individual Congressmen, Senators and Government officials.”\textsuperscript{150} In September 1949, ACHR began publishing its bulletin, \textit{Congress and Equality}, which covered the ACHR’s progress in the current session of Congress.\textsuperscript{151} In the year since its creation, the ACHR had thrown its support behind several major civil rights bills, as well as Housing and Education social legislation.\textsuperscript{152} Not satisfied with its member participation, the bulletin called on the members to place more pressure on Congress regarding civil rights.\textsuperscript{153} Additionally, the bulletin called out members of the Senate, indicating which were up for reelection in 1950 and who had voted against one of the most recent civil rights bills to enter the Senate floor, stating that they had “betrayed democracy, betrayed the cause of civil rights, betrayed the spirits of the platforms of both political parties and betrayed [African Americans] and other minorities who looked to them for redress from discriminations under which they have suffered so long.”\textsuperscript{154} By early 1950, the ACHR had secured Secretary of the Interior Julias A. Krug’s public promise that “[p]ublic facilities under the jurisdiction of the Department of Interior are going to be open to all on an equal basis and I

\textsuperscript{147} PARKER, \textit{supra} note 89, at 198.
\textsuperscript{149} The number of the constituency is estimated to include over 100,000 college students and graduates. PARKER, \textit{supra} note 89, at 199.
\textsuperscript{151} Lucile McAllister Scott, Ed., \textit{Your A.C.H.R. News}, \textit{IVY LEAF} (Alpha Kappa Alpha, Inc. Chicago, Ill.) Sept. 1949, at 6. The Bulletin was distributed to the local chapters and members of the Greek organizations making up ACHR. \textit{Id.}
\textsuperscript{152} \textit{Id.}
\textsuperscript{153} \textit{Id.}
\textsuperscript{154} \textit{Id.}

don’t mean ‘separate but equal.’”\textsuperscript{155} The ACHR was heavily involved in the case \textit{Henderson v. S. Railway Co.}, which was to be argued in front of the Supreme Court in the coming year.\textsuperscript{156} It additionally became involved in the Fair Employment Practices Bill (FEPC bill), which was defeated in the House of Representatives by a coalition of Southern Democrats and Northern Republicans.\textsuperscript{157} Although the ACHR considered the FEPC bill that passed to be “merely a pious resolution,”\textsuperscript{158} it nevertheless devoted its resources to breaking what it predicted as “the inevitable filibuster,”\textsuperscript{159} as well as “passing an FEPC bill with enforcement powers.”\textsuperscript{160} The ACHR’s efforts proved to be fruitless, however: in 1950 the 81\textsuperscript{st} Congress “expired without enacting the Fair Employment Practices Act, the anti-lynch and anti-poll tax bills.”\textsuperscript{161}

The ACHR was successful, however, in its support of the policy to end segregation of D.C. swimming pools, as Secretary of the Interior Oscar L. Chapman ordered that all swimming pools be operated on a non-segregated basis.\textsuperscript{162} In addition to its work with Senators and Congressmen, the ACHR also asked President Truman to “end Army Jim-Crow, to act against colonialism, to step up the activity of his civil service Fair Employment Board and create machinery to enforce the non-discrimination provisions in all defense contracts.”\textsuperscript{163} In October 1950 the ACHR’s board of directors met with President Truman and called on him “to act against racial and religious job discrimination in industries producing war materials and to

\textsuperscript{155} Lucile McAllister Scott, Ed., \textit{Your ACHR News}, IVY LEAF (Alpha Kappa Alpha, Inc. Chicago, Ill.) Dec. 1949, at 6. The Bulletin was distributed to the local chapters and members of the Greek organizations making up ACHR. \textit{Id.}

\textsuperscript{156} \textit{Id.}


\textsuperscript{158} \textit{Id.}

\textsuperscript{159} \textit{Id.}

\textsuperscript{160} \textit{Id.}


\textsuperscript{163} \textit{Id.}
set up an agency similar to the Fair Employment Practices Committee which operated during World War Two.”

In addition to its work in Congress, the ACHR continued to emphasize the need for the creation of local human rights councils in communities across the country, which were be made up of local chapters of the member Fraternities and Sororities. In 1950 one such council, the Howard University Council of the ACHR, held a series of informal teas for students from Catholic University, George Washington University, and Miner Teachers College as part of its project on “What Students Can do to Further Human Rights in the District of Columbia.” Another local council, the New York Local ACHR, created a voter education plan for the 1950 primary and general elections and organized registration drives whereby the NY ACHR provided babysitter and transportation services to allow for increased registration. In May 1950, the NY ACHR discussed starting a program meant to “convince realty interests that colored persons are good risks as property owners and to report evidences of discrimination by mortgage banks to the Justice Department as violations of the anti-trust laws.” By June 1951, there were twenty-three operating local councils and twenty-five councils still undergoing the formation process.

In 1951 Alpha Kappa Alpha voted to continue support for the ACHR for five years, and Alpha Kappa Alpha’s Supreme Basileus, Laura Lovelace, called on all local chapters to adhere to and follow the “program targets set up for the year by A.C.H.R.” In her letter to the chapters, Laura Lovelace stated that “[e]fforts should be made at every opportunity to develop a readiness for integration.” Alpha Kappa Alpha’s focus was to be on the creation and maintenance of a free and open housing market, and all legislative activity was to be aimed at ending the Senate rule which had led

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165 Scott, supra note 157, at 6.
166 Id.
167 Id., supra note 164, at 11.
168 Id.
171 Id.
to the failure of the FEPC bill in 1950 as the Sorority worked to become “effective tools of human betterment on the local scene,” and united “on the common cause of the rights of man.”

In 1951 local California ACHR councils began a letter writing campaign promoting a state FEPC bill, and by September the National ACHR had gathered the support of many national leaders to appoint a “qualified Negro American to fill the post made vacant by the resignation of David Niles, administrative assistant to President Truman.” The director of ACHR urged Congress to “overhaul its legislative machinery” through the creation of standing Senate and House committees on civil rights; by revising Senate rules to eliminate the filibuster; by prioritizing elements of the majority party platform in Congress; and by developing a new system for the appointment of committee chairman. By the end of 1951 ACHR had a list of eleven (11) legislative and governmental objectives:

a. Passage of a Fair Employment Practice Act;

b. Abolition of segregation and the assurance of equality of training and opportunity in the Armed Services;

c. Passage of an anti-poll-tax bill and the adoption of any and all legislative and administrative measures to insure voting rights;

d. Passage of an anti-lynching bill and the adoption of any and all administrative measures to end mob violence and protect the security of the person;

e. Abolition of segregation in public transportation;

172 Id. See also Lucile McAllister Scott, Ed., Your ACHR News, IVY LEAF (Alpha Kappa Alpha Sorority, Chicago, Ill.) Sept.-Dec. 1950, at 10 (stating that the Senate Wherry rule, which requires 64 votes to shut off debate was a major reason behind the failed Employment bill); Lucile McAllister Scott, Ed., Your ACHR News, IVY LEAF (Alpha Kappa Alpha Sorority, Chicago, Ill.) Mar. 1961, at 8-9 (stating that it was the opinion of ACHR as well as of several Senators that the Wherry Rule was one of the biggest obstacles for passing civil rights legislation like the FEPC bill, which was never allowed to come to a vote on the Senate floor).

173 Lovelace, supra note 170.

174 Scott, supra note 172, at 6.


176 Id. (noting that the appointment system in 1951 was a seniority system).
f. Abolition of segregation and discrimination of all forms in the nation’s capital;
g. Passage of a Defense Housing Act with safeguards against discrimination;
h. Passage of a Federal aid to education bill with safeguards against discrimination;
i. Revision of the cloture rule to eliminate the undemocratic filibuster in the United States Senate;
j. Fair representation of Negroes and other minorities in federal appointments; and
k. Abolition of racial discrimination in immigration and naturalization.177

By December 1951 the organization was almost three years old and had accomplished many notable things, including: (1) helping to defeat the pro-segregation amendments to the Selective Service Act; (2) preventing the passage of a bill that would have interfered with the non-segregated swimming pool policy in D.C.; (3) successfully urging the President to appoint an African American to the advisory committee on the Point Four program; (4) continuously carrying out a campaign against segregation in the Army and making several recommendations which led to positive change in the Armed Forces; (5) supporting the successful suit *Henderson v. United States et al*, which outlawed discrimination in dining cars; (6) fighting for the passage of the National Housing Act, which contained features to help end discrimination; (7) joining other organizations to expand the Social Security Act to cover a greater range of workers; (8) striving (but failing) to pass the FEPC bill and other civil rights bills in Congress; (9) testifying before Congress on legislation involving minority interests; (10) helping to draft the Executive Order to prevent employment discrimination in defense industries and working to hold the President accountable to it; (11) participating in a Conference with President Truman discussing the needs of African American citizens; (12) leading the movement for the appointment of a qualified African American as White House Aide to the President; (13) striving to ensure full participation of African Americans and other minorities in defense programs; (14) joining other organizational leaders in working to further the employment of African American professionals; and (15) joining an amicus

In 1952, ACHR threatened to pursue the Smith v. Hotel Phillips case, which was an important step in the “fight for equal accommodations for all persons in public places.” The ACHR also filed an amicus curiae brief in the Thompson Restaurant Case, “which aims to validate the anti-discrimination ordinance in the District of Columbia.” In an attempt to combat the “confederate flag craze” that was “sweeping the country” the ACHR began a movement “to encourage the public to fly the American flag as a symbol of faith in ultimate victory of the principles of equality of citizenship for all without regard to race or color in the United States.” The ACHR submitted presentations to the platform committees for both the Republican and the Democratic national conventions, and were successful in keeping the issue of civil rights “in the ascendancy in both parties.” Although ACHR considered the Republican Platform to be a “step backward” from its plan in 1948 and the Democratic Platform to be an “advance over 1948,” the ACHR strove to remain bipartisan and urged its members to urge as many African Americans to vote during this election, regardless of their presidential choice.

Through the 1950s the ACHR continued to work both with government officials as well as through local actions within the communities. In early 1953, ACHR sent nine proposals to President Eisenhower, including: (1) to appoint African Americans to positions of responsibility within agencies; (2) to strengthen the Fair Employment Board of the Civil Service Commission, which was created in 1949 with the purpose of eliminating “discrimination throughout the federal establishment;” and (3) to reconstitute and strengthen the committee on contract compliance within the Department of Labor, whose job it is to prevent discrimination by

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180 Id.
181 Id.
183 Id. at 6.
government contractors.185 The ACHR also cooperated with other organizations as amici curiae in support of the plaintiffs in the Bolling v. Sharpe school segregation case from D.C., one of the cases that joined Brown v. Topeka, Kansas, Board of Education, the landmark case in which the Supreme Court outlawed segregation in public schools in 1954. 186 In response to Brown v. Board of Education, in June 1954 the ACHR created a pamphlet 187 to help local councils as well as cooperating organizations implement the decision and integrate public schools.188 Recognizing that this case was the result of legal efforts put forth by the National Association for the Advancement of Colored People, the council nevertheless urged its local counsel to “take all possible steps and even to adopt as a major project the implementation and proper execution of this great decision.”189

Following its October 1986 Board meeting, the ACHR submitted a list of problems, including the fact that school desegregation was “being denied citizens by threats, violence, and deceits,”190 as well as the fact that there was a “continued policy and practice of racial discrimination in housing finances and urban re-development.”191 In response, the council urged the president to “put the full force of the Executive Offices behind school desegregation,” and to establish “a President’s Committee on Fair Housing” for the “express purpose of eliminating segregated housing.”192 Additionally, in 1957 the council hosted a National Workshop on Leadership Responsibilities and Techniques, focusing on: “(1) newer problems in racial discrimination; (2) techniques in the solution of these problems; and (3) the transition from

185 Dorothy H. Davis, ACHR Sends Proposal to President Eisenhower, IVY LEAF (Alpha Kappa Alpha, Inc. Chicago, Ill.) June 1953, at 3.
186 347 U.S. 497 (1954); 347 U.S. 483 (1954); PARKER, supra note 89, at 198.
187 347 U.S. 483 (1954); The title of the pamphlet was “Integrating Our Schools,” and was available at the ACHR headquarters in D.C. Dorothy H. Davis, Ed., ACHR Urges Steps to Integrate our Schools, IVY LEAF (Alpha Kappa Alpha, Inc. Chicago, Ill.) Sept. 1954, at 25.
188 Id.
189 Id.
191 Id.
192 Id.
desegregation to integration.” In 1958, the ACHR voted to support legislation that would allow the Justice Department to act on “behalf of parents seeking to enter their children in a school,” and to act on “behalf of any person denied his civil rights.” In 1960 the ACHR objectives were social action that would continue to work to eliminate discrimination and segregation based on race, color, religion or national origin, as well as continuing to educate both the council’s members and the public through workshops as well as registration and voting campaigns.

The ACHR and the Non-Partisan Council significantly influenced the grassroots support for the civil rights movement. The ACHR sponsored campaigns for both voter registration and education. The ACHR sponsored a drive collecting funds for students whose education finances were withheld as punishment for their participation in desegregation activities. Included in these students were the “young men who staged the first sit-ins in North Carolina.”

Although the ACHR continued to fight for social change until 1963, in early 1955 the ACHR experienced “depletions in membership and finance,” and Alpha Phi Alpha left the organization. Focusing on three areas of concern: “(1) strengthening and improving human resources in staff personnel; (2) increasing financial support; and (3) reactivating and expanding the program of the Council in necessary areas, particularly with reference to grass roots participation,” the Council’s Board of Directors strove to increase its membership numbers. The results were positive:

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196 PARKER, supra note 89, at 199.
197 Parker *supra* note 139, at 9.
198 PARKER, *supra* note 89, at 199.
199 Parker *supra* note 139, at 9.
200 *Id.*
202 *Id.*
203 *Id.*
Alpha Phi Alpha voted to reconsider its withdrawal, Zeta Phi Beta voted to continue its support through 1956, and, in 1956, Kappa Alpha Psi voted to continue its support as well. Success was also found in expanding the Council’s grass roots participation, but by 1956 the organization was still not seeing the financial gains it wanted. In response, the Council began to discuss new ways to increase financial support without relying on memberships. By 1957, Alpha Phi Alpha had still not rejoined the Council. By 1959 both Kappa Alpha Psi and Phi Beta Sigma Fraternities had also left, leaving only the Sororities Alpha Kappa Alpha, Delta Sigma Theta, Phi Delta Kappa, Sigma Gamma Rho, and Zeta Phi Beta. Eventually, membership would drop down to four, as Delta Sigma Theta Sorority left, leaving Alpha Kappa Alpha, Phi Delta Kappa, Sigma Gamma Rho and Zeta Phi Beta. Finally recognizing that “the focus and characteristics of ACHR had been modified, [and] its supporters had changed in their approach to problems and in the resources available to them,” members of the four remaining sororities decided to offer the recommendation to terminate the Council. The Board of Directors accepted this recommendation, and on November 22, 1963, a gala was held, and the Council’s funds were distributed amongst the Prince Edward County Free School Association, the Student Nonviolent Coordinating Committee, and the Leadership Conference on Civil Rights.

204 Id.
205 Id. at 35.
206 Id.
207 Id.
208 ACHR Holds National Workshop on Leadership Responsibilities and Techniques, supra note 196, at 11.
210 Id.
211 Parker supra note 139, at 9.
212 Former Supreme Basileus Marjorie Parker noted that the committee in charge of the gala decided to go on, despite President Kennedy’s assassination, and, “in a very real sense the event became tribute to a martyr.” Id.
213 Id.
214 PARKER, supra note 89, at 199.
III. ALPHA KAPPA ALPHA’S ORGANIZATIONAL COMPLEXITY AND THE CHALLENGES TO RACIAL UPLIFT ACTIVISM

Despite their high ideals and laudable history, Alpha Kappa Alpha’s complex identity may pose some challenges for the organization in its ability to properly address racial uplift activism in the twenty-first century. Specifically, undergraduate members’ marginal or poor academic performance, fissures in sisterhood bonds, members’ marginal or nonexistent race consciousness, and their lack of organizational commitment may hamper Alpha Kappa Alpha’s racial uplift thrust, particularly in the areas of civic activism and shaping public policy.

Academic Achievement

Though Black fraternities have worked to inculcate their members with the importance of scholastic achievement, evidence does not support the notion that members gain any advantage over their non-affiliated counterparts in the classroom. In a review of university grade reports, Shaun Harper and colleagues found that a large percentage of GPAs of Black fraternities have fallen well below the overall average GPAs of other college fraternities. In their study, Chambers and colleagues found that the mean GPAs of NPHC members fell between 2.59 and 2.97. With the exception of Alpha Phi Alpha, sororities statistically outperformed every other fraternity observed in the study. These achievement gaps were not indicative of students’ propensity to perform, as they were enrolled in flagship, research-intensive institutions and their GPAs were relatively strong prior to college enrollment.

Harper and colleagues provide a cautionary, though not alarmist, perspective. For example, research illustrates a link between BGLO membership and positive gains in the ability to acquire and apply knowledge.

215 See generally Shaun R. Harper & Frank Harris III, The Role of Black Fraternities in the African American Male Undergraduate Experience, in AFRICAN AMERICAN MEN IN COLLEGE, 128, 128-50 (Michael J. Cuyjet ed., 2006)(discussing the history of the positive effects of BGLO affiliation, as well as the contemporary negative aspects).
216 See id. at 141-49.
217 Id. at 146-47.
219 Id at 242.
220 Id.
221 Chambers et al., supra note 218, at 201.
in complex ways.\textsuperscript{222} In a more obvious and direct way, poor academic achievement, along with poor critical thinking and weak problem-solving capabilities, may negatively affect BGLOs’ ability to positively influence the social and cultural capital of their members. In this sense, social and cultural capital refers to an individual’s network, access to resources, and ability to acquire knowledge.\textsuperscript{223} Poor academic performance can lessen a person’s opportunity to expand his or her social and cultural capital.\textsuperscript{224} When Black students’ social and cultural capital is limited, their ability to secure top internships, graduate and professional school admissions, and employment opportunities decreases.\textsuperscript{225} For example, in their research, Stephen Knouse and colleagues found that undergraduate GPA predicted one’s ability to not only secure an internship in college, but also a job upon graduation.\textsuperscript{226} Even more, Cecil Johnson found in his study of Kappa Alpha Psi Fraternity members that ultimate educational attainment predicted career success.\textsuperscript{227} In this way, poor academic performance can negatively impact a BGLO’s ability to advocate for racial uplift activism from a position of power and influence within the larger community, as its members may be professionally and financially constrained. This constraint may limit the amount of time and financial resources members can allocate to their respective organizations in the service of the greater community good.

Contemporary racial uplift activism may require creative and nontraditional solutions to recurring problems. Thus, current BGLO members should, but may not, possess a certain level of critical-thinking and “out-of-the-box” thinking skills needed to be effective community problem-solvers. Without a motivated force of critical thinkers, BGLOs will lack the ability to effectively design and develop socially-based projects that successfully address the diverse set of needs that are prevalent in the Black community. Even more, poor undergraduate academic performance on the part of BGLO members may further handicap these organizations’ racial

\textsuperscript{222} Id.
\textsuperscript{223} PRUDENCE L. CARTER, KEEPIN’ IT REAL 137 (Cathy Cohen & Fredrick Harris eds. 2005).
\textsuperscript{224} See id. at 50.
\textsuperscript{225} Id. at 29.
uplift activities where members are left unemployed, underemployed, or without a reasonable modicum of job and financial security, all of which may be set in motion by undergraduate academic performance.

Sisterhood

In keeping with the notion of social capital, research indicates that social networking and civic activity are interconnected. Social networks are formed when individuals feel a sense of belonging within a group. Social identity—the process people use to classify themselves and others in the social world—helps to shape these networks. The “oneness” felt within the social network creates a sense of belonging for the members of the group and creates an exclusive environment.

Social networks can create fissures within an organization based upon individual characteristics, including age, race, religion, and sexual orientation. Within BGLOs, age and generational differences can play a role in undermining racial uplift activism. As individual BGLOs approach and exceed one hundred years of existence, the ages of members vary widely. These age gaps could be responsible for generational divides between younger and older members. Age gaps have been particularly relevant for younger members identifying with hip-hop culture and for older members with more “traditional and mainstream views” on how BGLOs should promote themselves. Diverging expectations on issues such as fraternal

231 Anderson et al., supra note 229, at 130.
reputation, the representation of fraternal symbols, presentation of self, and academic attainment can limit interaction between younger and older members.

While interracial pledge classes have existed in BGLOs since the 1950s, some BGLOs and members still debate the propriety of admitting non-Black members. Criticism of non-Black BGLO members derives from BGLO members and, more frequently, individuals of the non-Black member’s racial group. The potential fissures created by racial issues within BGLOs are quite varied. Some fear the loss of tradition with the initiation of non-Blacks, while others are concerned about the direction of civic engagement with non-Blacks as members. There are members, however, who believe that the inclusion of non-Blacks is in keeping with the ideals of BGLOs.

Religious affiliation also may create fissures in civic involvement within BGLOs. The vast majority of BGLO members are Christians, of various denominations. However, there is a small subset of BGLO members who believe that there is a tension between their BGLO affiliation and Christian identity. Frequently, these individuals renounce their BGLO membership. In their exploration of the experiences of non-Christian, non-heterosexual, and non-Black members of Alpha Phi Alpha Fraternity, Rashawn Ray and Kevin W. Spragling found that religion is an important dimension that influences members’ social interactions with and treatment from other members. Ray and Spragling found that over half of non-

234 Id.
235 Id.
237 See id.
239 RASHAWN RAY & KEVIN. W. SPRAGLING, Am I Not a Man and a Brother? Authenticating the Racial, Religious, and Masculine Dimensions of Brotherhood within Alpha, in ALPHA PHI ALPHA AND THE CRISIS OF ORGANIZATIONAL
Christian fraternity members report experiencing forms of mistreatment and isolation from Christian members based on their religious beliefs.\textsuperscript{240}

Sexual orientation serves as a rather controversial issue, particularly within Black Greek-letter fraternities (BGLFs).\textsuperscript{241} While religious interpretations of homosexuality vary, in keeping with traditional Christian beliefs, many African American fraternity members struggle with the notion of homosexuality. Black fraternal membership carries with it a strong sense of collective and personal masculinity, which many members perceive as contrary to homosexuality.\textsuperscript{242} One study found that homophobia within BGLFs was not an unexamined prejudice, but rather an ideology in keeping with a belief system that is “discussed, debated, and refined.”\textsuperscript{243} While homosexuality may appear contrary to ideals of Black masculinity cultivated by BGLFs, homophobia will only exclude potential leaders in the ongoing crusade for social justice and equality.

In a study of social capital formation within a voluntary youth association, researchers found that White participants exhibited a tendency toward racial homophily, while Black participants were equally likely to form interracial ties with socially dissimilar peers as with socially similar peers.\textsuperscript{244} Thus, Whites were shown to be less likely to create relationships that transcended race, gender, and educational boundaries, thereby limiting their ability to create network ties and accumulate social capital.\textsuperscript{245} Black Greek-letter organizations place a similar limitation on their ability to foster network ties across all social boundaries where age, race, and religious chasms exist.\textsuperscript{246} This may be no more clear than in the context of BGLFs vis-à-vis gay membership. This is in part due to the homophobic views of BGLF members and the failure of BGLF leadership to address the issues or create safe spaces where the issue can be discussed.

\textsuperscript{240} Id. at 219.

\textsuperscript{241} ALAN D. DE\textsc{S}ANTIS & MARCUS. \textsc{C}OLEMAN, \textit{Not on My Line: Attitudes about Homosexuality in Black Fraternities, in Black Greek-Letter Organizations in the Twenty-First Century} 291, 291 (Gregory S. \textsc{P}arks ed., 2008).

\textsuperscript{242} RAY \& SPR\textsc{A}GLING, \textit{supra} note 239, at 225.

\textsuperscript{243} DE\textsc{S}ANTIS \& COLEMAN, \textit{supra} note 241, at 308.


\textsuperscript{245} Id. at 487.

\textsuperscript{246} See generally \textit{id.}.
The case of Brian Stewart presents a paradigmatic instance of this phenomenon. Stewart, a bright young man who had served as a White House intern, was rejected one day after interviewing to join Kappa Alpha Psi Fraternity at Morgan State University. Stewart was later sent a series of social media messages between fraternity members discussing Stewart, one of which included a homophobic slur. After Morgan State investigated his complaint, the university placed the Kappa Alpha Psi chapter on probation for discriminating against Stewart on the basis of his sexual orientation. Black Greek-letter fraternities cannot hope to bring in members of the homosexual community so long as they allow incidents like this to continue.

**Racial Consciousness**

For decades, psychologists and political scientists have been researching the extent to which individuals identify with their own racial group and the influence that such identity has on political engagement. In 1961, Donald Matthews and James Prothro examined the attitudes and behaviors of Blacks, as well as the reactions and attitudes of Whites, in the U.S. South. In the researchers’ assessment of the prerequisites of Black leadership, they identified “an interest in and identification with other members of the race.” Such racial “interest and identification” can more broadly be conceptualized in the context of group identity, racial identity, and race consciousness.

Group identification is “an individual’s awareness of belonging to a certain group and having a psychological attachment to that group based on a perception of shared beliefs, feelings, interests, and ideas with other group

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248 *Id.*
251 *Id.*
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2014] members. Therefore, group identity has further been framed within the context of social identity theory such that an individual’s identity is largely defined by group membership. In turn, racial identity is the “awareness of and identification with a racial group based on feelings of in-group closeness.”

Black racial identity is the extent to which Blacks identify with Blacks. Psychologist William Cross articulated a five-stage theory of Black racial identification, called Nigrescence, which translates as: “the process of becoming Black.”

The model progresses through the Pre-encounter, Encounter, Immersion, Emersion, and Internalization stages. In the pre-encounter stage, the individual is unaware of his or her race and the social implications that come with racial categorization. In the encounter stage, the individual experiences a situation that suddenly and sharply raises race as an issue; it is generally an awakening to race consciousness. This encounter makes the individual open to a new, racialized worldview. In the immersion stage, the individual becomes consciously Black, though this consciousness is often provincial where Blackness is oversimplified. The emersion stage is characterized by a growth from the oversimplified ideologies. During the internalization stage, an individual has internalized their Blackness and no longer feels the need to “wear it on their sleeve.” In turn, they are comfortable rejoining society with a strong sense of their racial self to be able to forge relationships with members from other racial/ethnic groups. Not surprisingly, researchers have found that Black racial identity predicts community outreach such that the pre-encounter stage negatively (i.e., weaker racial identity), and the immersion-emersion and internalization

253 Id. at 474.
254 Id. at 475.
256 Id. at 158-59.
257 Id. at 190-91.
258 Id. at 159.
259 Id. at 159.
260 Id. at 207.
261 Id. at 210.
262 Id. at 212.
stages positively (i.e., stronger racial identity), predict community outreach among Black college students.\footnote{263 See Joe L. Lott, II, Racial Identity and Black Students’ Perceptions of Community Outreach: Implications for Bonding and Social Capital, 77 J. NEGRO EDUC. 3 (2008).}

Moving beyond simply group and racial identity, race consciousness is the “willingness of an individual not only to identify with her racial group but also to work with the collective group.”\footnote{264 Jane Junn & Natalie Masuoka, Identities in Context: Politicized Racial Group Consciousness Among Asian American and Latino Youth, 12 APPLIED DEV. SCI. 93, 95 (2008).} Other scholars have defined it as “in-group identification politicized by a set of ideological beliefs about one’s group’s social standing, as well as a view that collective action is the best means by which the group can improve in status and realize its interests.”\footnote{265 McClain et al., supra note 252, at 476.} Internal and external influences shape the ways in which an individual develops his or her racial identity, including social norms and social institutions. Group consciousness plays a pivotal role in racial uplift activism, as it is utilized to mobilize Blacks to confront racism and protect the interests of the community.\footnote{266 Junn & Masuoka, supra note 264, at 95.} Research has demonstrated that Blacks’ race consciousness explains Black political involvement in the 1960s and 1970s.\footnote{267 McClain et al., supra note 252, at 478 (citing sources); see also Arthur H. Miller et al., Group Consciousness and Political Participation, 25 AM. J. POLI. SCI. 494, 503-04 (1981).}

The question for BGLOs is the extent to which their membership’s racial identity and race consciousness impact these organizations’ racial uplift agenda. Participation in BGLOs has shaped the ways in which members progress through the racial identity development process. Shaun Harper and colleagues explored how Cross’ Nigrescence theory, and Parham and Helm’s theory of Blacks’ self-actualization, highlight the importance of providing Black students with the space to conceptualize and experience Blackness.\footnote{268 Harper et al., supra note 215, at 135.} Those who viewed their racial identity in favorable terms developed higher levels of self-esteem and effectively achieved their academic goals.\footnote{Id. at 136.} According to Harper and colleagues, BGLOs serve as an important vehicle for the exploration of racial identity, and they provide Black students with
the opportunity to negotiate their understandings of race within a safe environment.270

Implicit, subconscious racial bias offers a counter-narrative to research that suggests that BGLO members have stronger racial identities than Blacks who are non-members. Expressions of implicit racial bias among BGLO members may go unrecognized by those possessing bias. 271 According to measures like the Implicit Association Test (IAT), approximately seventy percent of Whites in the United States maintain automatic, implicit anti-Black/pro-White biases. 272 Similar studies have established that fifty to sixty percent of Blacks harbor similar biases, though less consistently than Whites.273 When BGLO members took the race IAT during one study, nearly twenty-three percent reported implicit racial bias for Whites.274 When college-age members were more closely scrutinized, forty percent demonstrated an implicit anti-Black/pro-White bias.275 In contrast, no participant expressed an explicit preference for Whites over Blacks.276 This research suggests that implicit racial biases may undermine a significant portion of BGLO members’ race consciousness and, in turn, commitment to racial uplift activism.

Organizational Commitment

There is no guarantee that BGLO members will remain financially and physically engaged in their respective organization for life. As it relates to how new members are brought into BGLOs, studies show that members who are hazed may be more likely to be active long-term.277 A number of theories have been put forth to explain this. First, cognitive dissonance theory posits that incongruous cognitions create uncomfortable psychological tensions, and a person experiencing dissonance will alter cognitions to

270 Id. at 137.
272 Id. at 163.
273 Id. at 165.
274 Id. at 168.
275 Id.
276 Id.
achieve a greater degree of consonance and reduce the tension. In the context of BGLOs, a member who underwent a severe initiation enjoys membership but did not enjoy the initiation experience; the member overvalues membership to compensate for the severity of the initiation and thereby lessen dissonance. Alternatively, under affiliation theory, BGLO members who have gone through the trauma of a severe initiation will naturally seek out the company and comfort of those who have shared the experience. Dependence theory holds that members of BGLOs that go through severe initiations develop dependency on those administering the initiation. More recent studies have cast doubt on the relationship between hazing and group commitment.

Organizational theorists suggest that “organizational effectiveness is multidimensional.” Although a solid infrastructure contributes to an organization’s success, effectiveness is not ensured by “organizational design alone... [M]embers of the organization [must] behave in a manner supportive of organizational goals.” Organizational effectiveness depends upon the willingness of its members to remain active and display “dependable role behavior, as prescribed by the organization, and spontaneous and innovative behavior which go beyond explicit behavioral prescriptions.” A committed member’s participation and production promote organizational effectiveness.

Accordingly, that is why reclamation—the reclaiming of inactive members—is focused upon these groups. In fact, even where engaged, there is no promise that there will be a commitment on the part of BGLO members to racial uplift activism via their fraternity or sorority. Consequently, BGLOs can be only as effective in the realm of racial uplift activism as their active and engaged members demand and to the extent that they are willing to participate.

279 Id. at 427-28.
280 Id. at 431.
281 Id. at 430.
282 Id. at 441-43.
284 Id.
285 Id.
CONCLUSION

Many believe that the accomplishments achieved during the twentieth century solved America’s race problem. With the election of the first Black president, Barack Obama, this sentiment has been further solidified for some. However, President Obama’s symbolic victory for racial progress cannot be misconstrued with the lack of real social change in the lives of Black Americans. Research on education, the labor market, housing, law and crime, and health show that significant racial differences still exist.

America has never fully departed from separate and unequal educational practices. Neighborhoods are more segregated now than in the
1950s. Consequently, schools are highly segregated by race. In turn, the quality of schooling across districts is unequal because of the link between property taxes and school funding. As a result, minority students overwhelmingly attend underfunded schools in comparison with their White counterparts. Even when minority students are bussed to high-achieving schools, they are more likely to be tracked into lower-level courses. Despite claims that Blacks are genetically inferior, culturally inept, or “acting White,” empirical research shows that Blacks are actually more engaged in school than some of their White counterparts and that school and neighborhood resources have been attributed to most of their low academic outcomes. The poor caliber of schools that minority students attend is coupled with the continued deconstruction of Affirmative Action policies which would otherwise counter inequities prevalent at the university level.

In addition, labor market outcomes are bleak in the Black community. Black unemployment rates remain twice as high as those of Whites and are even higher for Black men. Sociological research points to discrimination as a main culprit. Further, Blacks face egregious forms of discrimination in the housing market. The current recession has affected the wealth of Blacks in crippling ways. It is estimated that Blacks have lost over fifty percent of their wealth in the past five to seven years. Besides Blacks living in more

294 KOZOL, supra note 288, at 236.
295 TYSON, supra note 288, at 8.
296 See CARTER, supra note 288, at 8; see also R. L. Lewis & E. Pattison, Cracking the Education Achievement Gap(s), in RACE AND ETHNIC RELATIONS IN THE TWENTY-FIRST CENTURY: HISTORY, THEORY, INSTITUTIONS, AND POLICY 297 (R. Ray ed., 2010).
297 Brief for Harvard Graduate School of Education Students for Diversity as Amici Curiae Supporting Respondents, Fisher v. Univ. of Texas at Austin, 133 S. Ct. 2411 (2013) (No. 11-345).
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fragile housing markets situated closer to poorer neighborhoods, Blacks are more likely than Whites to receive subprime housing loans even when they have better credit and higher incomes. In fact, recent multimillion-dollar settlements with the federal government by Wells Fargo, Bank of America, and Morgan Stanley have resulted in these companies admitting predatory lending against Blacks and Latinos.

Moreover, neighborhood segregation leads to the profiling and criminalization of Blacks. Compared to Whites, Blacks are more likely to be stopped by the police and are sanctioned with longer sentences for similar crimes. As a result, studies show that one-third of Black men will spend some time during their lives in the criminal justice system. The proliferation of Black-on-Black crime, mostly among young Black males in urban areas, must also be acknowledged for spikes in mortality rates. In turn, Blacks have higher rates of mortality, morbidity, obesity, and chronic diseases than Whites.

The disparities detailed above are not only emblematic of the experiences of poor and working-class Blacks but transcend social class to affect middle-class Blacks as well. Middle-class Blacks are more likely than middle-class Whites to live beside or in poorer neighborhoods that do not appreciate on par with the national housing market and are zoned for subpar schools. As a result, professional Blacks who work with professional Whites do not share in the middle-class lifestyle of economic security, safety and good health. The problems that Blacks face give further credence to the importance of racial uplift activism in the twenty-first century. The question is what organized Blacks can and will do to systematically address these issues. The resistance that one might get to such an inquiry from BGLOs and their members is likely to be in the realm of a denial that BGLOs are anything more than fraternities and sororities that, at best, are charged with doing community service and being philanthropic. But their history and

300 Oliver & Shapiro, supra note 290, at 10-11.
301 MUHAMMAD, supra note 291, at 1.
302 Williams & Collins, supra note 291, at 359-61.
organizational precepts militate against such a belief. This is particularly the case with certain of the BGLOs vis-à-vis the others. By way of example, Alpha Phi Alpha founder Henry Arthur Callis framed the fraternity’s founding with the following quote: “Society offered us narrowly circumscribed opportunity and no security. Out of our need, our fraternity brought social purpose and social action.”

The overriding and lingering question is, how can BGLOs become relevant in the areas of civic activism and shaping public policy around racial-justice issues? The answer to such a question necessitates a monumental shift in organizational culture. Arguably, for many decades, each national president of each of these organizations has been able to put his or her personal touch on their respective organization. In essence, by executing their platform, they shape their organization during the course of their term. Some leaders wish to be engaged around racial-justice issues; some do not. This creates a chicken and egg problem: a national president must press forward on racial-justice issues but, as a candidate, he or she must get elected by a membership that may or may not be particularly concerned with such issues. If BGLOs are to be relevant in the area of racial-justice, there must be an organizational culture that takes such issues seriously. Potential leaders within these organizations must then run for offices where they can execute on these organizational ideals. Members must then buy into the vision of such candidates and elect them. Then, the newly elected leaders must execute on that vision, with the tangible support of the members.

As this article suggests, the problems that BGLOs face cannot be separated and isolated. In order to address the four domain issues holistically, BGLOs need to reconsider how they identify, recruit, and educate potential members. In fact, they must start young. Given that these organizations largely comprise African American, college-educated men and women, BGLOs need several things: (1) a large pipeline of black boys and girls going to college, (2) boys and girls who are prepared for the academic rigors of college, and (3) boys and girls who are inculcated with the broad ideals associated with BGLOs. This necessitates two things. One is that BGLOs are engaged in the racial-justice activities needed to keep the doors of higher education institutions open to African American high school graduates. The other is the facilitation of such a pipeline by mentoring (e.g., Big Brothers/Big Sisters) and tutoring African American youth.

In order to address the marginal to poor academic performance of undergraduate members and college chapters, BGLOs should consider raising their undergraduate GPA requirements. This would allow

304 Wesley, supra note 46, at 31.
undergraduate chapters to institute their own higher GPA requirements for membership than the national organization, and/or require chapters to maintain a certain GPA to remain active. These organizations should develop and institute structured programs around raising and sustaining high undergraduate GPAs. This could include more systematic mentoring programs between alumni members and college members centered on professional development, including the academic performance needed to maximize professional opportunities. BGLOs must more effectively grapple with the issue of hazing, because it is inextricably intertwined with undergraduate membership and chapter GPAs. BGLOs may raise the intellectual environment of their organizations by starting national, monthly book clubs, assigning readings to broaden the intellectual horizons of the membership, especially around issues of pressing concern for the organizations. The organizations might also, during the process whereby they initiate new members, have aspiring members work together to solve a racial-justice problem confronting the local community. As a test, it would be determined how effectively the aspiring members work together to use their, and other, resources to solve the problem. If more than a mere hypothetical, the solution could then be implemented after the individuals are initiated.

In the area of brotherhood and sisterhood, BGLOs, as organizations comprising highly educated, largely Black people, must be places where any issue can be discussed. Leaders in these organizations must find a way to facilitate discussions among members around issues of age, race, and faith, including what those factors mean with regard to organizational membership. Black Greek-letter fraternities, in particular, must grapple with what it means to be a man and a member in the context of questions about the role of non-heterosexual members. Without such a dialogue, BGLFs will not thrive and will be less effective in their racial-justice initiative.

With regard to the racial identities and race consciousness of BGLO members, BGLOs need to make Black history more a part of the initiation process of members. The organizations must also make the racial uplift history of BGLOs a part of this education. Arguably, most members know little that is meaningful about their own organizations and what they have historically stood for. Researchers have found that by inculcating African Americans with a strong sense of racial pride, in part via an understanding of

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305 Gregory S. Parks et al., Belief, Truth, and Positive Organizational Deviance, 56 HOW. L.J. 201, 326 (2013).
Black history, enhances their Black racial identity.\textsuperscript{306} The same can be found where individuals are exposed to positive African American representations.\textsuperscript{307}

With regard to organizational commitment, BGLOs must first find ways to make themselves relevant to the lives and needs of initiated members. Once initiated, individuals are forever members of their BGLOs. They do not need to pay dues or attend meetings to maintain that status. BGLOs must spend some time studying their membership to discern why members go inactive and reconcile the findings with the extant scholarly literature on organizational commitment. Even more, however, BGLOs must come to grips with the fact that, if they are not meaningfully engaged in racial-justice issues, members who are committed to such issues will cease to be active in BGLOs. Individuals have finite time and money. Accordingly, if BGLOs wish to compete with organizations like the NAACP, National Urban League, National Bar Association, etc., for members—or at least have their members hold dual memberships—then BGLOs must show meaningful commitment to racial-justice issues.

It is not the authors’ contention that addressing these issues will be easy. With visionary BGLO leadership, however, and a membership that seeks to agitate for greater engagement around these issues, BGLOs can be a transformative force for the greater good of Blacks.


RACE INEQUITY FIFTY YEARS LATER: LANGUAGE RIGHTS UNDER THE CIVIL RIGHTS ACT OF 1964

Jasmine B. Gonzales Rose*

INTRODUCTION

The occasion of the fiftieth anniversary of the Civil Rights Act of 1964 gives pause to consider whether the Act has been effective in eradicating discrimination against people of color. Much has changed over the past fifty years. In 1964, it would have been difficult to imagine an African American president and the end of de jure racial restrictions in employment, education, voting, jury service, and places of public accommodation. However, as the old French expression goes: plus ça change, plus c’est la même chose—the more things change, the more they stay the same.1

Racial discrimination still exists in 2014, but it manifests itself differently. In view of this, it is imperative that the civil rights laws of yesterday are equipped to address the race problems of today. Over the past half-century, both racial demographics and the manner in which racism is expressed in the United States have changed. Expressions of racism have become more subtle and sophisticated.2 Rather than explicitly barring someone from employment, education, public accommodations, and civic participation on the basis of his or her race, racially discriminatory exclusion is often couched in seemingly race-neutral terms.3 Such racially discriminatory practices often go unremedied because current colorblind legal jurisprudence is increasingly formalistic and frequently refuses to look beyond the surface of inequitable acts to reveal the underlying discriminatory impetus.4

* Assistant Professor of Law, University of Pittsburgh School of Law. I am grateful to the University of Pittsburgh School of Law’s Derrick A. Bell Fund for Excellence Award and its Bell Fellow, Megan Block, for providing research assistance and support for this project. I am also indebted to Andrea Freeman, James Gonzales, Benjamin Minegar, and Grace Miclot for their feedback.

1 JEAN-BAPTISTE ALPHONSE KARR, LES GUÊPES (Jan. 1849).
3 Johnson, supra note 2, at 235.
4 Adherents of “colorblindness” define racial discrimination as either on-its-face
Another change is that, while in 1964 African Americans were the largest racial minority, today Latinos constitute the largest racial minority population in the United States. It is often assumed that antidiscrimination laws protect all racial groups equally. This Article questions that assumption and explores the competence of the Civil Rights Act of 1964, which was enacted to address racism against African Americans, in addressing racial discrimination against Latinos by examining the Act’s treatment of language discrimination. Racial discrimination is often expressed differently against Latinos than it is against African Americans. Most notably, language discrimination, which includes discrimination on the basis of actual or perceived English-language ability, bilingualism, and accent, is a common method of subordinating Latinos. For Latinos, language discrimination is not simply a linguistic issue; it is frequently a form of discrimination on the basis of race and national origin. Language discrimination is challenging to address in the courts because English-language requirements are often viewed as race-neutral, even when they serve to exclude or subordinate Latinos and other racial minorities.

This Article focuses on language discrimination in the areas that the Civil Rights Act of 1964 was primarily concerned with: employment, education, public accommodations, and civic participation—concentrating, in the latter respect, on jury participation. The Civil Rights Act, particularly racial exclusion or racial classification or recognition of any kind, whether it be for the purposes of race-based exclusion or affirmative action. Colorblind jurisprudence imposes a literal “anti-differentiation principle” whereby “discrimination is defined so narrowly that it is virtually impossible to advance a constitutionally [or statutorily] cognizable claim of racial discrimination . . . .” Cedric Merlin Powell, Schools, Rhetorical Neutrality, and the Failure of the Colorblind Equal Protection Clause, 10 RUTGERS RACE & L. REV. 362, 378 (2008).

2014] Race Inequity Fifty Years Later

Titles VI and VII, has been the primary federal law used to challenge language discrimination in the United States. Regulations promulgated and cases decided under Title VI and VII have been ahead of constitutional jurisprudence in recognizing that language discrimination is a form of national origin and, at times, race discrimination. However, the Act has ultimately proved ineffectual in redressing language inequity for several reasons.

This Article examines the Civil Rights Act of 1964’s treatment of language discrimination and suggests ways that the Act can better protect against such discrimination. Part I explores the differences and similarities between race discrimination in 1964 and today and looks at language discrimination as an example of contemporary race discrimination against Latinos. Part II examines language discrimination in the areas of employment; education; public accommodations; and the courts, particularly jury service; as well as the availability of protection against such discrimination under the Civil Rights Act of 1964. It evaluates both the Act’s deficiencies and its untapped potential in combating language discrimination. Part III examines structural problems with the Act that have limited its effectiveness in eradicating language discrimination.

I. RACE & LANGUAGE DISCRIMINATION: YESTERDAY & TODAY

In evaluating race inequity fifty years after the enactment of the Civil Rights Act of 1964, it is important to consider the changing face of racial discrimination and racial demographics in the United States. In 1964, the largest racial minority group was African Americans. Jim Crow laws overtly discriminated against African Americans, relegating them to separate public schools and public facilities and denying opportunities to participate in democratic self-government activities, such as voting and jury service. In 2014, Latinos are the largest racial minority. Racial discrimination persists today but is less conspicuous. Rather than hanging signs that say “No Negros” or “No Mexicans,” racial exclusions are doled out in “race-neutral”

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10 Pedrioli, supra note 5, at 102 n.42.
12 Pedrioli, supra note 5, at 102 n.42.
code. One example of these racially discriminatory but purportedly race-neutral exclusions is English-language requirements. Under current “colorblind” jurisprudence, a sign outside a restaurant stating “No Mexicans or Dogs Allowed” (as was prevalent in the Southwest in the 1950s and 1960s)\textsuperscript{13} would be unlawful and condemned by the majority of Americans. However, a sign stating “English only,” even when the common understanding is that in practice it means “No Spanish” and hence “No Latinos,” may survive legal scrutiny and even be celebrated by many Americans as patriotic.\textsuperscript{14} Similarly, prospective jurors could not overtly be excluded from service on the basis of their race,\textsuperscript{15} but language ability (either limited English proficiency or full bilingual ability) can serve as a basis whereby Latino citizens and other minorities can be excluded.\textsuperscript{16}

Language-based restrictions have long been a tool used to subordinate Latinos.\textsuperscript{17} In the Jim Crow era, African Americans were segregated in schools throughout the South and other regions of the United States on the basis of their race.\textsuperscript{18} Latinos were also subjected to race-based educational segregation, but this segregation was veiled under the pretext of language. For instance, in the Southwest, Mexican American children were segregated in separate “Mexican” schools or “Mexican” classrooms within white schools on the purported basis of their deficient English-language skills.\textsuperscript{19} However, these students’ English-language abilities and consequent assignment to a


\textsuperscript{14} See Pedrioli, supra note 5, at 102 n.42; Rodriguez, supra note 9, at 220–21.

\textsuperscript{15} Strauder v. West Virginia, 100 U.S. 303, 310 (1879), abrogated by Taylor v. Louisiana, 419 U.S. 522 (1975).


\textsuperscript{17} Buscando América, supra note 7, at 1432–34.


Mexican school or classroom were frequently determined not on the basis of linguistic skill, but rather simply on their Mexican appearance or Spanish surname.\textsuperscript{20} The segregated Mexican schools or Mexican classrooms offered substandard facilities and instruction,\textsuperscript{21} and sometimes lacked any teachers at all.\textsuperscript{22}

Today, English-language requirements, although race-neutral on their face, are often prompted by racial animus against Latinos. English-only laws are habitually brought about in response to popular movements driven by a “mission[] of ‘race betterment,’” “questions about the intelligence and values of Latin American immigrants,” and a “fear of a Hispanic takeover.”\textsuperscript{23} However, despite racist, nativist, and xenophobic beginnings, legislative history and statutory language do not mention Latinos or the Spanish language. This is not surprising; overtly acknowledging the primary targets of the bill would be legally and politically objectionable. Nonetheless, there is frequently a common understanding that, in both original intent and application, “English-only” rules and statutes are often intended to be “No-Spanish” restrictions.\textsuperscript{24} These rules are generally less about a genuine preference for English than a means to limit Spanish usage, exclude Spanish

\textsuperscript{20} Mendez, 64 F. Supp. at 550.
\textsuperscript{22} My grandfather, Rafael L. Gonzales, reports that in Southern Colorado, in some instances, white students were placed in Mexican classrooms, but only as a serious form of punishment. Interview with Rafael L. Gonzales, La Junta, Co. (July 14, 2014).
\textsuperscript{24} Braden Beard, Note, No Mere “Matter of Choice”: The Harm of Accent Preferences and English-Only Rules, 91 TEX. L. REV. 1495, 1506–07 (2013) (citing Alfredo Mirandé, “En la Tierra del Ciego, El Tuerto es Rey” (“In the Land of the Blind, the One Eyed Person is King”): Bilingualism as a Disability, 26 N.M. L. REV. 75, 103 (1996)).
speakers, and make Latinos of all linguistic backgrounds feel unwelcome.25

Language discrimination affects Latinos of diverse socioeconomic, citizenship, immigration, and language backgrounds. Latinos may be discriminated against on the basis of being Limited English Proficient (LEP), fully Spanish-English bilingual, or having a Spanish/Hispanic accent. Further, due to the problem of perceived foreignness (viewing Latinos as foreign irrespective of the duration of their American ancestry or nationality),26 Latinos are often discriminated against when they are mistakenly perceived as LEP or bilingual or as having an accent even when they do not. For example, I come from a Chicano New Mexican family that never crossed any border. Rather, the border crossed my family when New Mexico became part of the United States pursuant to the Treaty of Guadalupe Hidalgo in 1848. I am a native English speaker who grew up in Oregon in an English-speaking household and learned Spanish primarily through classes and work abroad. However, throughout my life people have frequently assumed I am LEP or speak English with a Spanish accent. For instance, in third grade I was placed in special education classes for a nonexistent “accent.” As an adult, in several professional settings, colleagues have described me as a person with a “heavy Spanish accent,” though I speak English with an Oregon/Pacific Northwest accent that is a rather standard American accent unassociated with Hispanic background. This phenomenon of misperceiving an accent or English-language limitation based solely upon a Latina’s physical appearance, surname, or ancestry indicates the close relationship between race and language for Latinos. Not only is language often central to one’s internal Latino identity,27 it is also a key external racial

25 Aka & Deason, supra note 23, at 85–86.
27 Christopher David Ruiz Cameron, How the García Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy, 85 CAL. L. REV. 1347, 1364 (1997); Rodríguez, supra note 9, at 141 (noting that language “defines the essence of cultural identity”); see Hernandez v. New York, 500 U.S. 352, 364, 370 (1991) (Even Justices of the United States Supreme Court have acknowledged that, for many Latinos, Spanish language is used to “define the self,” and “[l]anguage permits an individual to express both a personal identity and membership in a community”); J.A. Fishman, Language and Ethnicity, in LANGUAGE, ETHNICITY AND INTERGROUP RELATIONS 15, 25 (Howard Giles ed., 1977).
identifier used by others to classify a person as Latino.\textsuperscript{28}

As the argument that language discrimination can be a form of race discrimination is an unfamiliar concept to many, it might be helpful to pause and consider the meaning of race and racism, and the intersection of race, racism, and the Spanish language for Latinos. In our society, racial groups are defined by certain physical or cultural characteristics.\textsuperscript{29} This differs from national origin (the country of one’s or one’s ancestor’s origination) because diverse populations are lumped together in broad classifications such as white, black, Asian, or Latino instead of recognizing the diversity of national origin and other backgrounds of the individuals and their ancestors.\textsuperscript{30} Racial prejudice is the attribution of negative qualities to these identifying characteristics.\textsuperscript{31} Racism is racial prejudice plus power.\textsuperscript{32} We often see this with skin color, hair texture, and phenotype.\textsuperscript{33} For instance, people with dark skin, kinky or curly hair, and certain facial characteristics may be racially classified as “black” without regard to their unique ancestry. Racism materializes when negative qualities are associated with physical (or cultural) traits. An example of this distinction would be when someone sees a person with the aforementioned physical characteristics and classifies them as “black” and then, without any basis, perceives them to be dangerous, intimidating, dishonest, or criminally inclined. The first assumption is one about race; the second is racism.

For Latinos, in addition to physical characteristics, Spanish language or accent are attributes used to designate the individuals as a racialized collective group of Latinos, Hispanics, or “Mexicans” despite their multiplicity of ancestry and other background traits.\textsuperscript{34} Racism steps into play when the use of Spanish is perceived to hold innately negative qualities, such as being “dirty,” un-American, abusive, foul, threatening, uneducated, or offensive. These racist perceptions about the negative qualities of Spanish are then used as a justification for imposing English-only rules. Racism is also present when Spanish language or accent is used as a racial proxy to exclude

\textsuperscript{30} Id. at 828.
\textsuperscript{31} Id. at 835–40.
\textsuperscript{33} Gonzales Rose, supra note 29, at 835–40.
\textsuperscript{34} Id. at 826.
or subject the speaker to less favorable treatment. Throughout this Article, we will see examples of how Spanish language is used as a proxy for race and how Spanish is perceived to possess inherently negative qualities that are, in turn, employed to justify English-only policies.

Language discrimination affects many Americans. LEP persons are the group most frequently and severely affected by language discrimination. LEP individuals comprise a significant percentage of the population and are predominately people of color, particularly Latinos. Nearly ten percent of the population in the United States is LEP. That is approximately 29.5 million people. There is a tremendous correlation between race and English-speaking ability in the United States. The vast majority, 87 percent, of LEP individuals are people of color. That is about 25.67 million people of color, of which an estimated 21 million are Latino. Despite popular perceptions to the contrary, many LEP individuals are United States citizens. A conservative estimate is that 13 million United States citizens are LEP.

English-language requirements and preferences exclude and subordinate LEP people, particularly Spanish-speaking Latinos, in a variety of contexts, including employment, education, domestic relations, access to healthcare and public services, and participation in democracy. For example, private employers have increasingly imposed “English-only” rules in workplaces, which have been applied to humiliate, discipline, and fire workers, as well as exclude LEP customers, especially Latinos. In public

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35 In this essay, a LEP individual is defined as one who “[does] not speak English as their primary language and [has] a limited ability to read, speak, write, or understand English . . .” Limited English Proficiency (LEP), LEP.GOV, http://www.lep.gov/faqs/faqs.html (last visited June 9, 2015).
37 Id. at 1.
38 Id.
40 Gonzales Rose, supra note 29, at 814.
41 Id.
42 See Garcia v. Gloor, 618 F.2d 264, 266 (5th Cir. 1980). Garcia, a bilingual
schools, students’ violations of English-only rules have resulted in Latino students being sent to “Spanish detention” or suspended simply for speaking Spanish on school grounds.\textsuperscript{43} Some courts have even found speaking Spanish at home to be a form of child abuse and have threatened to remove custody from Latino parents unless they speak English to their children.\textsuperscript{44} Furthermore, LEP individuals face significant barriers when it comes to accessing healthcare and public services.\textsuperscript{45} Even the ability to exercise the fundamental right to vote can be inhibited when accommodations are not provided to LEP citizens.\textsuperscript{46} Further, LEP citizens are routinely excluded from jury service in most jurisdictions.\textsuperscript{47}

LEP individuals are not the only people subject to language discrimination. Bilingual persons, particularly bilingual Latinos, are also affected. A recent study revealed that 38 percent of Latinos in the United States are “Spanish dominant, 38 percent are bilingual and 24 percent are English dominant.”\textsuperscript{48} This is not merely an immigrant issue. Nearly half of United States-born Latinos are not English dominant.\textsuperscript{49} Widespread LEP language-based exclusions, coupled with accent and bilingualism discrimination, affect a large number of Latinos and other people of color in the United States but are often left out of discussions about race discrimination. In pondering whether the Civil Rights Act of 1964 has been effective in curtailing race discrimination, it is important that the topic of

\begin{itemize}
  \item employee, was fired for speaking Spanish in an English-only workplace. The Fifth Circuit upheld the “English-only” rule, finding it did not impose hardship upon Garcia because he was bilingual and capable of speaking English. \textit{Id.} See also Pedrioli, supra note 5, at 97; Juan F. Perea, \textit{Ethnicity and Prejudice: Reevaluating “National Origin” Discrimination Under Title VII}, 35 WM. & MARY L. REV. 805, 826–27 (1994) [hereinafter \textit{Ethnicity and Prejudice}] (discussing how courts of appeal fail to recognize language restrictions in the workplace as a form of national origin discrimination).
  \item Buscando América, supra note 7, at 1443; Mirandé, supra note 24, at 103.
  \item Buscando América, supra note 7, at 1445.
  \item Gonzales Rose, supra note 29, at 815.
  \item Id.
\end{itemize}
language discrimination finds a place in the discussion.

II. THE CIVIL RIGHTS ACT OF 1964 & LANGUAGE DISCRIMINATION

The Civil Rights Act of 1964, most notably Titles VI and VII, is the primary source of law utilized to challenge English-only policies and other forms of language discrimination. Another section of the Act, Title II, which addresses discrimination in places of public accommodation, has not been used to tackle language discrimination, but it could be. The Act was primarily concerned with addressing racial restrictions in employment, education, places of public accommodation, and full participation in democracy; thus, in evaluating the Act’s efficacy in combating language discrimination, it is appropriate to focus on these areas. In recent years, there appears to have been an upsurge in language discrimination in workplaces, public schools, and restaurants. This section discusses the current state of language discrimination jurisprudence under the Act and how the Act can be better utilized to promote language equality.

A. LANGUAGE DISCRIMINATION IN EMPLOYMENT

The majority of language discrimination litigation has arisen in the employment context. Language discrimination in the workplace can occur in a variety of ways, such as denying employment or promotion based upon English-language ability, non-English usage, or accent. Policies that are frequently challenged are English-only workplace rules. These rules prohibit workers from speaking languages other than English on the job and have become increasingly common in the past few decades. Challenges to employee-firings as a result of a violation of English-only workplace rules

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52 Id.
55 Beard, supra note 24, at 1496, 1503–05.
56 Mirandé, supra note 24, at 76.
are most often evaluated under Title VII of the Civil Rights Act of 1964.\textsuperscript{58} Title VII prohibits employment discrimination based on race, color, religion, sex, and national origin.\textsuperscript{59} Prohibiting employees from speaking non-English languages at work has been found to constitute national origin discrimination in violation of Title VII.\textsuperscript{60}

The term “national origin” is not defined in the Act.\textsuperscript{61} However, national origin has been defined by the United States Supreme Court as “refer[ing] to the country where a person was born or, more broadly, the country from which his or her ancestors came.”\textsuperscript{62} For Title VII purposes, the Equal Employment Opportunity Commission (EEOC) has delineated national origin discrimination as including “the denial of equal employment opportunity because of an individual’s, or his or her ancestor’s place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group.”\textsuperscript{63} The EEOC has also declared that an “essential national origin characteristic” is the “primary language of an individual.”\textsuperscript{64} These guidelines are forward-thinking and recognize the reality that one’s native language is a part of his or her national origin and that discrimination on the basis of language or background can amount to national origin discrimination under the Act.

The EEOC presumes that rules requiring employees to speak English at all times in the workplace, including breaks, violate Title VII because such rules amount to burdensome terms and conditions of employment and can foster a hostile work environment.\textsuperscript{65}

The primary language of an individual is often an essential national origin characteristic. Prohibiting employees at all times, in the workplace, from speaking their primary language

\textsuperscript{60} See, e.g., EEOC v. Premier Operator Servs., Inc., 113 F. Supp. 2d 1066 (N.D. Tex. 2000); Saucedo v. Bros. Well Serv., Inc., 464 F. Supp. 919 (S.D. Tex. 1979). However, while it is well-settled that English-only workplace rules may potentially violate Title VII, in the majority of Title VII cases challenging such rules the courts have found that the rules were justified by business necessity and do not violate Title VII. See Buckman, \textit{supra} note 58.
\textsuperscript{61} See 42 U.S.C. § 2000e (noting the lack of a definition for “natural origin”).
\textsuperscript{63} 29 C.F.R. § 1606.1 (1980).
\textsuperscript{64} Id. § 1606.7.
\textsuperscript{65} Id. § 1606.7(a).
or the language they speak most comfortably, disadvantages an individual’s employment opportunities on the basis of national origin. It may also create an atmosphere of inferiority, isolation[,] and intimidation based on national origin which could result in a discriminatory working environment.66

When English-only rules are only applied at certain times, the rules must be justified by business necessity.67 Recognized business necessities include safety, where all communications in a common language of English enable employees to understand the dangerous task at hand,68 and serving monolingual English-speaking customers.69 The EEOC acknowledges that “[i]t is common for individuals whose primary language is not English to inadvertently change from speaking English to speaking their primary language.”70 As such, employers who believe they have a business necessity justifying an English-only rule must provide notice to the employees outlining the “general circumstances when speaking only in English is required and of the consequences of violating the rule.”71 Failure to provide such notice is considered evidence of discrimination on the basis of national origin.72 However, it should be noted that the courts have not uniformly followed the EEOC guidelines.73

A distinction has been made in the courts between employees who are fully bilingual and those who are LEP. The courts’ treatment of bilingual employees is troubling. Many courts have found that employees who are fully bilingual in English and another language should be able to comply with the employer’s language policy and thus are less able to attack it because they can choose to speak only English.74 This emphasis on language “choice” is problematic for at least two key reasons. First, bilingual people often involuntarily speak their native language, so it is not always an actual choice.

66 Id.
67 Id. § 1606.7(b).
68 Montes v. Vail Clinic, Inc., 497 F.3d 1160 (10th Cir. 2007).
69 Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980).
70 29 C.F.R. § 1606.7(c) (1980).
71 Id.
72 Id.
73 See, e.g., Garcia v. Spun Steak Co., 998 F.2d 1480 (9th Cir. 1993) (rejecting the notion that an across-the-board English-only workplace rule presumptively establishes a prima facie case of disparate impact based on national origin discrimination).
74 Gonzalez v. Salvation Army, 985 F.2d 578 (11th Cir. 1993); Jurado v. Eleven-Fifty Corp., 813 F.2d 1406 (9th Cir. 1987); Gloor, 618 F.2d 264.
Second, emphasis on the bilingual employee’s choice of language obfuscates the employer’s discrimination.

As noted above in the EEOC regulations, bilingual people often inadvertently speak in their native language. “[A]dhering to an English-only requirement is not simply a matter of preference for Hispanics, or other persons who are bilingual speakers, but . . . such restraints can be virtually impossible in many cases[,]” particularly when speaking with members of their own cultural group. 75 Many Title VII language discrimination cases arise after Latino employees were fired for briefly speaking to a fellow Latino Spanish-speaking coworker. 76 For instance, in the case of Garcia v. Gloor, Gloor Lumber Supply had an English-only rule prohibiting employees from speaking Spanish at work unless they were communicating with Spanish-speaking customers or on break. 77 Gloor Lumber Supply is located in Brownsville, Texas, and a majority of both their employees and customers are Spanish-speaking Latinos. Hector Garcia, a bilingual Mexican American salesperson, was fired when another Mexican American employee asked him a question concerning a product requested by a customer and Garcia responded in Spanish that the item was not available. 78

The United States Court of Appeals for the Fifth Circuit held that this enforcement of the employer’s “speak-only-English” rule did not amount to national origin discrimination or otherwise violate Title VII because Mr. Garcia was bilingual and thus chose to speak Spanish on that occasion. 79 Like many bilingual employees, Mr. Garcia did not actively choose to violate a workplace rule. His Spanish response to a fellow Latino coworker’s question was not an act of insubordination or even conscious choice at that moment; it was simply an involuntary slip of the tongue. The fact that bilingual speakers often inadvertently revert back to their native language when speaking with persons from their cultural group demonstrates how English-language requirements can be an unfair burden in employment, and also how deeply-rooted native language is in a person’s communication and identity.

Focusing on bilingual speakers’ “choice” of language obscures the

76 See, e.g., Saucedo v. Bros. Well Servs., Inc. 464 F. Supp. 919, 922 (S.D. Tex. 1979) (Mexican American discharged for saying two words in Spanish about where to place an item to his coworker); Gloor, 618 F.2d at 266 (Mexican American discharged for responding to a coworker’s question in Spanish about whether an item requested by a customer was available).
77 618 F.2d 264 (5th Cir. 1980).
78 Id. at 266.
79 Id. at 271.
racism and xenophobia behind English-only rules. In the Gloor case, Mr. Garcia’s Spanish reply to a Latino coworker did not harm the employer’s business in any way. However, the employer’s English-only policy and termination for violation of this policy was a significant harm to Mr. Garcia. As the EEOC has explained, one’s native language is core to one’s national origin.80 Penalizing an employee for—or preventing an employee from—expressing this essential element of his or her national origin when there is no genuine business necessity is inherently discriminatory. It is a direct attack on the employee’s national origin as well as race.

The discriminatory nature of English-only rules is striking when compared with discrimination on the basis of religion, which is also a protected characteristic under Title VII. Absent undue hardship on the employer, it would be unlawful for an employer to discharge a Sikh man who refused to remove his turban or a Catholic woman who refused to remove her crucifix necklace at work.81 Technically, a Sikh could choose to remove his turban and a Catholic could choose to remove her crucifix. However, the law recognizes that conditioning employment and its terms and conditions on such activity is discriminatory in itself.82 Although the employee theoretically could choose to forgo key aspects of expressing his or her religion, the employer’s unnecessary requests would result in dignitary harm, and acquiescence would carry a heavy cost for the employee. Arbitrary English-language requirements are similar. Even if bilingual employees could abstain from speaking their native language, requiring them to do so absent business necessity amounts to a tremendous dignitary harm, as well as an attack on their national origin and possibly their racial background. However, the courts have too often treated English-language requirements as akin to general grooming and dress-code requirements without recognizing the connection between native language and national origin, ethnicity, and race.83

80 29 C.F.R. § 1606.7 (1980).
83 Mirandé, supra note 24, at 76; Roman Amaguin, Garcia v. Spun Steak Company: Has the Judicial Door Been Shut on English-Only Plaintiffs?, 16 U. HAW. L. REV. 351, 363 n.104 (1994) (noting how the Garcia court compared the
Prohibiting a bilingual employee from speaking her native language is demanding her to give up a key attribute of her protected national origin, and often racial, identity. Firing an employee for speaking his native or cultural language, absent actual business necessity, is discrimination against that employee’s national origin (and frequently race) even if the employee technically could choose to speak English. Like religion, language is, at least to some extent, a mutable characteristic. However, the fact that a protected trait can be changed should not determine whether legal protection is warranted. Rather, legal scrutiny should focus on the necessity of the employer’s requirement that an employee change a protected characteristic, not on whether the protected characteristic could be changed.

Scholars have frequently written about English-only workplace rules and their impact on employees. An important yet largely overlooked point is the impact of English-only workplace policies on consumers. In addition to employees’ interests, the effect of workplace rules on customers and the broader public should be considered. English-only workplace rules vary. Some allow (and even encourage) Spanish-speaking employees to serve customers in Spanish, while others prohibit bilingual employees from speaking Spanish to consumers even if it is the customers’ primary or preferred language. In fact, customer service jobs are the types of jobs most likely to have English-only workplace policies. Thus, many consumers are affected by English-only rules.

The impact of English-only workplace rules on consumers is important for many reasons. First, English-only workplace rules can restrict the availability of goods and services to minorities. Second, examining the effect of such rules on customers reveals the discriminatory animus behind such rules. English-only rules are frequently instituted in restaurants and hotels. When English-only rules are introduced and enforced in these and

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84 See Ruiz Cameron, supra note 27, at 1366 (“To suppress the speaking of Spanish is to suppress an essential, if not the essential, component of Latino identity.”).
86 See, e.g., Long v. First Union Corp. of Va., 894 F. Supp. 933, 933 (E.D. Va. 1995) (upholding a policy that forbade employees from speaking Spanish except where a Spanish speaking customer required assistance); Garcia, 618 F.2d at 266.
87 See, e.g., Holland, supra note 85.
88 Rodriguez, supra note 57, at 1690.
89 See, e.g., id. at 1736–37 (discussing the EEOC settlement with Melrose Hotel); Complaint, EEOC v. Melrose Hotel Co., No. 04 CV 7514 (S.D.N.Y. Sept. 23,
other places of public accommodation, Title II may also be implicated. Accordingly, in evaluating the impact of English-only workplace policies on consumers, it is appropriate to examine Title II’s potential to protect consumers who are subject to language discrimination. Like English-only requirements in schools (discussed below), English-only demands in restaurants have seen a revival in recent decades.90

B. LANGUAGE DISCRIMINATION IN PUBLIC ACCOMMODATIONS

Title II of the Civil Rights Act of 1964 provides, “All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.”91 Establishments that qualify as places of public accommodation within the meaning of Title II include hotels, restaurants, lunch counters, gas stations, and places of public entertainment such as theatres, concert halls, and sports stadiums.92

Title II was prompted by the refusal of private business owners to serve African Americans in the South and the protests against this discrimination. Pushing for equal access to public accommodations and responding to demonstrations at lunch counters in the South, President John F. Kennedy gave a speech to Congress in support of the Civil Rights Act,
stating, “Surely, in 1963, [one hundred] years after Emancipation, it should not be necessary for any American citizen to demonstrate in the streets for the opportunity to stop at a hotel, or to eat at a lunch counter in the very department store in which he is shopping, or to enter a motion picture house, on the same terms as any other customer.”93 The legislative history of Title II reveals that the fundamental object of Title II was to vindicate “the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.”94

During the age of Jim Crow, in the Southwest, racial discrimination in and exclusion from places of public accommodation were common for Mexican Americans. Restaurant owners hung signs outside their establishments proclaiming “[N]o Mexicans or dogs allowed.”95 Mexican Americans were excluded from restaurants, could only sit in racially segregated balcony seats in movie theaters, and were only allowed to swim in public pools on “Mexican Day”—the day before the pool was drained and cleaned and made suitable for white patrons.96 In recent years, there seems to be a resurgence of excluding racial minorities, particularly Latinos, from places of public accommodation.97 However, in these colorblind times, signs proclaim “English only” instead of “No Mexicans.” The term “English only” has become racialized code. Despite the different wording, the result and underlying aim is basically the same: Latinos are refused entry on the basis of their race and national origin or, at a minimum, are made to feel unwelcome. Even if Latino patrons can speak English and will be served, they are being asked to abandon or distance themselves from a core attribute of their cultural, national origin, and racial groups. Even when this does not amount to an actual inconvenience, it can still be an indignity.

Examining English-only requirements in places of public accommodation demonstrates how such rules are not race-neutral. English-only rules do not merely have a disparate impact on Latinos and other racial

95 Castañeda, supra note 13, at 234.
97 Keith Aoki et al., (In)visible Cities: Three Local Government Models and Immigration Regulation, 10 OR. REV. INT’L L. 453, 521 (2008) (“Recently, activists sought prohibitions on the use of non-English languages for restaurant patrons and urged private employers to impose English-only rules on their employees.”).
and national origin minorities; rather, there is also often discriminatory intent behind these rules. Modern racism has abandoned the racial epithets of old and now uses racial and racist code words. One example is the English-only ordering policy at Philadelphia’s famous cheesesteak restaurant, Geno’s Steaks. In 2006, the owner placed a sign stating, “This is America: When Ordering Speak English.” The owner of the establishment stated that he posted the sign in response to the debate on immigration reform and the number of people in the area who are unable to order in English. This statement is revealing because, when he made it, the historically Italian community where this restaurant is located had seen an increase of immigrants from Latin America. Additionally, “immigration” and “immigrant” are racially coded words synonymous with Latinos. The owner also placed a sign stating, “I am Mad as Hell! I want My Country Back!” The idea that white Americans want “their country back” is commonly a response to the presence of Latinos, both native born and immigrant.

However, current colorblind formalistic jurisprudence ignores these indicators of racial animus. Despite the racist and xenophobic motivation behind Geno’s Steaks’ English-only sign, the Philadelphia Commission on Human Relations found the sign was not discriminatory because it “did not convey a message that service would be refused to non-English speakers.”

98 See generally IAN HANEY LÓPEZ, DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM & WRECKED THE MIDDLE CLASS (2014).
99 Michelle García, Wit Cheese, Not Con Queso, WASH. POST, June 18, 2006, at A2.
101 Id.
104 DeWayne Wickham, In Ethnic Pandering, Obama Can’t Top Reagan, USA TODAY, June 19, 2012, at 7A.
105 Andrew Maykuth, Ruling: “Speak English” Sign at Cheesesteak Shop Not Discriminatory, PHILLY.COM (Mar. 20, 2008), http://articles.philly.com/2008-03-
In response, the restaurant owner thanked the Commissioner for “making him a hero.” Although the owner has since died, the sign remains posted to honor his “dying wish” that it be preserved.

Similarly, in 2011, the Reedy Creek Family Diner in Greensboro, North Carolina displayed a sign stating: “No Speak English. No Service.” Another line of the sign read, “We only speak and understand American.” The owner says he placed the sign in response to “several Latino customers that came in and weren’t able to speak or read English.” He reported it was frustrating for him and the customers, and although he did not know enough Spanish to assist them with their order, he did know enough to understand he was being cursed at and put down. After placing the sign outside his business, he reported that he received an outpouring of positive feedback. He stated that he received supportive telephone calls from people in every state and eight foreign countries, was interviewed by politically conservative talk show hosts Rush Limbaugh and Glenn Beck, and, perhaps most importantly, tripled his business. The signs were so popular that he claims he printed 1,700 copies and gave away all but one.

Pro English, a group who advocates for “Official English” and English-only reform, contacted the owner of Reedy Creek Family Diner offering to represent him in any legal proceedings that might result from the English-only policy. Although legal action challenging such language requirements has not been brought, Title II could be an effective tool to address this type of language discrimination. Title II allows private actions...
for injunctive relief, and prevailing parties are generally entitled attorney fees.

1. The Negative Impact of English-Only Rules on Consumers

Whether the English-only requirements directly target patrons or indirectly affect customers when employees are prohibited from speaking non-English languages to customers, they negatively impact consumers and reveal the discriminatory animus behind such requirements. English-only requirements serve to exclude national origin and racial minorities, especially Latinos. This discriminatory exclusion produces both tangible and intangible injuries. Tangibly, these minorities are deprived of goods and services available to others. They also suffer intangible injuries, such as the dignitary harm that results when a business chooses to prohibit—or at least strongly discourage—people from their cultural, national origin, and racial group from being served by the establishment. These types of deprivations are matters about which the Civil Rights Act of 1964 is centrally concerned.

The effects of English-only workplace rules—restricting the availability of goods and services and denying dignity to employees and customers who speak other languages—reveal the discriminatory animus underlying them. English-only rules “appear most often in the consumer services sector[.]” Most EEOC complaints deal with the prohibition of Spanish language, and many of the workplaces at issue in these cases are located in areas with a significant Spanish-speaking Latino community. Rules prohibiting employees from speaking Spanish in consumer services result in decreased services for Spanish-speaking Latino customers. Although Latino employees are directly constrained by English-only rules, in many circumstances it may be the customers who are also indirectly targeted. As mentioned above, in some instances, Latino employees are prohibited from speaking Spanish with Spanish-speaking customers, even when those

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117 Reasonable attorney’s fees are available to prevailing Title II plaintiffs under § 204(b) of the Civil Rights Act of 1964, within the discretion of the court. 42 U.S.C. § 2000a-3(b) (2012).
118 Rodriguez, supra note 57, at 1690.
119 Id. at 1700.
120 See DiChiara, supra note 54, at 125 (explaining how “English-only” rules lead to miscommunication by preventing non-native English speakers from communicating with the United States government).
customers are monolingual. Moreover, as discussed above, some businesses may limit their customer pool even further by requiring that customers speak only English in order to receive service.

There seem to be two primary reasons a business would choose to limit its customer pool by excluding national origin and racial minorities, and both indicate discriminatory impetus. The business either wants to profit from discrimination by appealing to intolerant customers, or it prefers discrimination over making a profit. The first is a reason business owners frequently expressed after the enactment of the Civil Rights Act of 1964, when establishments that excluded African Americans claimed that serving black people was economically detrimental to their businesses. This “while I don’t mind black people, my customers do” attitude is itself discriminatory because the business owner is supporting and propagating societal prejudice. Conformity to discriminatory customer preference is not a legally permissible basis upon which to discriminate against employees or customers.

If excluding minorities is not lucrative, then discriminatory intent may be indicated by the business’s failure to act rationally. Ambitious businesses would likely seek Spanish-speaking employees to cater to a Spanish-speaking clientele to be locally competitive, or utilize bilingual signs, or at a minimum simply refrain from taking steps to actively discourage speakers of languages other than English from spending money at their establishment. A rational business person would be eager to have employees who speak Spanish or try to otherwise accommodate LEP customers to maximize profits, especially if it came at no additional investment. Conversely, discriminatory businesses intentionally seek to limit their service to this group of customers. Discriminatory intent should be inferred from the failure to act like a rational economic actor.

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121 See, e.g., Holland, supra note 85.
122 See, e.g., Katzenbach v. McClung, 379 U.S. 294 (1964) (rejecting a restaurant’s argument that it would lose a substantial amount of business if it were required to serve African Americans); Williams v. Connell, 9 Race Rel. L. Rep. 1427 (D.C. Fla. 1964) (arguing that African Americans could not be served in the restaurant because that would be detrimental to its business).
C. TITLE VI: PUBLIC PROGRAMS RECEIVING FEDERAL FUNDING

Title VI of the Civil Rights Act of 1964 and its corresponding regulations provide protection against language discrimination and require in many instances that LEP individuals be provided language interpretation in order to meaningfully participate in public programs and activities. Title VI provides that, “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”

Despite the lack of specific textual reference or mention of language in its legislative history, similar to the interpretation of Title VII, language discrimination has been recognized as a form of national origin and race discrimination under Title VI. The most famous instance is the United States Supreme Court case *Lau v. Nichols*. In *Lau*, LEP children of Chinese ancestry claimed that San Francisco public schools failed to provide them with English as a Second Language (ESL) instruction in violation of Title VI and the Equal Protection Clause of the Fourteenth Amendment. The Court found that the failure to provide ESL instruction to these students prevented their access to a meaningful education. The Court concluded that the Chinese-speaking LEP students had been denied a federally funded educational benefit on the basis of their national origin or race in violation of Title VI. Having decided the case on statutory grounds, the Court declined to reach the Equal Protection claim.

On August 11, 2000, President William J. Clinton issued Executive Order 13166, “Improving Access to Services for Persons with Limited English Proficiency.” Executive Order 13166 requires federal agencies to examine the services they provide, identify the need for these services to LEP persons, and develop an approach so that LEP persons have meaningful access to these services. The Order also requires that federal agencies make efforts to ensure that recipients of federal financial assistance also provide meaningful access to their services. Specifically, federal agencies are required to: (1) develop a plan that provides LEP individuals meaningful access to the agency’s programs and/or services; (2) issue agency-specific plans...
guidance to bring the agency’s programs/recipients of federal funds into compliance with Title VI, if the agency has not already done so; and (3) ensure that LEP individuals have input throughout the process. Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41455, 41457 (June 18, 2002).

Both Title VI protection against language discrimination and the requirement that language interpretation be provided to LEP individuals have been applied to ensure access to the courts.

1. Language Discrimination in the Courts: Access & Jury Service

In response to Executive Order 13166, the Department of Justice (DOJ) issued its own LEP Guidance regulations. The DOJ’s LEP regulations were designed to direct funding recipients “to ensure that the programs and activities they normally provide in English are accessible to LEP persons and thus do not discriminate on the basis of national origin in violation of Title VI of the Civil Rights Act of 1964.” Executive Order 13166 and the DOJ’s LEP Guidance have been applied in the court context and confirm that most courts are required to provide language services to LEP persons who participate in the courts.

Relying in part on Lau v. Nichols, the DOJ’s LEP Guidance reiterates that “failure to ensure that LEP persons can effectively participate in or benefit from Federally assisted programs and activities may violate the [national origin] prohibition under Title VI of the Civil Rights Act of 1964 . . . and the Title VI regulations against national origin discrimination.” Recipients of federal funding must consider four factors when determining what language assistance is necessary to provide meaningful access to its programs:

(1) The number or proportion of LEP persons eligible to be served or likely to be encountered by the program or grantee;
(2) the frequency with which LEP individuals come in contact

134 Id.
with the program; (3) the nature and importance of the program, activity, or service provided by the program to people’s lives; and (4) the resources available to the grantee/recipient and costs.\textsuperscript{140}

After weighing these factors, recipients of federal funding must determine the extent of language assistance they should provide. However, the LEP Guidance specifies that this flexibility “does not diminish, and should not be used to minimize” the agency’s obligations under Title VI.\textsuperscript{141} Thus, if certain programs are “more important . . . and/or have greater impact on or contact with LEP persons,” more language assistance will be required.\textsuperscript{142}

Applied to the courts, this four-factor test requires, among other things, that recipient courts ensure that LEP litigants and witnesses receive language assistance.\textsuperscript{143}

At a minimum, every effort should be taken to ensure competent interpretation for LEP individuals during all hearings, trials, and motions during which the LEP individual must and/or may be present. When a recipient court appoints an attorney to represent an LEP defendant, the court should ensure that either the attorney is proficient in the LEP person’s language or that a competent interpreter is provided during consultations between the attorney and the LEP person.\textsuperscript{144}

The DOJ LEP regulations mention how some courts have adopted certification procedures for court interpreters and instruct courts to consider carefully the qualifications of court interpreters who are not certified.\textsuperscript{145} These regulations also specify that informal interpreters, such as family members, are inappropriate.\textsuperscript{146}

The issue of providing language accommodation to enhance court participation among LEP beneficiaries and participants has focused primarily on litigants.\textsuperscript{147} But the exclusion of LEP citizens from jury service, and the

\textsuperscript{140} Id. at 41459.
\textsuperscript{141} Id.
\textsuperscript{142} Id.
\textsuperscript{143} Id. at 41471.
\textsuperscript{144} Id.
\textsuperscript{145} Id.
\textsuperscript{146} Id.
\textsuperscript{147} Gonzales Rose, supra note 29, at 862.
attendant denial of juror language accommodation (interpretation for jurors), is also an underexplored language-rights issue with significant racial and national origin implications. Elsewhere, I have argued that English-language juror requirements and the failure to provide juror language accommodation violates the Fair Cross-Section requirement of the Sixth Amendment and raises serious Equal Protection concerns. Here, I explore how the failure to allow LEP jurors to serve with juror language accommodation may violate Title VI.

Many people simply assume that LEP individuals are not competent to serve on a jury because of their lack of English-language skills. However, this ignores the possibility of allowing a juror to serve with the assistance of language interpreters. Juror language accommodation is not a new idea. It has an extensive, centuries-old history in the United States and Anglo-American legal systems. Further, juror language accommodation has long been employed in the state courts of New Mexico and is currently provided in many courts for hard of hearing, deaf, and blind jurors.

All federal courts and most state courts require English-language

150 N.M. CONST. art. VII, § 3 (providing, “The right of any citizen of the state to vote, hold office or sit upon juries, shall never be restricted, abridged or impaired on account of religion, race, language or color, or inability to speak, read or write the English or Spanish languages . . . .”); State v. Samora, 307 P.3d 328, 330–31 (N.M. 2013) (holding that the district court’s excusal of a LEP Spanish-speaking prospective juror violated the juror’s state constitutional rights to serve on a jury).
152 Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861, 1865(b)(2) (2012) (providing that a person is not qualified for jury service if she does not speak English or “is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form”).
153 See Gonzales Rose, supra note 29, 817–822 (providing an overview of state court English-language juror requirements).
proficiency as a prerequisite to serve on juries. Although the focus of Title VI analysis has been on litigants, jurors are also participants within the meaning of Title VI of the Civil Rights Act of 1964. As such, the exclusion of LEP jurors on the basis of their English-language ability could run afoul of Title VI. If otherwise eligible, LEP citizens could be made competent to serve on juries with language accommodation. Thus, in communities with significant numbers of LEP citizens, denying LEP citizens juror language accommodation could amount to unlawful discrimination on the basis of national origin or race under Title VI.

While no notable Title VI litigation has occurred on the issue, it seems clear that jurors should be considered participants in court programs pursuant to Title VI. Under similarly worded statutes like the Rehabilitation Act of 1973 (RHA) and Americans with Disabilities Act of 1990 (ADA), jurors have been deemed “participants” in court proceedings. When initially looking to draft a piece of civil rights legislation for persons with disabilities, Congress turned to Title VI of the Civil Rights Act to craft § 504 of the RHA, the precursor to the ADA. While Title VI provides that no person shall on the basis “of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance,” the RHA with the same wording provides that no qualified individual with a disability shall “be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”

In cases interpreting this RHA provision, once it is decided that jury service is a federally funded program, it is then accepted that persons with disabilities serving as jurors must not be denied that participation. For example, in Galloway v. Superior Court, the United States District Court for the District of Columbia interpreted the RHA’s language to conclude that it was “readily apparent” that the jury system fell within the purview of the statute such that Mr. Galloway, a blind man who previously had been dismissed categorically due to his blindness, must be allowed participation so long as he was “otherwise qualified.” Similarly, although not as explicitly, in People v. Caldwell, the Criminal Court in the City of New York

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158 Galloway, 816 F. Supp. at 15.
concluded that because summarily dismissing persons with disabilities from the jury selection process violated the ADA, jury service must be a “program” contemplated under the statute in which persons with disabilities were entitled to participate.\(^{159}\) This presupposes that jurors are participants in the court program.

When a program participant is excluded from a federally funded program on the basis of being LEP, the DOJ has set forth four factors that should be considered to determine whether language assistance is required. The first two factors are the “number or proportion of LEP persons eligible to be served or likely to be encountered by the program or grantee” and “the frequency with which LEP individuals come in contact with the program[.].”\(^{160}\) In many areas of the country, there are significant numbers of LEP persons, especially Spanish-speaking Latinos. Nationally, English-language requirements result in the juror disenfranchisement of almost 13 million United States citizens.\(^{161}\) Some communities, particularly those in urban areas or located near the southern border, have notably high populations of LEP residents.\(^{162}\) These populations tend to be geographically concentrated. Half of LEP persons reside in three states: New York, Texas, and California.\(^{163}\) In California and Texas there are several cities where LEP persons comprise over a quarter of the population. For instance, in Texas, 56 percent of Laredo’s residents are LEP, in El Paso it is 33 percent, and in McAllen it is 32 percent.\(^{164}\) In California, 31 percent of the residents of Salinas are LEP, 29 percent in El Centro, and 25 percent in greater Los Angeles.\(^{165}\) There are many other jurisdictions throughout the United States, including Puerto Rico, where LEP citizens make up a significant portion of the community.\(^{166}\) As different regions have varying concentrations of LEP persons, the need for juror language accommodation must be evaluated


\(^{160}\) 67 Fed. Reg. 41455, 41459 (June 18, 2002).

\(^{161}\) See Gonzales Rose, supra note 29, at 814 (showing that the number of LEP persons, irrespective of citizenship, is about twice as much).


\(^{163}\) Id.

\(^{164}\) Id.

\(^{165}\) Id.

\(^{166}\) In Puerto Rico, approximately 90 percent of the age-eligible population is excluded from federal jury service due to the federal English-language juror requirement. Gonzales Rose, supra note 148, at 528–29.
specifically in each court’s jurisdiction. Since the majority of LEP persons are Spanish-speaking, Spanish-language interpretation services are particularly needed.

The third factor presented by the DOJ to determine whether language interpretation should be provided is “the nature and importance of the program, activity, or service provided by the program” to people’s lives. Serving on a jury is an important responsibility of citizenship. When a person is excluded from this central function of democracy on the basis of their English-language ability, they are lumped together with the other groups of persons ineligible to serve: former felons, “infants,” non-citizens, and those deemed to have poor moral character. This results in tremendous dignitary harm as well as second-class status for LEP citizens.

English-language juror requirements also negatively impact criminal defendants. An estimated 11.3 million of the United States citizens precluded from jury service on the basis of English-language ability are people of color. In certain communities, English-language requirements can result in jury pools that are not racially representative of the community. Juries that are not representative of the community can have serious consequences for criminal defendants, who are often disproportionately people of color. These criminal defendants may be denied a “jury of their peers” or their fundamental Sixth Amendment right to a jury selected from a “fair cross-section of the community.”

The purposes of having juries selected from a fair cross-section of the community are to:

(1) “guard against the exercise of arbitrary power” ensuring that the “commonsense judgment of the community” will act as “a hedge against the overzealous or mistaken prosecutor,“

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169 Defined here as persons who have not reached the age of majority. See BLACK’S LAW DICTIONARY 793 (8th ed. 2004).
171 Gonzales Rose, supra note 29, at 814.
172 Id. at 816.
174 Gonzales Rose, supra note 29, at 848–56 (discussing how the exclusion of LEP jurors denies Latino criminal defendants the right to a “jury of their peers” or, more specifically, a jury selected from a “fair cross section of the community”).
(2) preserving “public confidence in the fairness of the criminal justice system,” and (3) implementing our belief that “sharing in the administration of justice is a phase of civic responsibility.”

Looking to this last purpose of having a representative jury pool, it is important to emphasize that when juries are not representative of the community, this can undercut the actual and perceived legitimacy and fairness of the courts and legal system. The majority of Americans believe that jury decisions reached by racially diverse juries are fairer than decisions reached by non-diverse juries. This belief is well-founded, as studies have revealed that racially homogenous white juries generally do not spend as much time deliberating, are less likely to consider diverse perspectives, and are more likely to commit errors or exhibit racism than racially diverse juries. By contrast, racially diverse juries lessen racist manifestations, consider more varied perspectives, deliberate more thoroughly, and ultimately commit fewer errors.

The fourth and final factor in determining whether language assistance is warranted is the resources available to the federal funding recipient (here the courts) and costs. The main resistance to providing interpretation to litigants and jurors are concerns about cost and accuracy. These two concerns are closely related. Accuracy of interpretation can only be guaranteed if the interpreters are highly trained and certified. However, certified interpreters are in limited supply and require considerable financial

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177 HIROSHI FUKURAI & RICHARD KOOTH, RACE IN THE JURY BOX: AFFIRMATIVE ACTION IN JURY SELECTION 128 (2003).
179 See GREENE, supra note 178, at 305.
181 Gonzales Rose, supra note 29, at 859.
investment.\footnote{Id. at 862.} It is significant, however, that the limited supply of certified interpreters is itself a result of language discrimination. The majority of LEP persons are Spanish speakers.\footnote{Jeanne Batalova et al., \textit{Limited English Proficient Individuals in the United States: Number, Share, Growth, and Linguistic Diversity}, MIGRATION POLICY INSTITUTE, LEP DATA BRIEF, Dec. 2011, 6.} Thus, Spanish-language interpreters are in the greatest demand. If bilingual education was embraced rather than “No-Spanish” and English-only policies in schools, there would be a larger pool of educated bilingual English-Spanish Americans, as well as speakers of other languages, who could train to become certified court interpreters. Any challenges to securing certified court interpreters should be scrutinized with the understanding that the shortage or cost obstacles (since presumably costs would be lower if there were a larger supply) have actually been brought about by discriminatory language policies.

Concerns about the accuracy and possible intrusive effect of juror language accommodation are valid but not insurmountable. There is a need to have qualified and certified interpreters such as the ones employed in the New Mexico state courts,\footnote{See generally Edward L. Chávez, \textit{New Mexico’s Success with Non-English Speaking Jurors}, 1 J. CT. INNOVATION 303 (2008).} and there is much that can be learned from the New Mexico interpretation system. Studies of LEP jurors in New Mexico state courts conducted by Lysette Chavez and Markus Kemmelmeier of the University of Nevada-Reno Department of Social Psychology have shown that not only is juror language accommodation possible, it is actually preferable.\footnote{Gonzales Rose, \textit{supra} note 29, at 863.} Archival research and mock jury studies demonstrate that LEP jurors and interpreters do not compromise deliberation outcomes.\footnote{Id.} Further, additional studies have shown that jurors who served alongside LEP jurors receiving juror accommodation actually viewed future jury service more positively than those jurors who had not served with a LEP juror.\footnote{Id.}

The Civil Rights Act of 1964 was centrally concerned about race and national origin discrimination in key functions of democratic involvement.\footnote{ALEXANDER, \textit{supra} note 173, at 38.} The Act took a bold stance against discrimination that excluded people on the basis of their race and relegated them to second-class citizenship. Judicial and administrative agency interpretation of Title VI has taken a realist approach to recognizing that language discrimination can be a form of national origin or race discrimination. In the last quarter century, efforts have been made to
increase interpretation services for LEP litigants in the courts, and it has been recognized that the failure to do so could amount to a Title VI violation.\textsuperscript{189} However, Title VI has not been sufficiently utilized to challenge juror language exclusion. English-language juror requirements are generally viewed as race and national origin neutral. But these requirements are not race and national origin neutral because they do not take into account how juror language accommodation can make Latino and other minority LEP citizens eligible to serve.

This is not the only manner in which these language requirements are viewed in isolation. Too often policy makers and jurists do not look at the systemic nature of juror language discrimination. Excluding citizens from jury service on the basis of LEP removes people of color from the jury pool and can result in unrepresentative juries. The perceived shortage of court interpreters is a result, at least in part, of English-only school policies and a lack of bilingual education. Further, the notion that a LEP person could fully participate on a jury if they learned English is a fallacy since bilingual jurors can be struck from jury service merely on the basis of their bilingual ability.\textsuperscript{190}

Too quickly the courts and society discount LEP citizens’ ability to serve with the assistance of interpreters. Centuries of historical practice of juror language accommodation as well as the experience of New Mexico state courts are ignored.\textsuperscript{191} Refusal to provide language accommodation to LEP jurors may violate Title VI in jurisdictions with significant numbers of LEP persons. Title VI should be employed to remedy this inequality and to reveal the discriminatory nature behind seemingly race-neutral English-language requirements.

\section*{2. Language Discrimination in Education}

As the United States Supreme Court decision in \textit{Lau v. Nichols} demonstrated, language discrimination in public schools can violate the national origin and race provisions of Title VI.\textsuperscript{192} Any school, public or private, that receives federal funds falls under the purview of Title VI.\textsuperscript{193}


\textsuperscript{191} \textit{See generally} Chávez, \textit{supra} note 184.


There is a long history of language discrimination in schools in the United States. Some states banned the teaching of foreign languages, and teachers who taught in foreign languages faced possible prosecution. However, these linguistic hostilities against German and Japanese were short lived. The targeting of both the Spanish language and Latino Spanish-speakers has persisted over the years and experienced a revival in the past several decades as hostility against Latino immigrants has heightened.

There is a long history of public schools in the Southwest imposing “No-Spanish” rules on Latino students. Such rules were particularly prevalent in the 1950s and 1960s, increasing when Mexican American children were allowed to integrate into previously racially segregated schools. Punishment for violating English-only school rules has varied in severity from humiliation, “Spanish detention,” or corporal punishment, to suspension or expulsion. Punishment for speaking Spanish was often designed to humiliate and imply that the Spanish language and those who speak it lack intelligence. Labor leader César Chávez long remembered and recounted instances where, in elementary school, he was placed with a dunce cap and a sign that said, “I am a clown, I speak Spanish.” Children were sometimes asked to write, “I will not speak Spanish on school grounds” hundreds of times on the blackboard, or were simply beaten for speaking a “dirty language.” The embarrassment of this punishment was undoubtedly amplified when a student had to explain to her parents that she

194 VALENCIA ET AL., supra note 13, at 81–82.
196 VALENCIA ET AL., supra note 13, at 82.
197 Id. at 85–86.
199 Buscando América, supra note 7, at 1443–45.
200 Id. at 1443; Mirandé, supra note 24, at 102–3; BARON, supra note 198, at 166.
201 See Buscando América, supra note 7, at 1444–45.
204 Immigration and Language Rights, supra note 23, at 910.
Race Inequity Fifty Years Later

had been disciplined for speaking their home language.205

No-Spanish rules are highly damaging to Latino children and their ability to learn. In the late 1960s, the United States Commission on Civil Rights conducted the “Mexican American Education Study” to research the crisis of deficient Latino educational attainment.206 The Commission found that many school districts enforced No-Spanish rules and these policies were detrimental to the students’ personal and academic development.207 No-Spanish rules inflict psychological harm and diminish Latino children’s self-esteem, which in turn lessens learning outcomes.208 In response to No-Spanish school rules, many Latino families felt pressured to make sure their children only spoke English.209 This resulted in a loss of Spanish as a heritage language for many families, leading to a loss of identity, self-esteem, and ability to communicate with one’s familial elders.210 Due to the harmful impact of these policies, No-Spanish rules have been highly criticized and deemed an unfortunate racist relic of the past.211

However, despite widespread renouncement of the practice, No-Spanish public school rules have reemerged in the past two decades.212 Even when the rules are termed “English-only” rather than specifying Spanish, these language rules have focused on Spanish-speaking Latinos and are for all practical purposes No-Spanish rules.213

The following three examples illustrate how English-only rules in schools are not race-neutral but are actually racially discriminatory and should be found to violate Title VI. These examples also demonstrate the need for Department of Education regulations addressing English-only school policies.

In 2005, Zach Rubio, a bilingual Latino 16-year-old in Kansas City, Kansas, was on a break at school when a schoolmate passing in the hall asked

205 Salinas, supra note 203, at 315 n.105.
206 Id. at 314 (citing UNITED STATES COMM’N ON CIVIL RIGHTS, THE EXCLUDED STUDENT 5 (1972)).
207 Id. at 315.
208 See Linguaphobia, supra note 19, at 66; Bethany Li, From Bilingual Education to OELALEAALEPS: How the No Child Left Behind Act Has Undermined English Language Learners’ Access to a Meaningful Education, 14 GEO. J. ON POVERTY L. & POL’Y 539, 549–50 (2007).
209 See Immigration and Language Rights, supra note 23, at 917.
210 Linguaphobia, supra note 19, at 66–67.
211 See id. at 65, 95–96; Immigration and Language Rights, supra note 23, at 292.
212 Buscando América, supra note 7, at 1444.
213 See Linguaphobia, supra note 19, at 65.
to borrow a dollar in Spanish.\footnote{Rubio v. Turner Unified Sch. Dist. No. 202, 453 F. Supp. 2d 1295, 1298 (D. Kan. 2006); T.R. Reid, \textit{Spanish At School Translates to Suspension}, \textit{WASH. POST} (Dec. 9, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/12/08/AR2005120802122.html.} Zach responded simply, \textit{“No problema.”}\footnote{Reid, \textit{supra} note 214.} A teacher overheard the conversation and sent Zach to the principal’s office, where the principal ordered him to call his father and leave the school.\footnote{Id.} The principal told Zach, \textit{“If you want to speak Spanish, go back to Mexico.”}\footnote{Amended Complaint at 1–2, Rubio, 453 F. Supp. 2d 1295 (No. 05-2522-KHV).} Zach was suspended from school for speaking Spanish.\footnote{Id.}

More recently, in November 2013,\footnote{David Edwards, \textit{Texas Principal Bans Hispanic Students from Speaking Spanish to ‘Prevent Disruptions,’} \textit{RAWSTORY} (Dec. 4, 2013), http://www.rawstory.com/rs/2013/12/04/texas-principal-bans-hispanic-students-from-speaking-spanish-to-prevent-disruptions/.} Amy Lacey, the principal at Hempstead Middle School in Hempstead, Texas, made an announcement over the intercom forbidding the entire school from speaking Spanish.\footnote{Id.} Subsequently, teachers began to threaten students with punishment for speaking Spanish.\footnote{Id.} The effect on the Latino children was considerable. Some students felt that the principal’s directive gave teachers and other students permission to discriminate against and harass them.\footnote{Id.} Children became afraid to speak their native tongue and risk getting disciplined.\footnote{Id.} One eighth grade student, Yedhany Gallegos, tried to explain to the principal that Spanish was her first language, and the principal responded by encouraging her to leave the school.\footnote{Id.}

More than half of the students in the Hempstead district are Latino and many speak Spanish.\footnote{Lisa Gray, \textit{Principal Who Told Kids Not to Speak Spanish Will Lose Job}, \textit{HOUSTON CHRON.} (Mar. 19, 2014), http://www.chron.com/news/education/article/Principal-who-told-kids-not-to-speak-Spanish-will-5327528.php.} As a result of these attacks on students’ language, the principal was suspended.\footnote{Id.} Her suspension may have triggered a campaign to intimidate Latinos in the community.\footnote{Id.} After taking disciplinary
action against Ms. Lacey, the district’s superintendent, who is Latina, reported that strangers have watched and taken photos of her house; her yard was vandalized; and her garbage was searched.\textsuperscript{228} Vandals also damaged the brakes of three Hempstead school busses.\textsuperscript{229} These actions are a sign of the racial tensions related to the use of Spanish in this community.

No-Spanish rules have also been extended by public schools to regulate communication off school grounds. In 2007, the Esmeralda County School District in Nevada made a rule prohibiting students from speaking Spanish on a school bus that transported Latino students who lived in the small farming and ranching community of Esmeralda to Tonopah High School in neighboring Nye County.\textsuperscript{230} The bus ride took approximately an hour and a half each way.\textsuperscript{231} There were other buses that transported students between Esmeralda County and Nye County, but students were free to speak any language of their choice on those routes.\textsuperscript{232}

These stories show how English-only school rules are often not race-neutral and, instead, discriminate on both the basis of national origin and race. In the \textit{Rubio} case, Zach was suspended for uttering “\textit{no problema}” instead of “\textit{no problem}.” He was suspended on the basis of the Spanish vowel “\textit{a}.” Interestingly, the phrase “\textit{no problema}” is not actually Spanish. Rather it is slang combining the English “\textit{no problem}” and the Spanish “\textit{no hay problema}.”\textsuperscript{233} This “Spanglish” phrase, as well as its even less grammatically correct, “\textit{no problemo},” are commonly used by white Americans, often with anti-Hispanic sentiment.\textsuperscript{234} However, it is unheard of, and difficult to imagine, that a non-Latino would be suspended or otherwise disciplined for saying “\textit{No problema}.” The racial and national origin animus against Latinos is obvious since Spanish was the only language targeted at that school. Further, the principal told Zach, “If you want to speak Spanish, go back to Mexico.” This is a racist statement, one that is common toward Latinos. Zach

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\textsuperscript{228}Id. \\
\textsuperscript{229}Id. \\
\textsuperscript{231}Id. \\
\textsuperscript{232}Id. \\
\textsuperscript{233}DAGNY TAGGART \& CHARISSE SUTTON, SPANISH PHRASEBOOK 97, 114 (2015). \\
\textsuperscript{234}Zentella, Ana Celia, ‘José can you see’: \textit{Latina Responses to Racist Discourse}, \textit{in BILINGUAL GAMES} 52, 62 (Doris Sommer et al. eds., 2003) (discussing racialized use of “mock Spanish” by Anglo-Americans, including the phrase “\textit{no problemo}”).
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is an American citizen by birth; he cannot go “back” to Mexico. He is not from Mexico. He is from the United States. This statement was a racial attack. In Hempstead Middle School, the principal focused only on the Spanish language, going so far as to yell over the intercom that Spanish is not permitted on school grounds. On the school buses in Esmeralda County, only the bus traveling to a farming community with a significant population of Latinos was subject to the language ban. These three different English-only school rules were clearly No-Spanish rules aimed at targeting Latino children.

These instances indicate that No-Spanish rules in public schools are not merely a historic relic. Along with constitutional First Amendment claims, Title VI could be a vehicle to address such rules. Two types of Title VI violations are presented by English-only school rules: different treatment and hostile educational environment. Different treatment claims arise when a student is subject to an adverse educational action or otherwise deprived of the ability to participate in or benefit from the educational program or activity provided by the school. This can occur, for example, when a Latino student is suspended from school for speaking Spanish. In such a case, to establish a prima facie case of discrimination under Title VI, the plaintiff must show that she is a member of a protected class; suffered an adverse action or deprivation; and that this adverse action or deprivation was taken because of race or national origin.

The second type of potential Title VI action concerns hostile learning environment. This applies when the actions taken by the school individually might not constitute a sufficient deprivation of participation or benefit but collectively the language-based national origin or racial harassment interferes with the student’s ability to participate in or benefit from the educational program or activities provided by the school. To prove a prima facie suit of hostile educational environment under Title VI, the plaintiff must show that she is part of a protected class; the harassment was implemented because of her race or national origin; the school actually

237 See Silva, 595 F. Supp. 2d at 1182.
238 Id.
239 See, e.g., Bryant, 334 F.3d at 934.
240 Id.
knew or was deliberately indifferent to the harassment; and the harassment was so severe, pervasive, and offensive that the harassment denied plaintiff access to the educational benefits or opportunities provided by the school.\textsuperscript{241}

The detrimental effect of No-Spanish rules on Latino students has long been recognized.\textsuperscript{242} Not only are Latino students directly deprived of educational opportunities by having their education interrupted with discipline for speaking Spanish, English-only rules denigrate the culture and identity of Latino youth, instilling a sense of inferiority and fear.\textsuperscript{243} Self-esteem, including cultural pride, and feelings of safety are vital for a child’s academic success.\textsuperscript{244} English-only school rules also encourage other expressions of race and national origin discrimination by administrators, teachers, and peers.\textsuperscript{245} The ban on Spanish is not only a direct attack on a central trait of the student’s identity, but it also becomes a proxy and pretext for expressing racial prejudice against Latinos. Hurtful comments, such as “Go back to Mexico”\textsuperscript{246} or telling a child she cannot touch a United States flag because they are not in Mexico,\textsuperscript{247} are thrust upon American students of Latino descent in English-only schools. As in the 1950s and 1960s, Spanish today is still considered a “dirty” and lowly language by some school administrations. This is suggested by how some schools have equated any Spanish use with bullying.\textsuperscript{248} A primary reason school administrators give for banning Spanish is a worry that foul, disrespectful, disruptive words will be used, even when there has been no factual basis for this concern.\textsuperscript{249}


\textsuperscript{242} See supra text accompanying note 208.

\textsuperscript{243} See Linguaphobia, supra note 19, at 66–67.

\textsuperscript{244} Michael John Weber, Note, Immersed in an Educational Crisis: Alternative Programs for African-American Males, 45 STAN. L. REV. 1099, 1104 n.33 (1993) (noting that, for racial minority students, the “connection between self-esteem, cultural pride, and academic achievement is widely accepted”).

\textsuperscript{245} See, e.g., supra text accompanying notes 210–25.

\textsuperscript{246} Amended Complaint at 7–8, Rubio, 453 F. Supp. 2d 1242 (D. Kan. 2007) (No. 05-2522-KHV).


\textsuperscript{248} Id. at 1175 (school claimed its English-only rule was enacted to combat bullying); L. Darnell Weeden, English only Rules in Public Schools Should be Presumed Illegal, 34 T. MARSHALL L. REV. 379, 381 (2009) (discussing how, “[i]n 2006, public school officials in Illinois required Latino students to put their signature on a contract stating that comments spoken in Spanish are presumed to involve bullying and subject a student to the penalty of suspension”).

\textsuperscript{249} Weeden, supra note 248, at 379–80, 382–83.
Currently, there are no federal regulations or guidelines directing schools’ usage of English-only rules. The best practice would be to encourage a multicultural, multilingual environment that values diversity and prepares students for the realities of a multicultural and multilingual world where bilingualism and cross-cultural competence are valuable and profitable skills. However, as pedagogical determinations are usually made at the state and local level,250 at a minimum, the United States Department of Education should offer guidelines advising schools how to avoid Title VI violations. As a starting place, the guidelines could be modeled after the EEOC’s Title VII “Speak-English-only rules.”251

As patterned after the EEOC’s Title VII national origin compliance “Speak-English-only rules,” English-only policies could only be established for a non-discriminatory purpose. Across the board bans on languages other than English (such as those that require only English to be spoken at all times on school premises) should be presumptively considered to violate Title VI. English-only rules should only be permissible if justified by educational necessity. Thus, it would be permissible to require that written or oral assignments be communicated in English, but a casual conversation between students during break time could not be subject to English-language restrictions. In evaluating whether to adopt an English-only rule, a school district should weigh the educational justifications for the rule against possible discriminatory effects. Given the extensive racial history of language discrimination in schools, English-only policies in schools should be scrutinized closely to ensure that they do not advance discrimination or otherwise decrease the educational success of Latinos and other minority children.

III. STRUCTURAL PROBLEMS WITH THE CIVIL RIGHTS ACT: LIMITED SUCCESS IN REDRESSING LANGUAGE DISCRIMINATION

The Civil Rights Act of 1964 was drafted primarily to address blatant racism against African Americans, but it has been interpreted more liberally to tackle race and national origin discrimination against diverse groups.252 One of the Act’s significant steps toward racial equity has been its recognition that language discrimination can be a form of national origin or race discrimination. These language discrimination protections have outpaced legal protections under the United States Constitution, which has been slow

251 29 C.F.R. § 1606.7 (2012).
252 See Pedrioli, supra note 5, at 99.
to recognize the reality that language discrimination is often a method of or pretext for race, ethnic, or national origin discrimination. However, the Act has been ineffectual in redressing language inequity for at least three reasons.

First, the federal government has established regulations concerning language discrimination, but some states have been reluctant to follow these regulations. Second, language protection under the Act has been inconsistent and incomplete due to a variety of factors, including resistance to recognizing the relationship between race and language. Finally, pursuant to the doctrine of constitutional avoidance, the Act has been utilized as an excuse not to reach constitutional rulings that could establish broader language-based protection for minorities.

A. STATE RESISTANCE TO FEDERAL REGULATIONS

States have been reluctant to follow federal law and mandates with respect to language equality, as exemplified by their resistance to ensuring meaningful access to the courts for LEP persons. Title VI applies to state courts that receive federal financial assistance and, therefore, as discussed above, such courts are required to abide by Executive Order 13166 and the DOJ’s LEP Guidance by ensuring that their programs are available to LEP individuals. Specifically, these state courts must provide interpretive services during all hearings, trials, and motions in which LEP individuals are present. Courts cannot charge LEP individuals for interpretive services and must ensure that the provided interpreters are competent.

Despite Title VI, Executive Order 13166, and the DOJ LEP regulations, LEP individuals continue to have limited access to and participation in the court system. Without an interpreter, LEP litigants are too often unable to fully understand court proceedings, making it impossible for them to “obtain restraining orders to protect them from domestic violence, argue for custody of their children, successfully fight against their family’s

253 See infra Part III A.
254 See infra Part III B.
255 Id.
256 See infra Part III C.
259 Id. at 41462, 41471.
260 See generally BRENNAN CTR. REPORT, supra note 137.
eviction, or compel employers to pay wages owed to them. Further, LEP criminal defendants may not understand their own trials without an adequate interpreter. Despite the serious consequences for LEP litigants who are forced to proceed without sufficient language interpretation, LEP litigants continue to face significant barriers when it comes to accessing the courtroom. According to a recent study, approximately 46 percent of the states surveyed did not require that interpreters be provided in all civil cases; 80 percent fail to guarantee that the court will pay for interpreters; and 37 percent of the states that do provide interpreters fail to require the use of certified court interpreters. Executive Order 13166 and the DOJ LEP regulations have made it clear that beneficiaries and participants of federally funded court programs and activities are entitled to interpretive services and that failure to provide such interpretation may constitute a violation of Title VI. However, this statute and its regulations have not been sufficiently enforced. Title VI-compliant interpretation programs should be more actively enforced to ensure equal access to court facilities for all persons, irrespective of English-language ability.

State resistance to Title VI mandates which require that LEP people be provided interpretation and adequate access to the courts is striking because the Act was drafted as a direct response to state refusal to follow federal antidiscrimination law. In the 1950s and 1960s, despite the landmark decision in *Brown v. Board of Education*, the hope of desegregation was “dulled by resistance [from Southern states] to any but minimal steps toward compliance.” The failure of states to desegregate their schools and public accommodations led to various sit-ins and protests throughout the South.  

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261 *Id.* at 3.

262 See id.; see also, e.g., Garcia v. State, 149 S.W.3d 135, 140 (Tex. Crim. App. 2004) (finding that the failure to provide an interpreter for a Spanish-speaking criminal defendant violated the Confrontation Clause of the Sixth Amendment because, “One of the most basic of the rights guaranteed by the Confrontation Clause is the accused’s right to be present in the courtroom during his trial,” and “[t]he right to be present includes the right to understand the testimony of the witnesses”) (internal citations omitted)).


264 *Id.*

265 *Id.* at 8.

266 *Id.*


269 JUAN PEREA ET AL., RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE
Unfortunately, several whites did not heed the message of nonviolence. As images of “white violence inflicted upon nonviolent black protestors” permeated every media outlet, Congress was pressured to respond by passing the Civil Rights Act of 1964 and the Voting Rights Act of 1965.\textsuperscript{270} Congress’s intention is manifest in the legislative history of the Civil Rights Act of 1964. Records of floor debates in the Senate reflect that “the overriding purpose of the legislation was to alleviate the manifest problems of society-wide discrimination against African Americans” that occurred despite federal law and orders to the contrary.\textsuperscript{271}

The failure of state courts to follow federal antidiscrimination law and regulations concerning LEP language access is an indicator that there has been less progress in the past fifty years in the realm of civil rights than many might believe or hope. Recent events targeting Latinos in the Southwest are eerily reminiscent of race discrimination in the South in the 1960s.\textsuperscript{272} The Civil Rights Act of 1964 and its regulations can only be effective if they are enforced.

**B. INCONSISTENT & INCOMPLETE LANGUAGE PROTECTION UNDER THE ACT**

As outlined above, the Civil Rights Act of 1964 has been used to address language discrimination. However the treatment of such discrimination under the Act is inconsistent and incomplete. On one hand, the Act has been more forward thinking than other segments of law, such as constitutional jurisprudence, in recognizing the reality that native language is often a central constituent of national origin, and that discrimination on the basis of language can amount to national origin discrimination and possibly race discrimination.

\textsuperscript{270} Id. at 164.
\textsuperscript{271} Ethnicity and Prejudice, supra note 42, at 821.
\textsuperscript{272} Lisa Gray, Principal Who Told Kids Not to Speak Spanish Will Lose Job, HOUSTON CHRONICLE (Mar. 19, 2014), http://www.chron.com/news/education/article/Principal-who-told-kids-not-to-speak-Spanish-will-5327528.php (discussing how, at a majority-Latino middle school in Hempstead, Texas, Principal Amy Lacey ordered students to not speak Spanish; Lacey was suspended for her discriminatory behavior and it is suspected that her “suspension may have set off a campaign to intimidate Hispanics,” including harassment of the district’s Latina superintendent and the severing of brake lines of school buses). “A lot of this sounds like Mississippi in the 1950s and ‘60s,” commented Augustin Pinedo, director of the League of United Latin American Citizens Region 18. Id.
The United States Supreme Court has not directly determined whether discrimination on the basis of language can constitute discrimination on the basis of national origin, race, or ethnicity under Equal Protection. 273 In Hernandez v. New York, a plurality opinion and the Court’s most recent language discrimination case, the justices indicated a variety of views about the possible connection between language and race. 274 In a concurring opinion by Justice O’Connor joined by Justice Scalia, Justice O’Connor stated that “[n]o matter how closely tied or significantly correlated to race the explanation for a peremptory strike may be, the strike does not implicate the Equal Protection Clause unless it is based on race.” 275 Justice Kennedy indicated the opposite view that “[i]t may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis.” 276 Currently, language restrictions and requirements are commonly subject to rational basis review, rather than the heightened scrutiny afforded restrictions based on race, ethnicity, and national origin. 277 Further, unlike causes of action under Title VI and Title VII, 278 disparate impact claims are not recognized under the Equal Protection Clause of the Fourteenth Amendment. 279 As such, language discrimination claims are generally more difficult to assert under the Constitution than under the Civil Rights Act of 1964. Therefore, the Act can be celebrated as a progressive advancement for language equity and, ultimately, racial justice.

On the other hand, the lack of explicit mention of language in the text of the statute or its legislative history has made language protections under the Act uncertain and subject to attack, criticism, and inconsistent

275 Id. at 375 (O’Connor, J., concurring).
276 Id. at 371 (Kennedy, J., plurality opinion).
277 See Hill, supra note 273, at 209 (citing United States v. Arce, 997 F.2d 1123, 1127 (5th Cir. 1993) (holding that the constitutionality of the Jury Selection and Service Act’s English-language requirement of § 1865(b) is subject to rational basis review)).
278 But see Alexander v. Sandoval, 532 U.S. 275 (2001) (noting that although disparate impact claims are available under Title VI and Title VII, no private disparate impact right of action is recognized under Title VI).
Language, as it relates to national origin, was only mentioned briefly in the Title VII bona fide occupation qualification exception context. It does not appear that Congress gave much consideration to either the substance or scope of the term “national origin,” much less to language, as the majority of legislative discussion of the Act focused on racial discrimination against African Americans. It is not surprising that discussions of the meaning of national origin under the Civil Rights Act were “quite meager” since African Americans were overwhelmingly born in the United States, were native English speakers, and thus did not experience discrimination on the basis of national origin or language.

With this backdrop, it is no surprise that antidiscrimination law is ill-equipped to deal with racial discrimination against Latinos. This is not to imply in any way that existing law sufficiently addresses racial discrimination against African Americans. Rather, it is an observation that the static development and interpretation of civil rights law under a black-white binary paradigm of race often leaves Latinos without sufficient legal recourse to address discrimination. Under the black-white paradigm, non-black minority groups can only seek legal redress to the extent to which they can successfully analogize their experience to that of African Americans.

Manifestations of racism against Latinos share some similarities with racism against African Americans, but there are two primary differences: language discrimination and perceived foreignness. Like African Americans, Latinos often experience racism based on skin color or phenotype, and they are the subject of derogatory racialized slurs. But unlike most discrimination against African Americans, discrimination against Latinos is expressed frequently in terms of language. Another principal expression of racism against Latinos is perceived foreignness; the assumption that, based on their race, minority persons are not “American” irrespective of how many generations of their families have lived in the United States or even whether

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280 Language discrimination is treated inconsistently under the CRA. For instance, although some courts have made the connection between language discrimination and national origin discrimination (see, for example, Lau v. Nichols, 414 U.S. 563 (1974), and Sandoval v. Hagan, 197 F.3d 484 (11th Cir. 1999), rev’d sub nom Alexander v. Sandoval, 532 U.S. 275 (2001)), other courts have not made the connection. See, e.g., Garcia v. Spun Steak Co., 998 F.2d 1480 (9th Cir. 1993); Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980).

281 Id. at 2549–50; see also Ethnicity and Prejudice, supra note 42, at 821.


they are indigenous to the land that is now part of the United States. In the case of Latinos, the majority are native-born United States citizens. In fact, many Chicanos never crossed the border, but rather the border crossed them as the result of the Mexican-American war in which the United States gained a third of its current land mass.

By recognizing language discrimination primarily under the national origin provisions of the Act rather than its race provisions, the Act perpetuates this perceived-foreignness problem. It ignores the fact that many targets of language discrimination are native born, multigenerational, and even indigenous Americans. In doing so, the Act seems to signal that language discrimination is an immigrant problem or a problem that relates to one’s foreign ancestry. It ignores the reality that, for many Latinos, language discrimination is race discrimination, thereby overlooking one of the principal ways in which Latinos experience racism.

C. CONSTITUTIONAL AVOIDANCE

Under the doctrine of constitutional avoidance, courts have used the Civil Rights Act of 1964 as a reason not to reach rulings that would establish constitutional protection for language minorities. Although this is not a fault of the Civil Rights Act itself, it is a way the statute interacts with constitutional judicial decision-making that reduces the effectiveness of the Act’s protection against language discrimination. The doctrine of constitutional avoidance is a judicially created principle that a court should not reach a constitutional ruling if the matter could be decided on statutory

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288 Buscando América, supra note 7, at 1431 (arguing that in many instances for Latinos, “language is inseparable from what we call ‘race’”).
grounds.290 This approach was applied in *Lau v. Nichols*.291 The United States Supreme Court’s finding that the failure to provide LEP students of Chinese descent ESL instruction amounted to a violation of Title VI on the basis of national origin or race provided grounds for not reaching the plaintiffs’ Fourteenth Amendment Equal Protection claims. Although a finding of a constitutional violation would not have necessarily directly benefited the *Lau* plaintiffs more than the Title VI ruling, it likely would have significantly advanced the rights of language minorities because Title VI and the other provisions of the Act are limited in their breadth of application and could be repealed by the legislature.

## CONCLUSION

Fifty years after the enactment of the Civil Rights Act of 1964, this groundbreaking statute still remains significant in the struggle for racial justice. Despite some shortcomings and limitations, the Act has the potential to effectuate improved language equity and, in turn, greater racial equality. However, for this to be achieved we need to examine the racialized nature of English-language requirements with close scrutiny. Language is too often left out of the discussion of race and civil rights because it is deemed to be a legitimate, race-neutral basis upon which to discriminate. As this Article has argued, however, language is not race-neutral. It is race laden.

The Civil Rights Act of 1964 is often celebrated in retrospect. The Act’s present glory might be how, in a colorblind era, its interpretation has taken a relatively realistic analysis of language discrimination by recognizing that English-language requirements can amount to national origin discrimination. This clear-sighted view of the reality of language discrimination should be expanded upon within the Civil Rights Act and adopted in other statutory and constitutional contexts to address modern day racism. “Like a virus that has mutated, racism has evolved into different forms that are more difficult not only to recognize but also to combat.”292

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290 See, e.g., *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (“The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.”).
Language restrictions in workplaces, schools, places of public accommodation, and courtrooms are contemporary symptoms of racism that work subtly to exclude and oppress Latinos and other persons of color. Civil rights laws need to be sufficiently adaptable to contend with ever-changing manifestations and expressions of racial subordination. The Civil Rights Act of 1964 has taken some small steps toward this end; perhaps if its gait were to invigorate, society would have something to truly celebrate in another fifty years.