Introduction

Inaugural Wiley A. Branton-*Howard Law Journal* Symposium

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It is truly a pleasure to participate in this program commemorating the fortieth anniversary of the Civil Rights Act of 1964,[1] one of the greatest legislative achievements in American history. It also feels appropriate to me that this commemorative event is taking place at Howard University School of Law, an institution that has played an unrivaled role in the United States for generations as an incubator for leadership and litigation campaigns in the fight for civil rights and equal justice.[2] Nothing could be more fitting than to have this retrospective look at two generations of life under the 1964 Act as the inaugural event of the 2004 Wiley Branton Symposium hosted by the *Howard Law Journal.* Wiley Branton was a tenacious civil rights litigator, public official, and educator who embodied the highest ideals of the legal profession.

I would like to take this opportunity to thank my former boss, at one time the Senior Fellow of the Yale Corporation, and now the Howard University School of Law's justly celebrated Dean, Kurt Schmoke, for extending to me the invitation to speak today, and to Professor Okianer Christian Dark with whom I had the pleasure of serving last spring as co-faculty advisors on the Howard and Yale Brown@50 commemorations, for her hard work in organizing this Symposium. I also want to express my appreciation to Ms. Natalie Ward and other members of the *Howard Law Journal* upon whose

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1. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

2. *See generally* Genna Rae McNeil, *Justiciable Cause: Howard University Law School and the Struggle for Civil Rights,* 22 How. L.J. 283 (1979).

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shoulders has fallen, I have no doubt, the major burden for ensuring that the necessary details connected with hosting this Symposium all came together in a timely and orderly fashion.

I. PERSPECTIVE

An important benefit one hopes to gain from retrospectives like this one, to state the obvious, is a sense of *perspective*. In that regard, it is worthwhile to remember people like Richard and Sallie Robinson of Tennessee, Bird Gee, and George M. Tyler. Sallie Robinson was excluded from the "ladies car" on an interstate train, Bird Gee was denied the right to enjoy a meal at an inn in Kansas, George M. Tyler was refused admission to Maguire's New Theatre in San Francisco, and an unnamed individual could not gain admittance to the Grand Opera House in New York City all because they were U.S. citizens of African American descent. If their names do not ring any bells with you, it may be because the Robinsons, Gee, and Tyler had unsuccessfully attempted to assert rights to enjoy access to places of public accommodation on a non-discriminatory basis, afforded them by the Civil Rights Act of 1875.[3] Federal prosecutions, as well as private actions brought on their behalf, pursuant to that Act, were rejected by the U.S. Supreme Court in 1883, which held the statute unconstitutional.[4]

Plessy v. Ferguson[5] announced that the "separate but equal doctrine" was soon to come, followed by decades of America's own version of racial apartheid in public transportation, schools, housing, public accommodations, and employment. Although limited civil rights laws were enacted in 1957[6] and 1960,[7] the Civil Rights Act of

3. Ch. 14, 18 stat. 335 (codified as amended at 18 U.S.C. § 243).

4. The Civil Rights Cases, 109 U.S. 3 (1883).

5. 163 U.S. 537 (1896).

6. Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (codified as amended in scattered sections of 28 U.S.C. and 42 U.S.C.). The Civil Rights Act of 1957 provided for the establishment of the Civil Rights Section of the Justice Department, established a federal Civil Rights Commission with authority to investigate discriminatory conditions and to recommend corrective measures, and empowered federal prosecutors to obtain court injunctions against public or private interference with the right to vote. *See generally id.*

7. Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86 (codified as amended in scattered sections of 18 U.S.C., 20 U.S.C., 28 U.S.C., and 42 U.S.C.). The Civil Rights Act of 1960 permitted the joinder of states as defendants, provided the Attorney General access to local voting records, and authorized courts to register voters in areas of systematic discrimination. *See generally id.*

1964,[8] which included a provision once again affording non-discriminatory access to places of public accommodations,[9] was the first major federal civil rights legislation in nearly a century.

The need for perspective also creates a reminder of the terrible struggle waged by African Americans during the Civil Rights Movement to force the nation to look with a clear eye at the dehumanizing, cruel, and punishing features of state-sanctioned racial segregation and discrimination; at the police dogs, truncheons and water-hoses trained upon peacefully protesting Black children; and the bombing of Black churches and the assassinations of civil rights leaders.[10] We need to recall the 250,000 mostly Black, but significantly bi-racial, assemblage surrounding the Lincoln Memorial and filling the National Mall for as far as the eye could see on August 28, 1963. Both Martin Luther King, Jr. with his *I Have a Dream* speech[11] and twenty-three year old John Lewis with his more direct demand for "freedom and freedom now"[12] were determined to press the Kennedy Administration to take a forceful stance toward enactment of a major civil rights bill.

Of course, federal executive branch officials and members of Congress have traditionally needed to be motivated by outside public pressure to overcome the institutional barriers to enactment of bold legislation that attacks deep-seated inequities in American society. What is needed as well is strong leadership from the oval office; courageous, dedicated legislators prepared to act primarily, if not solely, on the basis of what is right rather than what is just expedient; and skilled lobbyists who are able to work on the inside to keep elected officials honest, make the necessary arguments, and deploy political muscle at critical junctures in the legislative process.

After the assassination of John F. Kennedy, President Lyndon Johnson provided such leadership and inimitable political insights.[13]

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8. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

9. 42 U.S.C. §§ 2000a to 2000a-6 (2000).

10. *See* HUGH DAVIS GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY, 1960-1972, at 125-52 (1990).

11. *See* DREW D. HANSEN, THE DREAM: MARTIN LUTHER KING, JR., AND THE SPEECH THAT INSPIRED A NATION 43-63 (2003).

12. *See* JOHN LEWIS & MICHAEL D'ORSO, WALKING WITH THE WIND: A MEMOIR OF THE MOVEMENT 224 (1998).

13. *See* John G. Stewart, *"The Civil Rights Act of 1964: Strategy," in* THE CIVIL RIGHTS ACT OF 1964: THE PASSAGE OF THE LAW THAT ENDED RACIAL SEGREGATION 167-209 (Robert D. Loevy ed., 1997).

In both the House and Senate, the Democratic and Republican sponsors of the civil rights bill acted in exemplary fashion.[14] The Leadership Conference on Civil Rights lobbied with a fierce determination, probably unparalleled up to that time.[15] Nevertheless, we are reminded that, by the time President Johnson signed the Civil Rights Act into law on July 2, 1964, almost fifty-four weeks of constant congressional activity had preceded it,[16] including the longest filibuster in the history of the United States that lasted for five-hundred-thirty-four hours, one minute, fifty-one seconds, over thirteen weeks, and in which 4 million words were uttered.[17] That achievement was truly one for the history books.

II. EFFECTIVENESS

Any backward look at a legislative program would not suffice without an assessment of its effectiveness. The 1964 Act has eleven separate titles,[18] but I think that it is generally agreed that three—Title II (public accommodation),[19] Title VI (non-discrimination by recipients of federal financial assistance)[20] and Title VII (equal employment opportunity)[21]—have been the most important during the intervening forty years. This is not the occasion to rehearse the many and varied views on the effectiveness of each of these titles. Suffice it to say that the public accommodations provision went into effect quickly[22] and has taken hold far beyond its proponents' expectations. Today, incidents of racial discrimination by restaurants and common carriers are widely viewed as truly aberrational and socially unacceptable.[23] The bar against discrimination by recipients of federal finan-

14. CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 194-217, 218-29 (1985).

15. Joseph L. Rauh, *The Role of the Leadership Conference on Civil Rights in the Civil Rights Struggle of 1963-1964, in* THE CIVIL RIGHTS ACT OF 1964, *supra* note 13, at 49-75; *see also* DENTON L. WATSON, LION IN THE LOBBY: CLARENCE MITCHELL, JR.'S STRUGGLE FOR THE PASSAGE OF CIVIL RIGHTS LAWS 591-625 (1990).

16. *See* WHALEN & WHALEN, *supra* note 14, at 227.

17. *Id.* at 193.

18. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

19. 42 U.S.C. §§ 2000a—2000a-6 (2000).

20. *Id.* §§ 2000d—2000d4-a.

21. *Id.* §§ 2000e—2000e-17.

22. *See* Randall Kennedy, *Racial Equality in Public Accommodations, in* LEGACIES OF THE 1964 CIVIL RIGHTS ACT 159 (Bernard Grofman ed., 2000).

23. *See, e.g.*, Edward Iwata, *Restaurant to Settle 7 Lawsuits, Pay $8.7 million; Cracker Barrel was Accused of Discrimination,* USA TODAY, Sept. 10, 2004, at B6; Del Jones, *Denny's Faces Another Claim of Racial Bias*, USA TODAY, Sept. 27, 1995, at B1; David Segal, *Denny's Serves*

cial assistance has been less uniformly successful,[24] but the employment discrimination provision has changed the complexion and composition of the American workplace in ways that are evident to the naked eye.[25] One can derive many important general principles from the text and judicial construction of these three titles: racial discrimination is an unacceptable drag on the economy;[26] Congress' use of its spending power to curb racial and other forms of individual discrimination is constitutionally authorized;[27] and Congress may appropriately impose sanctions for practices that have discriminatory effects, even without any proof of discriminatory intent.[28]

Overall, I believe it is fair to say that the Act has accomplished what its most vigorous opponents feared—it has served to undermine and destroy America's centuries-old racial caste system. The overt symbols of White superiority and entitlement have gradually disappeared, but the 1964 Act has done more than that. It has, in conjunction with the *Brown* decision,[29] opened up opportunities in education, employment, and access to public services that were previously closed to African Americans. It has also provided the impetus for subsequent civil rights acts addressing discrimination in housing[30] and voting.[31] The *Brown* decision and its vision of equality have served as rallying points for other racial and ethnic groups, women, the disabled, and the gay community, which all seek federal protection from discriminatory practices affecting them. In response, Congress has adopted the 1964 Act as a template for legislation benefiting some of those same groups, such as Title IX of the 1972 Education Amend-

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Up a Sensitive Image; Restaurant Chain Launches PR Drive To Show Minorities It Has Changed Its Ways, WASH. POST, Apr. 7, 1999, at E1.

24. *See* STEPHEN C. HALPERN, ON THE LIMITS OF THE LAW: THE IRONIC LEGACY OF TITLE VI OF THE 1964 CIVIL RIGHTS ACT (1995); *see also* NORMAN AMAKER, CIVIL RIGHTS AND THE REAGAN ADMINISTRATION 59-77 (1988).

25. *See* David L. Rose, *Twenty Five Years Later: Where Do We Stand on Equal Employment Opportunity Law Enforcement?*, 42 VAND. L. REV. 1121 (1989).

26. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 251-52 (1964).

27. *See* Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 594-97, 598-99 (1983).

28. *See* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

29. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

30. *See* Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 81 (codified as amended at 42 U.S.C. §§ 3601–3616, 3617–3519 (2004)); Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (codified at 42 U.S.C. § 3601-31).

31. *See* Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973-1973bb-1); Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (codified as amended at 42 U.S.C. § 19973); Voting Rights Amendment Act of 1975, Pub. L. No. 94-73, 89 Stat. 400 (codified as amended at 42 U.S.C. § 1973); Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (codified as amended at 42 U.S.C. § 1973).

ments (non-discrimination in education on the basis of sex),[32] the Age Discrimination in Employment Act of 1967,[33] the Rehabilitation Act of 1973,[34] and the Americans with Disabilities Act of 1990.[35]

This is not to suggest, however, that enforcement of the 1964 Act and its companion civil rights statutes has proceeded without impediment. In fact, over the last two decades, the U.S. Supreme Court has handed down a significant number of decisions that seriously curtailed the reach of these legislative schemes.[36] The ensuing delay and confusion caused by these rulings and their implementation by lower federal courts have seriously affected the scope and quality of civil rights enforcement.

Fortunately, however, Congress has usually been rather prompt in enacting corrective legislation where these judicial curtailments have occurred, notably with respect to the 1982 amendments to the Voting Rights Act,[37] and the Civil Rights Act of 1991,[38] which addressed issues of employment discrimination. It is truly an impressive record of steadfast and consistent legislative action. The currently proposed civil rights legislation, entitled Fairness and Individual Rights Necessary to Ensure a Stronger Society: Civil Rights Act of 2004,[39] will offer Congress an opportunity once again to attempt legislative correction with respect to recent Supreme Court decisions viewed as hostile to effective civil rights enforcement.[40]

Given the recent presidential election and the cries from various quarters for "uniters," not "dividers," among our political leaders and abatement of partisan sniping,[41] I would be remiss if I did not mention the following fact at this juncture: the congressional record with respect to the 1964 Civil Rights Act and all civil rights legislation passed up to and including the 1991 Act has been one of significant bipartisan

32. Pub. L. No. 92-318, tit. IX, 86 Stat. 235, 373 (codified as amended at 20 U.S.C. 1681).
33. Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-34).
34. Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C.).
35. Pub. L. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101-12213 (1998)); 47 U.S.C. § 225).
36. *See* Drew S. Days, III, *Race and the Constitution*, 45 N.Y.L. SCH. L. REV. 101, 104-15 (2001); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441 (2000).
37. Pub. L. 97-205, 96 Stat. 131 (codified at 42 U.S.C. 1971, 1973-1973bb-1).
38. Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.).
39. H.R. 3809, 108th Cong. (2004).
40. Dina Lassow, *In Support of a New Civil Rights Act*, HUM. RTS., Summer 2004, at 22, *available at* http://www.abanet.org/irr/hr/summer04/su.htm.
41. Leon Rubinstein, *Bush Must Be Uniter, Not Divider*, S. FLA. SUN-SENTINEL, Nov. 8, 2004, at 27A.

support for increasing protections and for swift and forceful responses to Supreme Court cutbacks. Perhaps this history will offer a model for how relationships among our political leaders on Capital Hill might function in the future.

III. THE UNFINISHED WORK OF THE CIVIL RIGHTS ACT OF 1964: SHAPING AN AGENDA FOR THE NEXT FORTY YEARS

I know that the theme of this entire Symposium is the future of the 1964 Act, and I am aware that panelists have already discussed how to respond to this challenge in various arenas—employment, housing, and alternative dispute resolution in particular. I will not presume to "poach" on their preserves or appropriate their views and advance them as my own in this respect. I think, however, it is generally recognized that, although the 1964 Civil Rights Act has had a transformative impact upon American society, more must be done to move beyond the "formal equality" that it offers. We must address the gross inequalities that one sees in our schools,[42] housing,[43] job opportunities,[44] and health care[45]—among other numerous concerns—and devise remedies that recognize the presence of these deficits, not only in minority communities, but in majority communities as well.[46]

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42. *See* GARY ORFIELD, HARVARD UNIV., SCHOOLS MORE SEPARATE: CONSEQUENCES OF A DECADE OF RESEGREGATION (July 2001) (highlighting the steady resegregation of schools throughout the 1990s and its effect of creating vastly unequal educational opportunities.), *available at* http://www.civilrightsproject.harvard.edu/research/deseg/Schools_More_Separate.pdf.

43. *See* U.S. DEP'T OF HOUS. & URBAN DEV., DISCRIMINATION IN METROPOLITAN HOUSING MARKETS: NATIONAL RESULTS FROM PHASE 1 OF THE HOUSING DISCRIMINATION STUDY (2003), *available at* http://www.huduser.org/publications/hsgfin/phase1.html (concluding that although certain types of housing discrimination have decreased since 1989, discrimination against members of all major racial and ethnic minority groups remains substantial in both rental and sales markets).

44. *See* MARIANNE BERTRAND & SENDHIL MULLAINATHAN, ARE EMILY AND GREG MORE EMPLOYABLE THAN LAKISHA AND JAMAL?: A FIELD EXPERIMENT ON LABOR MARKET DISCRIMINATION, (Poverty Action Lab, Paper No. 3, 2003), *available at* http://www.povertyactionlab.com/papers/bertrand_mullainathan.pdf; *see also* NANCY MCARDLE, HARVARD UNIV., RACIAL EQUITY AND OPPORTUNITY IN METRO BOSTON JOB MARKETS (2004) (analyzing the disparity in opportunities to access the job market among people of color particularly in the Boston metro area as a result of several factors including job discrimination, geographic location and lack of educational preparation), *available at* http://www.civilrightsproject.harvard.edu/research/metro/boston_employment.pdf.

45. For a detailed review of inequities in health care, see COMM. ON UNDERSTANDING & ELIMINATING RACIAL & ETHNIC DISPARITIES IN HEALTH CARE, INST. OF MED. OF THE NAT'L ACADS., UNEQUAL TREATMENT: CONFRONTING RACIAL AND ETHNIC DISPARITIES IN HEALTH CARE (Brian D. Smedley et al. eds., 2003).

46. *See, e.g.*, NAT'L LOW INCOME HOUS. COALITION, AMERICA'S NEIGHBORS: THE AFFORDABLE HOUSING CRISIS AND THE PEOPLE IT AFFECTS (2004), *available at* http://www.nlihc.org/research/lalihd/neighbors.pdf.

The prevalence of these deficits suggests the need for coalition-building and concerted action in a civil rights movement appropriate for today's twenty-first century, global environment.

CONCLUSION

The members of the eighty-eighth Congress responsible for the 1964 Civil Rights Act deserve to feel extremely proud of what their effort has accomplished throughout the past forty years, which was certainly far more than they had any reason to expect. May we be equally worthy of such praise in 2044 for the work we are doing to ensure that the least among us possesses the ability to lead their lives with dignity and with a realistic hope for an even better tomorrow for their children and grandchildren.

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