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“FOREWORD: A SHORT BIOGRAPHY OF THE CIVIL RIGHTS ACT OF 1964”*

Kenneth W. Mack

SYMPOSIUM ON THE FIFTIETH ANNIVERSARY OF THE CIVIL RIGHTS ACT OF 1964, *SMU Law Review*, 2014

IN the popular, and sometimes scholarly, imagination, the Civil Rights Act of 1964 brings to mind images associated with the old Southern racial caste system that the act helped undo: the now-familiar black and white images of schoolchildren facing down firehoses and police dogs in Birmingham, the historic signing ceremony in the White House with President Lyndon Johnson surrounded by politicians and civil rights leaders, and the image of thousands of protesters who marched and organized to demand freedom. The Act was signed into law on July 2, 1964, after years of grassroots protest, violence in the South, organizing and boycotts attacking segregation in the North, civic engagement and lobbying by a host of organizations, and the longest debate in Senate history. The result was accomplished only after the breaking of the Southern filibuster that had given segregationists a lock on national politics. Opponents fought hard and long to block passage of the Act because many of its provisions had the potential to change the basic understandings of Americans about inequality (not just limited to race) and about federal power to remedy it.

In truth, that historic enactment was the product of organizing and advocacy that stretched back to the beginning of the twentieth century. Ordinary citizens and civil rights groups had pushed for federal anti-lynching legislation since the 1920s and had advocated for federal legislation creating a permanent Fair Employment Practices Committee since the 1940s. Indeed, the Act came on the heels of the 1963 “March on Washington for Jobs and Freedom,” where the marchers’ official goals included access to employment, housing, public accommodations, education, the voting booth, and desegregated schools—as well as a federal full employment program.¹ Its enactment was followed by continued vio-

* I would like to thank Randall Kennedy and Paul Frymer for providing valuable comments on an earlier version of this essay, and the editors of the *SMU Law Review* for their assistance.

1. WILLIAM P. JONES, *MARCH ON WASHINGTON: JOBS, FREEDOM, AND THE FORGOTTEN HISTORY OF CIVIL RIGHTS* 174 (2013).

lence, repression and activism that led to the Voting Rights Act of 1965. A long and contentious process led to these two historic statutes of freedom, but their enactment was not an endpoint of the story. In fact, the Civil Rights Act's passage was followed by a renewed fight about the nature of inequality that drew in a broad spectrum of actors at all levels of American politics, and the Act continues to transform society to the present day.

I. THINKING ABOUT LAW AT THE HALF-CENTURY MARK OF THE CIVIL RIGHTS ACT

This is an essay about how *not* to think about the 50th anniversary of the Civil Rights Act, both from the lawyer's vantage point as well as the historian's. One way to interpret the Act—a quite tempting way for lawyers—is as a snapshot encompassing those familiar images surrounding its enactment. This is tempting for lawyers because such an interpretation would make it easier to apply our conventional skills and read the statute as a text to be given a definitive interpretation. Viewed that way, the Act might seem to be addressed to problems that existed in 1964 and that persisted for perhaps a decade or two afterward—in short, directed to problems of a society very different from our own. The Supreme Court, for instance, has shown a willingness to apply such a synchronic reading to the Voting Rights Act. The Court marked the near-50th anniversary of the Voting Act by ruling that a key coverage provision of the statute was addressed to problems that were of historical rather than present interest, and concluded that the provision was unconstitutional.² “Things have changed dramatically [since the mid-1960s],” wrote Chief Justice Roberts in criticizing what he viewed as outdated provisions of the Voting Rights Act.³ Recent Court decisions have manifested an intention to cut back on the reach of the Civil Rights Act—although there seems to be little inclination on the part of the Justices to redraw it as aggressively as they have done with the Voting Rights Act.⁴ Nevertheless, some commentators see hints of a possible aggressive reinterpretation of the Civil Rights Act in recent opinions of the Court.⁵

For differing reasons, historians might be inclined to view a statute such as the Civil Rights Act as a relatively straightforward text whose effects on the larger culture and society we can map with some precision. In the first decade or two after its enactment, the Act was seen by historians as a centerpiece of what came to be known as the “Second Reconstruction”—a renewal of a still-unresolved struggle for freedom that accompanied the

2. *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612 (2013).

3. *Id.* at 2625.

4. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013); *Vance v. Ball State Univ.*, 133 S. Ct. 2434 (2013); *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

5. Luis Fuentes-Rohwer, *The Racial Metamorphosis of Justice Kennedy and the Future of Civil Rights Law*, in *THE NEW BLACK: WHAT HAS CHANGED—AND WHAT HAS NOT—WITH RACE IN AMERICA* 80 (Kenneth W. Mack & Guy-Uriel Charles eds., 2013).

abolition of slavery a century before. In recent years, however, social movements, community organizing, and activities seemingly far removed from formal law have become the preferred sites of attention for historians.⁶ For many scholars, the push for formal legal protections of basic citizenship rights now seems not very important—at least compared to the long history of organizing and protest that encompassed the civil rights movement. Indeed, some scholars have argued that formal legal victories set back efforts to achieve substantive equality—that such victories sometimes distract movement organizers from the real work of achieving such equality and even invite backlash against the movement's accomplishments.⁷

Much of this criticism has been directed to social reform litigation rather than the different advocacy and political process that leads to legislation. There simply has not been enough attention devoted to the connections between reform movements and transformative statutes such as the Civil Rights Act.⁸ Yet even on the subject of the Civil Rights Act itself, some scholars have concluded that the Act was, at best, half a loaf—important, to be sure, but hardly addressed to the deep structural, transnational issues of inequality that beset America in the late twentieth, and now twenty-first century.⁹ For all its importance, perhaps the Act is a mere “output,” to employ a term used in a well-known legal history essay, a simple text that is the product of a larger set of forces located elsewhere.¹⁰ Or perhaps, as many left-of-center scholars have argued, formal rights such as those encompassed in the Act are, for a variety of reasons, deeply disempowering for those seeking effective social change.¹¹

The Civil Rights Act, however, was a particularly open-ended, transformative text. Its history shows that formal law sometimes opens new

6. C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (3d ed. 1974); C. VANN WOODWARD, *THINKING BACK: THE PERILS OF WRITING HISTORY*, 81–90 (1986); HARVARD SITKOFF, *THE STRUGGLE FOR BLACK EQUALITY, 1954–1980* (1981).

7. MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991); CHARLES M. PAYNE, *I'VE GOT THE LIGHT OF FREEDOM: THE ORGANIZING TRADITION AND THE MISSISSIPPI FREEDOM STRUGGLE* 315 (2007); DOUG McADAM, *POLITICAL PROCESS AND THE DEVELOPMENT OF BLACK INSURGENCY, 1930–1970*, 133–34, 184–85 (2d ed. 1999); ALDON D. MORRIS, *THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT: BLACK COMMUNITIES ORGANIZING FOR CHANGE* 35–37 (1984). Some of these scholars argue that statutes, particularly the Civil Rights Act, have a different potential for social movements, but for reasons other than the ones that I advance in this article.

8. One insightful exception to this trend is NANCY MACLEAN, *FREEDOM IS NOT ENOUGH: THE OPENING OF THE AMERICAN WORKPLACE* (2006).

9. See, e.g., JUDITH STEIN, *RUNNING STEEL, RUNNING AMERICA: RACE, ECONOMIC POLICY, AND THE DECLINE OF LIBERALISM* 69–91 (1998).

10. William E. Forbath, Hendrik Hartog, & Martha Minow, *Introduction: Legal Histories from Below*, 1985 *WIS. L. REV.* 759, 761 (1985).

11. See DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION: FIN DE SIECLE* 299–320 (1997); Robin L. West, *Tragic Rights: The Rights Critique in the Age of Obama*, 53 *WM. & MARY L. REV.* 713 (2011). For a summary of this debate and a thoughtful rejoinder, see Karen M. Tani, *Welfare and Rights Before the Movement: Rights as a Language of the State*, 122 *YALE L.J.* 314, 369–83 (2012).

debates rather than closing old ones. Indeed, the core text of the civil rights movement—the Supreme Court’s unanimous opinion in *Brown*¹²—quickly became, in the hands of movement activists, a text not just about schools but about whether buses could remain segregated in Birmingham, Alabama, and whether a local movement led by a young Martin Luther King, Jr. could claim its first victory.¹³ Indeed, recent work shows that, even within the educational context, the *Brown* opinion was a particularly open-ended text that inspired educational reformers and activists around the world to begin to debate and reform many aspects of the educational system.¹⁴ The messiness of social movement politics often escapes easy conclusions about the effects of formal law.¹⁵ The Civil Rights Act is a prime example of one such text that continues to inspire imaginative re-readings to this very day.

There are large stakes behind the question of how to read that statute, and in differing ways, the essays gathered in this symposium by Ming Hsu Chen, Ruqaiyah Yearby, and Leticia Saucedo help to reinforce that conclusion. Each of the essays shows what a transformative event the Civil Rights Act was for nearly all Americans across the lines of color, language, sex and region. Each essay shows how open-ended the Civil Rights Act was (and remains), both as a text and as the product of history. Each attests to the continued relevance of the Act, and to the long and unresolved societal conflicts about the nature of inequality a half a century after its enactment. Chen focuses on agency guidance—regulatory interpretations of the Act that “are not, strictly speaking, enforceable in court.” She reminds readers that one of the most significant effects of the Act stemmed from a seemingly unimportant interpretation of its Title VI, which prohibited discrimination in programs receiving federal funds. In a 1970 policy guidance, the Department of Health, Education and Welfare’s Office of Civil Rights (OCR) interpreted Title VI’s national origin provision to require school districts to “take affirmative steps to rectify the language deficiency in order to open its instructional program” to children who are unable to “speak and understand the English language.”¹⁶ That interpretation, she argues, caused a profound change in the way that federal agencies defined national origin discrimination, and through those agencies, the way that the larger society became cognizant of the issue of minority language rights. The policy guidance became a centerpiece of the 1974 Supreme Court ruling in *Lau v. Nichols*, where

12. *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294 (1955).

13. Randall L. Kennedy, *Martin Luther King’s Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999 (1989); Robert Jerome Glennon, *The Role of Law in the Civil Rights Movement: The Montgomery Bus Boycott, 1955–1957*, 9 LAW & HIST. REV. 59 (1991).

14. MARTHA MINOW, IN *BROWN’S WAKE: LEGACIES OF AMERICA’S EDUCATIONAL LANDMARK* (2010).

15. For an important corrective, see TOMIKO BROWN-NAGIN, *COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT* (2011).

16. OFFICE FOR CIVIL RIGHTS, F.R. DOC. 70–9236, *IDENTIFICATION OF DISCRIMINATION AND DENIAL OF SERVICES ON THE BASIS OF NATIONAL ORIGIN* (July 17, 1970).

the guidance played a key role in the Court's ruling in favor of a Title VI challenge to school district policies that did not offer sufficient language aid to Chinese-speaking students.¹⁷ Buttressed by the Court's imprimatur, the effect of the 1970 policy guidance can be felt today in thousands of decisions on all levels of government to monitor and remedy language discrimination, and have seeped into "policies and laws extending language access to virtually all public institutions, providing lawful immigration status to undocumented students, and amending the Voting Rights Act."¹⁸

Yearby also maps the transformative potential of Title VI, but her story is one of unrealized promise and hope for a better future. She focuses on the continued discrimination and outright segregation in "hospitals and nursing homes that receive federal funds," and argues that Title VI's potential to eradicate the racial disparities in access to health care remain largely undeveloped. The Civil Rights Act, she notes, was preceded by a decades-long struggle to undo the segregationist provisions of the Hill-Burton Act, which provided federal funds for hospital construction but explicitly authorized racially segregated facilities. That effort culminated in a federal court ruling that barred race discrimination in hospitals receiving Hill-Burton funds shortly before the passage of the Civil Rights Act. Yearby argues that despite the existence of Title VI and the creation of the OCR to monitor and enforce compliance with the Act, there was little federal effort to use the Act to attack existing racial segregation and exclusion in the health system. Indeed, health disparities between blacks and whites, she demonstrates at great length, have only grown more salient during the last 50 years. Like Chen, she focuses on the theory of exclusion and discrimination that lies behind Title VI, noting that federal agencies have discretion to enforce the Act using a disparate impact interpretation. Yearby ends her piece by mapping out a transformative agenda, encompassed within existing law, for taking the Civil Rights Act into this uncharted territory in attacking a wide range of racial disparities in the health care system.¹⁹

Saucedo also sees the Civil Rights Act as encompassing a forward-looking and transformative agenda, this time encompassed within Title VII of the statute, which prohibits employment discrimination based on race, color, religion, sex and national origin. Focusing on the exploitation of immigrant workers, Saucedo maps out an ambitious project whereby the EEOC could use both its advisory and enforcement roles to redefine workplace inequality. To this end, Saucedo draws on intersectionality theory, which has become one of the more significant social-cultural interventions to emerge from the Civil Rights Act. Formulated by Professor

17. *Lau v. Nichols*, 414 U.S. 563 (1974).

18. Ming-Hsu Chen, *Language Rights as a Legacy of the Civil Rights Act of 1964*, 67 SMU L. REV. 247 (2014).

19. Ruqaiijah Yearby, *When is Change Going to Come?: Separate and Unequal Treatment in Health Care Fifty Years After Title VI of the Civil Rights Act of 1964*, 67 SMU L. REV. 287 (2014).

Kimberlé Crenshaw, intersectionality emerges from the gaps in the Title VII framework, which require victims of discrimination to allege one category of discrimination—race, for instance, or sex, but not two. Intersectionality focuses on the multiple intersecting identities that we inhabit as we proceed through life, and the overlapping theories of discrimination necessary to capture the equality struggles of, for instance, black women.²⁰ Saucedo examines the crosscutting, multidimensional forms of inequality that confront immigrant workers. She offers a critique of the EEOC's efforts to use single category analysis under Title VII and presents an alternative account of workers' struggles within the Title VII regime that, she believes, would be more fully protective of their interests.²¹

All three essays, in differing ways, help explain why the Civil Rights Act was no ordinary statute, no ordinary "output" of contending social and political forces, and why it would be a disservice to the Act's past and present to view it as such. The Act is commonly seen as an effort to ban discrimination in employment and public accommodations, but the enacted statute had eleven parts, many growing out of contests over the nature of inequality that stretched back decades. Title I of the Civil Rights Act regulated formal requirements for voting that were being used substantively to limit access to the ballot—addressing itself to the methods of proof of qualification for voting, literacy tests, and other formal voting requirements.²² Its existence as part of our most famous Civil Rights Act serves as a reminder that formal requirements for voting and substantive voting rights have always been—and remain—intertwined. Title II banned discrimination and segregation based on race, color, religion and national origin in many public accommodations.²³ Title III authorized the Attorney General to bring lawsuits when certain public or state-owned facilities discriminated based on race, color, religion or national origin.²⁴ Title IV made federal resources available for school desegregation and authorized the Attorney General to bring suits to accomplish that objective.²⁵ Title V extended the existence of the Civil Rights Commission and empowered it to investigate suspected discrimination, advise government bodies, and serve as a national clearinghouse of information on discrimination.²⁶ Title VI extended the reach of civil rights law deep into many aspects of American life by prohibiting exclusion or discrimination based on race, color or national origin in programs

20. Kimberlé Williams Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence*, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 357 (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995).

21. Leticia M. Saucedo, *Intersectionality, Multidimensionality, Latino Immigrant Workers, and Title VII*, 67 SMU L. REV. 257 (2014).

22. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

receiving federal funds.²⁷ Title VII banned discrimination, exclusion and segregation based on race, color, religion, sex and national origin by many employers, labor organizations and employment agencies.²⁸ Title VIII authorized federal collection of recent voting and registration data in order to document barriers to voting, based on race, color and national origin.²⁹ Title IX made it more likely that civil rights cases would be heard in federal rather than state court by authorizing an appeal of a federal district judge's decision to send a case back to state court. It also authorized the Attorney General to intervene in certain cases, including Fourteenth Amendment litigation.³⁰ Title X established a federal Community Relations Service to offer mediation in disputes involving discrimination.³¹ Title XI provided an option for jury trials in many criminal contempt proceedings brought under the Civil Rights Act.³²

II. THE LONG LEGISLATIVE HISTORY OF THE CIVIL RIGHTS ACT

Like many statutes, the various provisions of the Civil Rights Act were the products of both principle and compromise. Some of those provisions were transformative in the context of the 1960s; others were partly exercises in legislative logrolling; while others remained open-ended promises that were made effective through future action and advocacy. Any honest "legislative history" of those provisions, as documented in recent scholarship, would have to stretch back decades before their enactment and embrace what some scholars have termed the "long civil rights movement."³³ The roots of the advocacy that resulted in the Civil Rights Act might be traced back to the early twentieth century, and even to the latter stages of the nineteenth. The centerpiece of the story is the National Association for the Advancement of Colored People (NAACP), founded in 1909, to redeem the promises of the first Reconstruction. The interracial organization quickly inserted itself into national politics with its advocacy around lynching, voting rights, school segregation, and criminal procedure.³⁴

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. See Jacquelyn Dowd Hall, *The Long Civil Rights Movement and the Political Uses of the Past*, 91 J. AM. HIST. 1233 (2005). This particular formulation of the idea of the long movement has been subject to criticism, although there is broad scholarly consensus on the need to look to the longer arc of history to contextualize the 1950s and 1960s. See Sundiata K. Cha-Jua & Clarence Lang, *The 'Long Movement' as Vampire: Temporal and Spatial Fallacies in Recent Black Freedom Studies*, 92 J. AFRICAN-AMERICAN HIST. 265 (2007); Eric Arnesen, *Reconsidering the "Long Civil Rights Movement,"* 10 HISTORICALLY SPEAKING 31 (April 2009).

34. The most authoritative history of the NAACP's early years is PATRICIA SULLIVAN, *LIFT EVERY VOICE: THE NAACP AND THE MAKING OF THE CIVIL RIGHTS MOVEMENT* (2009).

It is by no means a given that Congress could and would pass a statute regulating employment discrimination in the 1960s. That achievement was a direct product of developments that had been in motion since the 1930s when the NAACP, joined by a host of other organizations, expanded its agenda. The labor market would remain an important part of the group's advocacy up to and beyond the passage of the Act, despite the common identification of the organization with Southern school desegregation.³⁵ During the depression years, a young Thurgood Marshall joined many other civil rights lawyers in defending the "Don't Buy Where You Can't Work" movements, where African-Americans organized to boycott businesses that they believed did not employ and promote sufficient numbers of black workers. The NAACP's Charles Houston, who served as Marshall's mentor, spent the latter part of his career attacking union discrimination and working to unite the advocacy efforts of the NAACP and those of the more racially-inclusionary labor unions.³⁶ Through both local studies and interpretive works, many historians in recent years have documented the sometimes-friendly, sometimes-antagonistic interconnections between civil rights organizations and the labor movement.³⁷ As long ago as the 1930s, blacks and whites would argue over a set of questions that the Civil Rights Act would leave unresolved and that we continue to debate to this day: whether non-discrimination in the workforce meant simply the removal of formal racial barriers to jobs and union participation, or rather meant actual substantive equality (ensuring actual participation of minorities in the workforce).³⁸

As is commonly noted, Congress chose to lodge its power to enact the Civil Rights Act primarily in the Commerce Clause.³⁹ That choice grew out of the activities of civil rights activists during the New Deal era, and

35. SULLIVAN, *supra* note 34, at 145–236; PAUL FRYMER, *BLACK AND BLUE: AFRICAN AMERICANS, THE LABOR MOVEMENT, AND THE DECLINE OF THE DEMOCRATIC PARTY* (2008); RISA GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* (2007); MACLEAN, *supra* note 8; David Freeman Engstrom, *The Lost Origins of American Fair Employment Law: Regulatory Choice and the Making of Modern Civil Rights, 1943–1972*, 63 STAN. L. REV. 1071 (2011); Sophia Z. Lee, *Hotspots in a Cold War: The NAACP's Postwar Workplace Constitutionalism, 1948–1964*, 26 LAW & HIST. REV. 327 (2008); Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era before Brown*, 115 YALE L.J. 256 (2005).

36. GENNA RAE MCNEIL, *GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS 156–93* (1983); Mack, *supra* note 35, at 318–31.

37. See, e.g., ANTHONY CHEN, *THE FIFTH FREEDOM: JOBS, POLITICS, AND CIVIL RIGHTS IN THE UNITED STATES, 1941–1972* (2009); PATRICIA SULLIVAN, *DAYS OF HOPE: RACE AND DEMOCRACY IN THE NEW DEAL ERA* (1996); MARTHA BIONDI, *TO STAND AND FIGHT: THE STRUGGLE FOR CIVIL RIGHTS IN POSTWAR NEW YORK CITY* (2003); NELSON LICHTENSTEIN, *THE STATE AND THE UNIONS* (2002); BETH T. BATES, *PULLMAN PORTERS AND THE RISE OF BLACK PROTEST POLITICS IN AMERICA, 1920–1945* (2001); DAVID NELSON, *DIVIDED WE STAND: AMERICAN WORKERS AND THE STRUGGLE FOR BLACK EQUALITY* (2001); ERIC ARNESEN, *BROTHERHOODS OF COLOR: BLACK RAILROAD WORKERS AND THE STRUGGLE FOR EQUALITY* (2001); KEVIN BOYLE, *THE UAW AND THE HEYDAY OF AMERICAN LIBERALISM* (1995).

38. Mark Tushnet, *Book Review—Paul Moreno, From Direct Action to Affirmative Action*, 42 AM. J. LEG. HIST. 337, 338 (1998).

39. On the debates that would result in the Commerce Clause rather than the Fourteenth Amendment becoming the principal justification for the statute, in particular to

of the constitutional revolution of the late New Deal. Recent writing has exhaustively documented the racial discriminations and exclusions that were written into key New Deal institutions such as the National Recovery Administration, the Federal Housing Administration, and the Social Security Administration.⁴⁰ That discrimination provided an entry point for African-American lawyers and activists such as John P. Davis to help shift the movement's advocacy to the labor market during the New Deal. Davis, after taking Felix Frankfurter's public utilities seminar at Harvard Law School, returned to his native Washington, D.C., where he eventually became the head of the Joint Committee for National Recovery, a coalition of over twenty advocacy groups that lobbied for non-discrimination in federal programs and for economic rights.⁴¹ While the formal coalition was short-lived, its effort would lead directly to President Roosevelt's wartime decision to prohibit discrimination based on "race, creed, color, or national origin" in defense industries and government service, and to create the wartime Committee on Fair Employment Practice (FEPC) to monitor compliance with that directive.⁴² By the end of the war, the establishment of a permanent FEPC, as well as state-level FEPCs, to police private discrimination became a core demand of the civil rights movement.⁴³

The ability of activists to make such demands, and indeed the power of Congress to enact Titles VI and VII of the Civil Rights Act, grew out of the constitutional revolution of the late New Deal. As has been well documented by many scholars, the Roosevelt administration's experimental response to the Great Depression prompted an intense debate about the expansion of the administrative state and the power of the federal government to regulate economic life—a debate that, in conventional accounts, was seemingly resolved by 1938.⁴⁴ Civil rights activists were well aware of the debate and saw their ongoing effort to write non-discrimination into economic life as buttressed by its resolution. By 1937, Philadelphia lawyer Raymond Pace Alexander was arguing in favor of what he

Title II of the Act, see Christopher Schmidt, *The Sit-Ins and the State Action Doctrine*, 18 WILLIAM & MARY Q. 767, 809–17 (2009).

40. For a useful summary, IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE: THE UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH CENTURY AMERICA* (2005).

41. Mack, *supra* note 35, at 331–45.

42. Exec. Order No. 8802, 6 Fed. Reg. 3109 (June 27, 1941). The immediate cause of Roosevelt's decision was labor leader A. Philip Randolph's threat to hold a march on Washington to prompt federal action on discrimination. See Jones, *supra* note 1.

43. THOMAS J. SUGRUE, *SWEET LAND OF LIBERTY: THE FORGOTTEN STRUGGLE FOR CIVIL RIGHTS IN THE NORTH 70–76* (2008); CHEN, *supra* note 37, at 35–46.

44. See, e.g., DANIEL R. ERNST, *TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940*, 51–138 (2014); BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* (1998); WILLIAM E. LEUCHTENBERG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* (1995). For a summary of the differing accounts of the longer history leading up to this moment, see Howard Schweber, *Lochner v. New York and the Challenge of Legal Historiography*, 39 LAW & SOC. INQUIRY 242, 244–54 (2014).

called “the Right of Employment in all industries, of whatever character,” where the state exercised regulatory authority in the form of loans, contracts, subsidies, or regulation.⁴⁵ A decade later, Houston was arguing that his union discrimination litigation would establish a non-discrimination principle that “will apply to any public utility”—that is, any private entity that was closely regulated by the federal government or received significant federal assistance.⁴⁶ Indeed, one can draw a straight line from the New Deal-era civil rights advocacy and jurisprudential debates to the demand for, and inclusion of, basic economic rights in the statute enacted 30 years later.

When the civil rights bill was being framed in 1963 and 1964, Congressional opponents attacked its constitutionality, and they had a point. The statute brought many areas of citizenship rights within federal jurisdiction, and worked against basic constitutional assumptions that one could trace back to the end of Reconstruction.⁴⁷ Recent work in law and political science has reinforced a point that needs emphasis—the development of federal institutions that could assert authority over the civil rights of private American citizens was no sure thing. Indeed, in its early years the NAACP worked strategically as a political pressure group, lobbying successive Presidents as well as Congress, and presenting careful arguments to the Supreme Court on the scope of federal authority.⁴⁸ One of Houston’s first pieces of work for the organization was a set of briefs that were intended to convince the Department of Justice that it had authority to act in response to a set of horrific instances of racial violence in the Deep South.⁴⁹

The NAACP and its allied activists and organizations sought to shift the bounds of federal authority—first through its anti-lynching campaign and the development of national institutions that could directly protect the basic rights of individual citizens.⁵⁰ That effort worked against a set of nineteenth-century rulings through which the Supreme Court had cut back on the scope of the Reconstruction Amendments and had attempted to lodge many basic civil rights at the state level.⁵¹ In doing so, the emerging movement was aided by the civil rights section (which became the civil rights division under the 1957 Act) of the Department of

45. See Raymond Pace Alexander, Notes for an Address: Why Philadelphia Needs “The National Negro Congress” (Sept. 24, 1937).

46. Mack, *supra* note 35, at 344–45.

47. See MEGAN MING FRANCIS, *CIVIL RIGHTS AND THE MAKING OF THE MODERN AMERICAN STATE* (2014).

48. SULLIVAN, *supra* note 34; FRYMER, *supra* note 35, at 70–97; Engstrom, *supra* note 35, at 1114.

49. McNEIL, *supra* note 36, at 101–05.

50. SULLIVAN, *supra* note 34, at 61–145.

51. See, e.g., CHARLES LANE, *THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION* (2008); ROGERS M SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* (1997); LOREN MILLER, *THE PETITIONERS: THE STORY OF THE SUPREME COURT OF THE UNITED STATES AND THE NEGRO* (1966); For a recent counter-argument, see PAMELA BRANDWEIN, *RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION* (2011).

Justice, which began to formulate aggressive theories of federal power to attack economic exploitation of black workers in the South.⁵² While the successes and failures of the NAACP's school desegregation campaign have drawn much attention, what has often been overlooked is the constitutional revolution necessitated by civil rights lawyers' and activists' advocacy around schools, criminal procedure, voting rights, and the like.⁵³ The powers claimed in the Civil Rights Act are now a basic assumption of our constitutional structure, even if the constitutional framework on which they have been built has recently come under attack.⁵⁴ In the 1960s, however, these developments were not a given, but rather built on decades of advocacy and debates, which created a new set of assumptions about federal power and institutional structures that made possible the innovative set of powers claimed in the Civil Rights Act.

The popular image of the Civil Rights Act is that it was addressed primarily to the problems of the 1950s and 60s-era Jim Crow South, but the movement that brought it into being addressed problems of national scope.⁵⁵ In the North and the West, racial segregation and exclusion was often pervasive in hotels, restaurants, swimming pools, and theaters. Some Northern school districts explicitly segregated their students through the mid-twentieth century.⁵⁶ While the Southern sit-in movement directed much attention on that region, it was in other parts of the country where the movement, and the legal framework, that would eventually result in Title II of the Act found its initial footing. Northern black civil rights lawyers often won their first legal victories against race discrimination in cases involving public accommodations.⁵⁷ As late as the 1950s, the *Negro Travelers' Greenbook* advised black Americans where they could stay, eat and patronize public accommodations as they traveled in all parts of the country.⁵⁸ Straight through the 1960s, in cities like Philadelphia, civil rights activists and municipal bodies engaged in delicate negotiations to place token black families on all-white blocks, bring token integration to public accommodations like skating rinks, and overcome employers' blanket bans on hiring any blacks into certain occupations.⁵⁹ A violent mob famously greeted Dr. Martin Luther King, Jr. when he arrived in Chicago in the mid-1960s to confront Northern-style race

52. GOLUBOFF, *supra* note 35.

53. For a recent work that emphasizes this theme, see BRUCE ACKERMAN, *WE THE PEOPLE*, VOLUME 3: THE CIVIL RIGHTS REVOLUTION 63–104 (2014).

54. See *Nat'l Fed'n of Indep. Bus. v. Sibelius*, 132 S. Ct. 2566 (2012) (Scalia, Thomas, Kennedy and Alito, dissenting) (questioning the late New Deal jurisprudential revolution that validated the expansion of federal regulatory power).

55. *FREEDOM NORTH: BLACK FREEDOM STRUGGLES OUTSIDE THE SOUTH, 1940–1980* (Jeanne Theoharis & Komozi Woodard eds., 2003); SUGRUE, *supra* note 43, at 130–99, 286–312.

56. SUGRUE, *supra* note 43, at 130–99, 286–312.

57. *Id.*; *FREEDOM NORTH: BLACK FREEDOM STRUGGLES OUTSIDE THE SOUTH, 1940–1980* (Jeanne Theoharis & Komozi Woodard eds., 2003).

58. *NEGRO TRAVELERS GREEN BOOK* (1957).

59. SUGRUE, *supra* note 43, at 130–62.

discrimination.⁶⁰

Schools were also sites of sustained movement activism in the North. As early as the 1940s, local black communities staged school boycotts to protest explicit racial segregation in many Northern school systems.⁶¹ In the 1960s, NAACP lawyers Robert Carter and Lewis Steele pushed a series of innovative cases challenging the intentional, but often nearly invisible, means by which Northern school districts drew attendance zones and used other means to enforce racial segregation in schools.⁶² The Civil Rights Act challenged commonsense assumptions held by white Americans across the country, and it helped prompt a revolution in racial attitudes that still remains incomplete.⁶³

None of these developments, however, would necessarily lead to the enactment of a federal civil rights bill, particularly one with the provisions that eventually made it into the Act. To accomplish that goal, activists, politicians, lawyers and civic leaders had to overcome both political and jurisprudential hurdles that made it unlikely that the federal government would assume such power. Civil rights leaders pushed Harry Truman to establish his President's Committee on Civil Rights, whose famous report, entitled *To Secure These Rights*, recommended federal action on segregation, lynching, voting, employment discrimination, and in other areas. More than two dozen states would adopt fair employment legislation by 1964, but the federal effort was stymied by opposition from Republicans and Southern Democrats until the enactment of Title VII.⁶⁴ More provocative was the Powell Amendment, which laid the groundwork for the federal funding provisions of Title VI and built directly on the New Deal era political and jurisprudential breakthroughs. In the 1940s, Harlem Congressman Adam Clayton Powell Jr., with help from the NAACP, began attaching riders to legislation to deny federal funding to state programs that practiced race discrimination.⁶⁵ When the Eisenhower Administration proposed a substantial school funding bill, Powell's proposal, now known as the Powell Amendment, tied the Eisenhower White House up in knots. Partly in response, Attorney General Herbert Brownell proposed additional voting rights protections in what eventually became the Civil Rights Act of 1957.⁶⁶ That act finally broke the Southern filibuster threat that had bottled up federal legislation for decades, but at the cost of a statute that stripped out federal authority to effec-

60. *Id.*

61. *Id.*

62. KENNETH W. MACK, REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER 32-34, 247 (2012).

63. ROBERT L. CARTER, A MATTER OF LAW: A MEMOIR OF STRUGGLE IN THE CAUSE OF EQUAL RIGHTS 165-202 (2005).

64. MACLEAN, *supra* note 8, at 43.

65. CHARLES V. HAMILTON, ADAM CLAYTON POWELL, JR.: A POLITICAL BIOGRAPHY OF AN AMERICAN DILEMMA 187, 226-35 (2001).

66. DAVID NICHOLS, A MATTER OF JUSTICE: EISENHOWER AND THE BEGINNING OF THE CIVIL RIGHTS REVOLUTION 114-18, 143-69, 252-57 (2007).

tively protect minority rights.⁶⁷ Much the same process happened three years later with the Civil Rights Act of 1960.⁶⁸

Upon taking office in 1961, President John F. Kennedy moved cautiously on civil rights out of deference to the Southern wing of his party, despite campaign promises of aggressive action.⁶⁹ However, both the President and Attorney General Robert Kennedy soon found themselves confronted by a burgeoning national movement that ranged from marchers, sit-in protesters and freedom riders in the South, to the NAACP's increasingly contentious campaign to desegregate Southern universities, to school boycotts in Northern cities, to aggressive demands for black access to jobs at urban public construction sites in places like Philadelphia.⁷⁰ Prodded into action, the administration proposed what many activists criticized as a tepid bill in early 1963.⁷¹ The original bill envisioned by the administration included some patchwork fixes for existing voting laws, assistance for school districts that voluntarily desegregated and a simple extension of the fact-finding Civil Rights Commission created by the 1957 Act.⁷² Yet, pushed by continued activism and television images of civil rights protesters being beaten, the Kennedy administration eventually endorsed a much stronger bill later that year, which would finally become the Civil Rights Act of 1964.⁷³

The formal enactment process was just as contested, contentious and open-ended as the long history that led to that moment. As noted above, little of what is now seen as the core of the Civil Rights Act was in the original Kennedy proposal, made in early 1963.⁷⁴ By June, white Northerners had been greeted by images of child protesters being arrested in Birmingham, urban protests and unrest in the North, and a mass march of over a hundred thousand people in Detroit headlined by King and the increasingly confrontational Detroit Rev. Albert Cleage, Jr.⁷⁵ That month, the growing national scale of the conflict led President Kennedy to declare that "The fires of frustration and discord are burning in every city, North and South."⁷⁶ Justice Department lawyers drafted a bill that would be denominated H.R. 7152, which now contained provisions governing public accommodations, voting and the authority for the Attorney General to initiate school desegregation suits, but not, as yet, any employment discrimination mandate.⁷⁷ The Act's famous employment

67. *Id.*

68. *Id.*

69. TODD PURDUM, AN IDEA WHOSE TIME HAS COME: TWO PRESIDENTS, TWO PARTIES, AND THE BATTLE FOR THE CIVIL RIGHTS ACT OF 1964 1-58 (2014).

70. *Id.*

71. *Id.*

72. CLAY RISEN, THE BILL OF THE CENTURY: THE EPIC BATTLE FOR THE CIVIL RIGHTS ACT 23-77 (2014).

73. *Id.*

74. See PURDUM, *supra* note 69, at 54-85; RISEN, *supra* note 72, at 67-87.

75. ANGELA D. DILLARD, FAITH IN THE CITY: PREACHING RADICAL SOCIAL CHANGE IN DETROIT 271 (2007).

76. President John F. Kennedy, Civil Rights Address (June 11, 1963).

77. MACLEAN, *supra* note 8, at 65-72.

discrimination title would be added relatively late in the process, at the behest of a coalition of groups led by the NAACP and the United Auto Workers.⁷⁸

The enactment process drew in a broad set of actors who influenced the legislation as it wound through Congress during the next year, from labor movement and civil rights lobbyists, to social movement activists who kept the issue in the headlines, to white supremacists in the South who also did so, to Justice Department officials, to the Supreme Court Justices themselves.⁷⁹ Provisions that today seem like just plain common sense stirred strong opposition from Northern Republicans. Title II prompted so much Republican opposition that Congressional leaders prepared two identical versions of the bill, one with a public accommodations provision, and a more “realistic” one without it. Within Congress, Northern Republicans, who tended to oppose civil rights legislation, and liberal Democrats, who wanted a stronger bill, were key voting blocs. Both were needed to overcome veto power that the Southern Democrats had held over national legislation since the New Deal. The following year would draw thousands of individuals into high-stakes legislative maneuvering, lobbying by civil rights groups such as the Leadership Conference on Civil Rights, civic engagement, clergy appeals, and continued social movement pressure, with the bill’s supporters split constantly between matters of principle and what could be “realistically” accomplished. Supreme Court Justices were unwillingly involved as the bill’s drafters parsed the Justices’ ongoing responses to court cases involving student sit-in demonstrators so as to draft a statute that would pass constitutional muster.⁸⁰ Sometimes, what hardly seemed realistic suddenly became so, as when civil rights activists secured an employment discrimination provision by not backing down from thirty years of advocacy. At other times, seemingly-inexplicable changes, such as the amendment of Title VII to include sex, would reverberate until the present day.⁸¹ Along the way, four little girls died in a church bombing in Birmingham, a president was assassinated, and over 200,000 people marched on Washington for jobs and freedom.⁸² The result was the statute now known as the Civil Rights Act of 1964.⁸³

The output of all this was formal law—a text with various provisions, many of them official guarantees of certain types of “rights.” These are the kinds of legal rights that have produced much criticism within the

78. *Id.*

79. The fullest account of that process is PURDUM, *supra* note 69, at 98–328; RISEN, *supra* note 72, at 95–244; CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* (1985); DONALD G. MORGAN, *CONGRESS AND THE CONSTITUTION: A STUDY OF RESPONSIBILITY* 292–330 (1966).

80. Schmidt, *supra* note 39.

81. MACLEAN, *supra* note 8, at 117–23. For an insightful account of the emergence of sex discrimination in the statute, see Cary Franklin, *Inventing the “Traditional Concept” of Sex Discrimination*, 125 HARV. L. REV. 1308 (2012).

82. See PURDUM, *supra* note 69, at 98–328; RISEN, *supra* note 72, at 95–244.

83. See WHALEN, *supra* note 79.

scholarly community.⁸⁴ Yet, as Chen, Yearby and Saucedo's essays demonstrate, it would be a mistake to read that achievement in a narrow, synchronic manner, or as a text that speaks clearly to the reader, or as a means by which social movements locked themselves within limited confines. The statute was the product of decades of advocacy, and more than a year of formal statute-making punctuated with principled stands, political compromises, heartfelt entreaties, violence, and the specter of an intense and unresolved debate over just what equality might mean.

III. POST-ENACTMENT: ORGANIZERS, INTERPRETERS AND DREAMERS

Much had been resolved in the creation of the words that went into the Act. There were real reasons that supporters and opponents fought so long and hard over those specific words. At the same time, much remained to be resolved. The interpretive process that emerged from the enacted statute was just as long, contentious, and unresolved as that which preceded it. Take the addition of that one word, "sex," to Title VII, for instance. Although some derided that provision as an accident, EEOC staffers were surprised when a quarter of their initial complaints came from women.⁸⁵ The commission quickly found itself having to decide whether the workplace conditions of "stewardesses," as they were then called, constituted an "unlawful employment practice."⁸⁶ Suddenly, people had a name for a form of inequality that mainstream culture had not recognized before, and needed a set of legal theories to back it up. Pauli Murray, a black woman civil rights lawyer who had lobbied hard to have the term "sex" remain in the statute, saw much promise in that single word. It played a role in convincing Murray to continue the legal work that would later help the Supreme Court decide that sex discrimination was actionable under the Fourteenth Amendment.⁸⁷ In fact, the struggle to define and redefine what exactly constitutes sex discrimination in employment, and how to prove it under law, continues to this day. It is a debate that has drawn social movement activists, lawyers, Supreme Court Justices, and the President of the United States into continuing disputes such as Lilly Ledbetter's campaign for pay equity.⁸⁸ Given the aggressive interpretation and reinterpretation that has been weighted on the statutory language, one could hardly pretend that statute-making locked Americans into a narrow interpretation of that language.

If the simple word "sex" could prompt such a debate, the malleable nature of the statute was only enhanced by the complicated employment discrimination provisions of Title VII. Power to enforce those provisions

84. See KENNEDY, *supra* note 11; Tani, *supra* note 11, at 369–83.

85. MACLEAN, *supra* note 8, at 119–31.

86. SERENA MAYERI, *REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION* (2011).

87. *Id.*

88. See Lilly Ledbetter Equal Pay Act, Pub. L. No. 111–2, 123 Stat. 5 (2009); Ledbetter v. Goodyear Tire and Rubber Co., 550 U.S. 618 (2007).

was divided between the newly-created Equal Employment Opportunity Commission (EEOC), the Justice Department and private plaintiffs.⁸⁹ Title VII encompassed vague and conflicting phrases, such as “a bona fide seniority or merit system,” and a “professionally developed ability test . . . not designed, intended or used to discriminate,” and “otherwise to discriminate.”⁹⁰ Indeed, the statute did not even supply any real definition of the term “discrimination.”⁹¹ Those complicated provisions emerged from a statute-making process which involved many amendments to the original bill, moves to insulate the bill from further amendment, and strategic calculations to respond to the objections of the statute’s opponents.⁹²

The enacted Title VII seemed so cumbersome that NAACP Legal Defense and Educational Fund (LDF) head Jack Greenberg called it “weak, cumbersome” and “probably unworkable.”⁹³ He was quickly proven wrong. The reason was that the complicated structure of Title VII made it the vehicle for any number of reform agendas. Thousands of complaints quickly flooded the EEOC as workers sought to give meaning to the statute’s text. The LDF quickly changed course. Helped along by a North Carolina civil rights lawyer named Julius Chambers, the organization started a community organizing project in that state, with local residents as paid field workers. Its objective was to transform race relations in local workplaces.⁹⁴ Out of that effort would come significant changes in the state’s textile industry (unionization and integration), as well as a surprisingly broad opinion by Chief Justice Burger in *Griggs v. Duke Power Co.*, which recognized a disparate impact cause of action under the statute.⁹⁵ Of course, that was not the endpoint of the process. Title VII transformed workplaces across the country, while the debates over how to read its employment mandates would help birth a conservative legal movement that organized itself in response to affirmative action and other interpretive issues that arose from that text.⁹⁶

Perhaps what was most radical about the statutory language was that many of its most controversial provisions were interventions in the long-running debate over federal power to transform local institutions. The statute’s federal funding provisions (Title VI), its authorization for the Justice Department to file suit to compel integration (Titles III and IV), and other provisions tipped the balance decisively in favor of federal power to enforce school desegregation in the South. The Act built on the civil rights movement’s longstanding focus on federalizing basic citizen-

89. 42 U.S.C. § 2000e-2 (2012).

90. *Id.*

91. *Id.*

92. PURDUM, *supra* note 69, at 247–49; RISEN, *supra* note 72, at 200–23.

93. David J. Garrow, *Toward a Definitive History of Griggs v. Duke Power Co.*, 67 VAND. L. REV. 197, 205 (2014).

94. ROBERT BELTON, *THE CRUSADE FOR EQUALITY IN THE WORKPLACE: THE GRIGGS V. DUKE POWER STORY* (2014).

95. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

96. MACLEAN, *supra* note 8, at 225–64.

ship rights, and on the Eisenhower Administration's push to increase federal funding for local schools.⁹⁷ The Southern region of the United States, which in 1964 had the most racially segregated schooling system in the country, had the most integrated schooling system by the 1970s.⁹⁸ Those gains were not self-executing, but in fact depended on the efforts of local activists, federal officials, and community actors who believed in integration as a social good and worked to make it effective.⁹⁹ Much of that gain, however, has been reversed within the past decade as the legal requirements that once backed up the push to maintain integration in the South and in other parts of the country have been loosened or eliminated.¹⁰⁰ In addition, as the essays gathered in this symposium remind us, the debates prompted by the Act helped transform the entire country and produced new movements such as that for language rights. Indeed, in more recent debates over federal educational interventions such as the No Child Left Behind Act and the Race to the Top Initiative, one can see echoes of arguments about federal power to enforce equity in education that were prompted by the Act. Such extensions of federal power drew directly on the groundwork that was provided by the Civil Rights Act.

Then, of course, there are the dreamers—those who imagined that the Civil Rights Act might have already enshrined transformative, utopian ideals in law. One such dreamer was a young graduate student named Catherine MacKinnon who, upon hearing of an administrator who resigned because of her supervisor's advances, came up with the theory that the words “otherwise to discriminate” already supported an interpretation of Title VII that would define and prohibit something called “sexual harassment.” To many contemporary observers, such reasoning seemed as though it had scant support in the legal materials comprising the Civil Rights Act, but over time it has become both settled law and an idea that has affected law and politics around the world.¹⁰¹ Yet another dreamer was Kimberlé Crenshaw, who looked at the interstices of the phrase “because of such individual's race, color, religion, sex, or national origin” and saw a lack of a theory—or perhaps an emerging theory—that described the multiple kinds of inequality experienced by women of color.¹⁰² That idea had a name, intersectionality theory, and while it has not lodged itself in formal law in the same manner as sexual harassment, it continues

97. Gary Orfield, *The 1964 Civil Rights Act and American Education*, in LEGACIES OF THE 1964 CIVIL RIGHTS ACT (Bernard Grofman ed., 2000).

98. CHARLES T. CLOTFELTER, *AFTER BROWN: THE RISE AND RETREAT OF SCHOOL DESEGREGATION* (2006).

99. Orfield, *supra* note 97; CLOTFELTER, *supra* note 98.

100. GARY ORFIELD, ERICA FRANKENBERG, JONGHEON YE, & JOHN KUSCERA, *BROWN AT 60: GREAT PROGRESS, A LONG RETREAT, AND AN UNCERTAIN FUTURE* (May 15, 2014), available at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-60-great-progress-a-long-retreat-and-an-uncertain-future/Brown-at-60-051814.pdf>.

101. Deborah Dinner, *A Firebrand Flickers*, LEGAL AFFAIRS (March/April 2006); CATHERINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979).

102. Crenshaw, *supra* note 20, at 357.

to transform debates in fields far removed from the employment discrimination cases that prompted its creation. The dreaming continues apace, with newer ideas percolating up under the banner of performance theory, which propounds new readings of workplace discrimination that allow one to describe how a formally integrated workplace might nonetheless be filled with legally actionable race discrimination.¹⁰³ Whether these newer dreams might find themselves recognized in formal law remains to be seen, but they continue in the long tradition of reimagining the contours of law that preceded the enactment of the Civil Rights Act, were incorporated into the Act's contentious enactment process, and continue to this day.

IV. CONCLUSIONS: HOW MIGHT WE REMEMBER THE CIVIL RIGHTS ACT GOING FORWARD

Drawing on the illuminating essays by Chen, Yearby and Saucedo, what has been offered here might be termed a brief "biography" of the Civil Rights Act of 1964, a statute whose pregnant, generative language is the product of a long history of argument and activism, as well as a legislative process of unprecedented complexity, and whose meaning continues to evolve to this day. Are we at the end of its life—or at least the productive, generative phase of its life—as one might conclude by reading it as a simple set of words incorporating a fairly narrow stretch of meaning and history? It would do violence to the long history of the Civil Rights Act to read it as a simple text which one can interpret through the usual lawyers' tools of statutory construction. It would also impoverish our collective imagination to read the statute as some sort of endpoint in that process, apart from the long stream of debate, contestation and advocacy on the subject of inequality into which the Act inevitably flows. Is this the unique story of the Civil Rights Act, or perhaps a larger story that one could deploy with many other sources of formal law—statutes, judicial opinions, and the like? Is this an analysis that applies solely to the Act, or does it have implications for a more general consideration of formal legal rights and entitlements? I leave those questions for others to answer. For the moment, it is sufficient to mark off some interpretive, and historical ground, that leaves the Civil Rights Act where it should be: as a transformative text that encapsulates our ongoing struggle to define just what equality means in world where there have always been multiple meanings of that seemingly simple idea.

103. DEVON CARBADO & MITU GULATI, *ACTING WHITE?: RETHINKING RACE IN POST-RACIAL AMERICA* (2013).