Note: This article will appear in **TITLE VII OF THE CIVIL RIGHTS ACT AFTER 50 YEARS: PROCEEDINGS OF THE NEW YORK UNIVERSITY 67TH ANNUAL CONFERENCE ON LABOR (LexisNexis forthcoming 2015).** Until publication the contents are subject to change.

Chapter One

**The Civil Rights Act of 1964: A Magna Carta of Human Rights**

David Lopez and Andréa Amaya***[[1]](#footnote-2)\****

***Preface***

*In 2014, I was the luncheon speaker at the New York University Conference on Title VII of the Civil Rights Act after 50 Years. That year, I participated in similar events across the country to celebrate the fiftieth anniversary of the Act. As part of this celebration, I heard the personal accounts of numerous participants of the civil rights marches and legislative battles that led to the passage of the Act, as well as the retrospective views of historians, attorneys, and advocates, about these events and their profound impact on our country. Each of these stories highlighted different causes, events, and personalities, but in my mind they all flowed into a broad patriotic narrative about an act virtually all agreed was borne out of one of the most significant and transformative periods in our nation’s history.*

 *I was born the year the Act was passed. As neither a participant in the events leading to its passage, nor a true historian, I told the story of Title VII from my vantage point as General Counsel for the Equal Employment Opportunity Commission (EEOC). The EEOC, a creation of the Act, was charged with implementing Title VII, the Act’s prohibition against employment discrimination. Looking back at the development of Title VII, as well as later legislation prohibiting employment discrimination I have long recognized this as a journey fraught with setbacks and heartbreak. Still, taking the long view, I believe it has been a journey forward. This freedom struggle that culminated in the Civil Rights Act has, over the past half-century, liberated us all by unleashing tremendous individual potential and productivity previously frustrated by discriminatory attitudes and practices, now unlawful. In my retelling of this story I found a metaphor in the Magna Carta of 1215 – the legal document whereby the King of England first shared some of his political authority with others. I believe that this invocation aptly captures the broad legal and moral principles enshrined in the Act – human dignity and equality. As noted, I am not a historian and in recalling Title VII’s story, I set out to reveal something broader about ourselves as a nation. The story is interwoven from scattered sources, which, at times, bumped up against “history” in my empirical quest for a truth. Looking back, with a researcher’s eye, I think no part of the story proved more complex than the central metaphor of the “Magna Carta.” Though, the Magna Carta – as procurer of political freedom – has been largely categorized as a myth, I believe the story of the Act, represents a true step forward for freedom and recognition of our common pursuit of life, liberty, and happiness.*

1. **Introduction: A Magna Carta of Human Rights**

This year we celebrate the fiftieth anniversary of the Equal Employment Opportunity Commission (EEOC). The EEOC is a product of Title VII of the landmark Civil Rights Act of 1964.

When the Civil Rights Act was passed, Roy Wilkins, General Secretary of the NAACP, called the new law “a Magna Carta of human rights.”[[2]](#footnote-3) Howard Smith, Democratic Congressman from Virginia’s 8th Congressional District and one of the co-authors of the *Southern Manifesto* called it “a monstrous oppression of the people.”[[3]](#footnote-4) With a half-century of experience under the Civil Rights Act, we must recall those early reactions to the Act as they continue to define the debate and progress of antidiscrimination efforts inside and outside of the courtroom. Yet, if we define the Magna Carta as a document enshrining the transcendent and timeless moral principles of human dignity and equality,[[4]](#footnote-5) then General Secretary Wilkins’ initial description of the promise of the Act has been significantly validated.[[5]](#footnote-6)

**II. Pursuing Equal Opportunity in Employment**

Virginia’s 8th Congressional District, which includes the City of Alexandria and Arlington County, sits across the Potomac River from Washington. Congressman Howard Smith formerly represented the 8th Congressional District and it is where I currently reside.[[6]](#footnote-7)

I have been blessed with three teenage sons. A rite of passage during the teenage years, is securing the first job. Not long ago, my two oldest sons attended a job fair at Washington and Lee High School, in the heart of Arlington. The school was named for the two most famous Virginians – George Washington, our first President, and Robert E. Lee, Confederate

General for the Army of Northern Virginia.[[7]](#footnote-8) After I dropped them off on the corner, of course, I snuck in to take a peak. What I saw reflected the dynamic American tapestry: teenagers of all backgrounds, African-American, Salvadorian, Nepalese, Russian, young women, young men – all entering the job market and dreaming of their futures, confident their achievements will turn on hard work and creativity; regardless of race, gender, national origin, disability, or sexual orientation.[[8]](#footnote-9)

As adults know, today’s young people will face some successes and some failures along the way, and sometimes life simply is not fair, but, as I observed at the job fair, they will begin to pursue their dreams with a sincere belief in “pluck not luck is what matters.” That concept, premised on basic equality of opportunity, is in a constant a state of evolution. We must acknowledge that, as we know it today, equal opportunity was not inevitable but instead the product of enormous vigilance and sacrifice over many generations.

**III. Marching for Formal Equality**

In the spring of 1963, civil right activists from all over the country turned their attention to Birmingham, Alabama, with hopes of casting off the odious chains of racial segregation, giving meaning to the Constitutional promise of *Brown v. Board of Education*, and opening up the city’s downtown economic center to African-Americans. Dr. Martin Luther King Jr. and the Southern Christian Leadership Conference (SCLC) leaders organized a visible and national series of nonviolent, civil rights demonstrations that pit the vulnerability of hopeful protestors against the chaotic, inhuman violence founded on racial hatred. As designed, a wide-eyed America tuned in.[[9]](#footnote-10)

 In April, Dr. Martin Luther King, arrested for prohibited parading, smuggled out a letter in response to a Birmingham News article entitled “White Clergymen Urge Local Negros to Withdraw from Demonstrations.” The “Letter from a Birmingham Jail,” drafted on the margins of that very newspaper article and contraband sheets of paper, became one of the most powerful pieces of advocacy in the history of our country. In this letter, Dr. King admonishes:

We must use time creatively, in the knowledge that the time is always ripe to do right. Now is the time to make real the promise of democracy and transform our pending national elegy into a creative psalm of brotherhood. Now is the time to lift our national policy from the quicksand of racial injustice to the solid rock of human dignity.[[10]](#footnote-11)

Upon release from jail, Dr. King and the leaders of the campaign made a controversial decision.[[11]](#footnote-12) They encouraged the young people of Birmingham – the same age as those young people at Washington and Lee High School – and younger to pick up the flag of the campaign and march peacefully through the streets of downtown Birmingham.[[12]](#footnote-13) On May 2, 1963, the “children’s crusade” began to march, and their young voices rose in song as they walked out of doors of the 16th Street Baptist Church and into downtown Birmingham.[[13]](#footnote-14) There, the protestors encountered the segregationist, commissioner of public safety Eugene T. “Bull” Connor.[[14]](#footnote-15) The jails soon overflowed with demonstrators.[[15]](#footnote-16) Conner quickly ended the arrests and ordered police to intimidate the children and other demonstrators with police dogs and fire hoses, the reports and images of which remain emblazoned on American’s hearts and minds.[[16]](#footnote-17)

Charles Moore’s black-and-white photographs of the young victims attacked by the Birmingham authorities and local vigilantes reverberated throughout the world, with many viewing the scenes through the fast-growing medium of television.[[17]](#footnote-18) Today, these photos invite discussion, criticism and praise as they are anything but black and white. In 1963, these images emphasized for those who either did not know or who did not want to know the depth of prejudice, brutality, and immorality of the southern caste system. One week later, many across the world were further shocked by images of Alabama Governor George Wallace standing in front of the door and at the steps of the University of Alabama, manifesting the racial animus of southern segregationist by refusing to comply with a court order requiring admission of African-American students.[[18]](#footnote-19)

Kennedy was barely elected to the presidency in 1960 with a fragile coalition of the industrial cities of the Midwest and East, and the segregationist South.[[19]](#footnote-20) However, whatever equivocation or political cautiousness President Kennedy may have displayed on the issue of civil rights quickly turned to resolve.[[20]](#footnote-21) On June 11, President Kennedy went on national television and announced his intention to introduce a comprehensive civil rights bill, he stated,

[w]e are confronted primarily with a moral issue. It is an issue as old as Scriptures and it is as clear of the American Constitution. The heart of the question is whether all Americans are to be afforded equal rights and equal opportunities, whether we are going to treat our fellow American as we want to be treated.[[21]](#footnote-22)

Kennedy’s speech echoed Dr. Martin Luther King, Jr.’s twin tenets of religious and political justice, and formally delivered his allegiance to the civil rights movement and a promise of peace. However, his call for peaceful change and resolution was answered with a retaliatory, monstrous act. Within 4 hours, Medgar Evers, head of the Jackson, Mississippi, branch of the NAACP and a World War II veteran, was murdered on his front lawn by Ku Klux Klan members.[[22]](#footnote-23) During his funeral at Arlington Cemetery, his widow, Myrlie Evers, stated, “You can kill a man but not an idea.”[[23]](#footnote-24) Thus, this story goes: peaceful assembly and use of democratic processes, answered with violence and terror. Eight days later Kennedy submitted his civil rights bill to Congress.[[24]](#footnote-25)

**IV. Passing the Civil Rights Act of 1964**

In August 1963, civil rights leaders turned their attention to the nation’s capital and a planned Washington March for jobs and economic justice.[[25]](#footnote-26) The whispering campaign began and on the day of the assembly many in the city froze in fear of widespread violence.[[26]](#footnote-27) The baseball doubleheader was postponed, hundreds of business closed shop, and suburbanites stayed at home.[[27]](#footnote-28) President Kennedy despite his outward support for the event, worried that the planned march would result in an unruly assembly and derail public support for a strong civil rights bill.[[28]](#footnote-29) But this fear proved ultimately to be unfounded. Two hundred thousand citizens arrived from across the country – a confetti crowd of all races, religions, and economic backgrounds; including rabbis, white union leaders, and more than 65 members of Congress.[[29]](#footnote-30) With opening speeches and three television networks coving the event, it was apparent to the world that the March on Washington would not only be peaceful, but transformational.[[30]](#footnote-31)

The peace could not last. Three weeks later on Sunday morning, four African-American girls, Cynthia Wesley, 14, Denise McNair, 11, Carol Robertson, 14, Addie Mae Collins, 14, were murdered in a bombing at the 16th Street Baptist Church, punctuating the threatening air in Birmingham.[[31]](#footnote-32) As a result of this atrocity the progressives in Congress were able to garner additional support for the strongest civil rights bill possible, one that included effective prohibitions against employment discrimination.[[32]](#footnote-33)

On November 22, 1963, President Kennedy was assassinated in Dallas, Texas.[[33]](#footnote-34) The nation was distraught.  Civil rights advocates feared that the assassination of Kennedy would halt the passage of a strong civil rights bill. Ascending to the presidency was Vice President Lyndon Baines Johnson, former Senator from the state of Texas.[[34]](#footnote-35) Though Johnson wasn't an ardent segregationist, he was a Southern Senator and frequently caucused with the segregationist wing of the Democratic Party.[[35]](#footnote-36)

It soon became clear, however, that Johnson was going to follow his own script.[[36]](#footnote-37) Two days after the assassination of John F. Kennedy's, President Johnson addressed a joint session of Congress in a televised speech.[[37]](#footnote-38) He made clear the first order of business, stating, "no memorial oration or eulogy could more eloquently honor President Kennedy's memory than the earliest possible passage of the civil rights bill for which he fought so long. We have talked long enough in this country about equal rights. We have talked for one hundred years or more. It is time now to write the next chapter, and to write it in the books of law."[[38]](#footnote-39)

The segregationists dug in.[[39]](#footnote-40) They initiated what would be the longest Senate filibuster ever, outlasting the prior record set in 1846.[[40]](#footnote-41) The backers of the bill and President Johnson pushed back. Johnson was insecure and could be mean but he knew all the tricks of politics and as Senate Majority leader was titled “Master of the Senate.”[[41]](#footnote-42) Johnson was known to supplicate, accuse, cajole, scorn, complain and even threaten as tactics.[[42]](#footnote-43) The “Johnson treatment” has been aptly described as a St. Bernard licking you and pawing you at the same time.[[43]](#footnote-44) When his friend and mentor, Richard Russell, unofficial Dean of Southern Democrats, suggested he should low on the civil rights bill because he would not only lose the election but also lose the South to the Democratic Party for a generation,[[44]](#footnote-45) Johnson purportedly told him, “I love you and I owe you. Which is why I want to tell you, please don’t get in my way on this civil rights bill, which has been blackened too long, because if you do, I’ll run you down.”[[45]](#footnote-46)

The filibuster continued.[[46]](#footnote-47) The rhetoric of the Southern Democrats was inflammatory.[[47]](#footnote-48) Sen. Strom Thurmond, a Democrat for South Carolina[[48]](#footnote-49) decried, “All the laws of Washington and all the bayonets of the Army cannot force the Negro into our homes, into our schools, our churches and our places of recreation and amusement.”[[49]](#footnote-50) Sen. Richard Russell (D-Georgia) threatened, “We will resist to the bitter end any measure or any movement which would have a tendency to bring about social equality and intermingling and amalgamation of the races in our (Southern) states.”[[50]](#footnote-51)

Senate Minority Leader Everett Dirksen threw his weight behind the bill.[[51]](#footnote-52) A conservative, pro-business Republican, Senator Dirksen, paraphrasing Victor Hugo, in a speech condemning the filibuster, said, “No army can withstand the strength of the idea whose time has come.”[[52]](#footnote-53) Indeed, the Republicans, from the Great Plains and Midwest, were the critical voting block needed to break the filibuster.[[53]](#footnote-54) Senator Dirksen worked assiduously around-the-clock to secure their vote for cloture to end debate and send the bill to a vote of the full Senate.[[54]](#footnote-55) On June 10, 1964, the Senate voted cloture, the debate ended and Congress swiftly passed the bill.[[55]](#footnote-56) On July 2, 1964, President Johnson, with Dr. Martin Luther King, Jr. standing over his left shoulder, signed the Civil Rights Act of 1964.[[56]](#footnote-57)

The photograph of this iconic moment stands at the entrance of the EEOC’s headquarters training center in Washington, D.C.[[57]](#footnote-58) The photograph contains many telling details, though there are two that seem particularly immediate. First, one may notice King’s expression. He appears merely content, and a more searching viewer will not discern feelings of joy or satisfaction. His contentment reflects the broader consideration of the past and the effort, the vast struggle that brought him here, as well as the sobering awareness that this much celebrated event was but a momentary pause on this country’s march to greater freedom and opportunity.[[58]](#footnote-59) Second, what we see with our twenty-first-century sensibilities is that at the signing of the 1964 Civil Rights Act there is a noticeable absence of women.[[59]](#footnote-60) Only men participated in the signing ceremony even though, as I will discuss, the language of Title VII and other portions of the Act included prohibitions against sex discrimination.[[60]](#footnote-61)

Passage of this monumental Act proved to be a turning point in our country, comparable in many ways to the fall of the Berlin Wall. This legislation not only addressed discriminatory structures in existence at the time, but it also, triggered a generational conversation about freedom and opportunity – in the streets, around the dinner table, in the boardroom, the classroom, the courtroom, and between the three branches of government that, as we shall see, has transformed this country. In the EEOC’s headquarters training center, a mere twenty steps from the iconic photograph of President Johnson signing the 1964 Act is another photograph, and together, they convey the promise of this country. A little less than fifty years later, this second, parallel photograph captures President Barack Obama, who has credited the role of the Civil Rights Act in his life, signing the Lily Ledbetter Fair Pay Act in 2009.[[61]](#footnote-62) Standing over President Obama’s shoulder is Lily Ledbetter from Gadsden, Alabama.[[62]](#footnote-63)

Perhaps less apparent in the signing of the Civil Rights Act of 1964 photograph is the impressive bi-partisan support of Republicans and Democrats.[[63]](#footnote-64) Indeed, every piece of Civil Rights legislation until the Lily Ledbetter Act was passed with strong bipartisan support.[[64]](#footnote-65) The Americans with Disabilities Act (ADA) is one such example of the willingness of insular groups to coalesce around their belief in broad protections from workplace discrimination. In 1990, President George H. W. Bush signed the ADA.[[65]](#footnote-66) When the Supreme Court handed down a series of decisions in 1999 narrowly interpreting coverage under the ADA,[[66]](#footnote-67) Congress passed and President George W. Bush signed the ADA Amendments Act in 2008.[[67]](#footnote-68)

**V. Enforcing Equal Opportunity**

On its face, the Civil Rights Act was a “Magna Carta of Civil Rights.” Title VII contained broad injunctions against discrimination, promising dramatic social change, however, the provision lacked specific guidance as to how these prohibitions would be enforced.[[68]](#footnote-69) Against this *tabula rasa*, civil rights advocacy groups such as the National Association for the Advancement of Colored People (NAACP), the NAACP Legal Defense and Education Fund (LDF) and the EEOC, often working closely together behind the scenes, filled in the blanks to ensure, first and foremost, equal employment opportunity for African-Americans. [[69]](#footnote-70) Practically, this meant developing the operation of Title VII’s procedural requirements through litigation.[[70]](#footnote-71) Concurrently, the advocacy groups began to develop the prohibition against race discrimination to address not only individual claims, but also broad systemic practices that veiled discriminatory employment practices, including implicit and societal discrimination. Constitutional equal protection jurisprudence provided a powerful wellspring of principles for the development of Title VII.[[71]](#footnote-72) The combined effort of the advocacy groups and the EEOC, frequently through the filing of amicus briefs and broad conciliation efforts, ultimately led to the Supreme Court’s unanimous recognition of disparate impact theory in *Griggs v. Duke Power,* later codified in the Civil Rights Act of 1991.[[72]](#footnote-73) Disparate impact theory provided private plaintiffs, as well as the EEOC (afforded litigation authority in 1972), with a powerful tool to combat employment practices, operating as, built-in headwinds to the employment of African Americans, not related to the job or needs of the business, as described by the Court in *Griggs*.**[[73]](#footnote-74)** Combatting discrimination continues to require constant vigilance and all too often the same issue reappears, each time “more subtle, more difficult to detect, and more difficult to eradicate”; thus, disparate impact theory has been a critical tool to fulfilling the Magna Carta prophesy as it was also extended to the protected classifications of sex and national origin.[[74]](#footnote-75)

Perhaps thespirit of the Magna Carta has most animated Title VII with respect to its prohibition against sex discrimination. The addition of the prohibition against “sex” discrimination was introduced by, none other than Congressman Howard Smith.[[75]](#footnote-76) A well-circulated story about Congressman Smith is that he introduced the prohibition as way to sabotage the bill.[[76]](#footnote-77) This view was partly perpetuated by the EEOC’ s first Chair Franklin D. Roosevelt, Jr.,[[77]](#footnote-78) a strong supporter of civil rights for African Americans, who said

“[T]he provision in the law covering women was inserted at the last minute because ‘Howard Smith, certainly no friend of equal opportunity,’ wanted to create ‘ridicule and confusion.’”[[78]](#footnote-79)

Recently, new scholarship has revealed a more complicated story.[[79]](#footnote-80) The “sabotage” or “joke” narrative ignores that many members of Congress supported the addition of “sex,” some of whom had long pushed for a prohibition against sex discrimination and worked tirelessly for its adoption once it was introduced. [[80]](#footnote-81) Also, this story ignores that Congressman Smith, a strident opponent of African-American civil rights, was a longtime friend of the National Women’s Party (NWP) with a twenty-year record of supporting the Equal Rights Amendment (ERA).[[81]](#footnote-82) In 1963, Smith was urged by the NWP members to introduce the amendment.[[82]](#footnote-83) The NWP hand selected Smith because he was a powerful Southerner, he was chair of the Rules Committee, and he was a friend of NWP leader, Alice Paul.[[83]](#footnote-84)

The EEOC’s effort to enforce the prohibition got off to a slow start.[[84]](#footnote-85) Many of the attorneys and the investigators understandably were focused on racial discrimination; however, at least one-third of the early charges filed with the agency alleged sex discrimination.[[85]](#footnote-86) When the Commission issued its first Guidelines on Discrimination Because of Sex in 1965, it produced an instrument worthy of the *Mad Men* era, giving its imprimatur to some forms of sex-restrictive advertising.[[86]](#footnote-87) In these Guidelines, the Commission explained: “‘An overly literal interpretation of the prohibition might disrupt longstanding employment practices. . . . These guidelines are an effort to temper the bare language of the statute with common sense and a sympathetic understanding of the position and needs of women workers.’”[[87]](#footnote-88) Moreover, “‘[W]here the plain command of the statute is that there be no artificial classification of jobs by sex, the Commission feels bound to follow it, notwithstanding the fact that such segregation has, in particular cases, worked to the benefit of the woman worker.’”[[88]](#footnote-89)

There was soon strong opposition to the Commission’s laggard approach to sex-discrimination. Commissioner Aileen Hernandez, the first woman appointed to this post and Attorney Sonia Pressman Fuentes,[[89]](#footnote-90) the first woman lawyer in the General Counsel’s office, protested and fought the battle from inside the EEOC.[[90]](#footnote-91) Ultimately, Commissioner Hernandez left the agency to help found the National Organization for Women.[[91]](#footnote-92) NOW’s *Statement of Purpose* made very clear that the organization was created in part as a reaction to the EEOC’s poor performance.[[92]](#footnote-93) The Statement declared:

Discrimination in employment on the basis of sex is now prohibited by federal law, in Title VII of the Civil Rights Act of 1964. But although nearly one-third of the cases brought before the Equal Employment Opportunity Commission during the first year dealt with sex discrimination and the proportion is increasing dramatically, the Commission has not made clear its intention to enforce the law with the same seriousness on behalf of women as of other victims of discrimination.[[93]](#footnote-94)

The Commission soon pivoted, and by 1980 issued new guidelines on sex discrimination recognizing sexual harassment as a cognizable theory.[[94]](#footnote-95) Looking back more than 50 years, it is now clear that if Congressman Smith introduced the provision as a joke, the joke was on him. This provision with scant legislative history has transformed the workplace by rendering unlawful sexual harassment,[[95]](#footnote-96) same-sex harassment,[[96]](#footnote-97) pay discrimination,[[97]](#footnote-98) promotions (to the “glass ceiling”),[[98]](#footnote-99) gender stereotyping,[[99]](#footnote-100) and most recently, select discrimination against the LGBT community.[[100]](#footnote-101) And when the Supreme Court in *Gilbert* said that Title VII did not extend to pregnancy discrimination, Congress, as party of the national discussion about the meaning of equality between the various branches of government, said “yes, it does!”[[101]](#footnote-102) The movement to enforce “because of sex” now prohibits a wide base of discriminatory practices rooted in deeply held stereotypes. However, it is well acknowledged that the expansion of “sex” owes much gratitude to the young people in Birmingham fighting for the rights of African Americans and the freedom struggle they embodied.[[102]](#footnote-103)

As mentioned, the faith community was also central to the passage of the civil rights movement, from the social activism in the South, to a twenty-four-hour vigil by Protestant, Jewish, and Catholic seminarians in Washington, D.C., to the lobbying of Midwestern members of Congress during the filibuster.

Title VII also included a prohibition against religious discrimination.[[103]](#footnote-104) During the agency’s early years, the Commission advanced the view, borrowed from constitutional principles, that this provision required employers to accommodate an employee’s religious beliefs and practices unless it resulted in hardship to the employer.[[104]](#footnote-105) Congress amended the statute in 1972 to incorporate the EEOC’s guidelines into the statute.[[105]](#footnote-106) Since the definition of religion was added in 1972, litigants have challenged the three prongs of the prima facie case for religious discrimination as well as the employer’s burden to show undue hardship in an effort to further flesh out the skeletal statutory language.[[106]](#footnote-107)

Most recently, the United States Supreme Court decided a high-profile case brought by the EEOC on behalf of Samantha Elauf, against Abercrombie and Fitch. When Elauf was seventeen years old, she interviewed for an Abercrombie Kids sales employee position (called “Model”) at her hometown shopping mall in Tulsa, Oklahoma. During her interview, Elauf wore a hijab in observation of her Islamic faith.[[107]](#footnote-108) The store manager who interviewed her liked her, rated her highly, and wanted to hire but was concerned that Elauf's hijab would be in violation of the company's “Look Policy.”[[108]](#footnote-109) Ultimately, when the store manager raised it with her district manager, she was instructed to lower the score and not to hire her.[[109]](#footnote-110)

The EEOC filed suit in the district court and was successful.[[110]](#footnote-111) On appeal, however, the Tenth Circuit reversed and denied rehearing en banc.[[111]](#footnote-112) I was ecstatic when the Supreme Court granted certiorari over a case with only modest damages. When we exited the Court following oral arguments, I felt enormous pride that regardless of how the case turned out, this young woman, working through our agency, was able to pursue her convictions, thus reaffirming the power of the words “Equal Justice Under Law”engraved above the entrance. In the end, we won.[[112]](#footnote-113) Justice Antonin Scalia wrote the 8-1 decision and reaffirmed Title VII’s unique and quintessentially American promise of religious freedom and tolerance.[[113]](#footnote-114)

**VI. Out of the Shadows: The Challenges of Giving Meaning to Freedom and Equal Opportunity**

Our training center also includes a photograph of Cesar Chavez, one of the founders of the United Farmworkers (UFW).[[114]](#footnote-115) Viewing this photo, I have flashbacks. As a child, my parents used to make me march with the UFW and boycott grapes sold by non-union farms. I hated every single minute of it. The tension, the chanting, the singing. . . I wanted to be at home with my books or baseball cards, anywhere but with the UFW and their omnipresent leader. I would ask my parents, “Why can’t we be normal . . . like the Brady Bunch?” My parents were patient, extremely patient. They would tell me, “mijo, you have an obligation to others who are not as fortunate, you have the obligation beyond yourself.” I would then roll my eyes and say the late-sixties early-seventies equivalent of “whatever!” Yet, I eventually learned the difference between hearing and listening – a valuable distinction to remember with kids of my own. My parents’ words echoed through the years and finally took hold.

Though Chavez may not have brought or advanced civil rights legislation per se, his photograph hangs in our training center as a reminder that the laws we enforce are only as powerful as their ability to protect the most vulnerable among us, the poorest of the poor, those living in the shadows. He can be seen in the context of the Magna Carta of Civil Rights as a symbol of the prohibitions against national origin discrimination,[[115]](#footnote-116) which has a legislative history as scant as the prohibition against sex discrimination, but not as fully and vigorously developed.[[116]](#footnote-117)

Cesar Chavez broke his twenty-five day fast with Robert Kennedy at his side in 1968.[[117]](#footnote-118) Like Dr. King, Chavez was a disciple of nonviolence, spurred by Gandhi-like power through sacrifice.[[118]](#footnote-119) He began his first public fast in 1968, amidst the escalating grape boycotts in California and a waning belief in the strategy of nonviolence.[[119]](#footnote-120) He called a meeting of the union to announce his penitent fast, an effort to ground the organization in tenets of nonviolence.[[120]](#footnote-121)

Dr. King noticed and admired Chavez. I recently discovered an amazing March 6, 1968, telegram from Martin Luther King to Cesar Chavez during the fast.[[121]](#footnote-122) It says: “My colleagues and I commend you for your bravery, salute you for your indefatigable work against poverty and injustice, and pray for your health and continuing service as one of the outstanding men in America.”[[122]](#footnote-123) This telegram bonded the men in their faith in nonviolence and quest for social justice for the most vulnerable in our society.[[123]](#footnote-124)

Later that month, Dr. King would, against the counsel of his advisors, fly to Memphis in support of African-American sanitation workers on strike, fighting a way out of the shadows for better working conditions after two of the their colleagues were killed while eating lunch in the back of a garbage truck.[[124]](#footnote-125) The “I am a Man” strike, as it came to be known, turned violent and Dr. King despaired.[[125]](#footnote-126) He believed his ideals of nonviolent disobedience had been compromised. He vowed to return to Memphis in early April to get it right.[[126]](#footnote-127)

On April 3, 1968, sick with the flu he addressed a packed crowd at the Masonic Temple, “I may not get there with you . . . but I want you to *know, tonight* . . . that we as a people will get to the Promised Land!”[[127]](#footnote-128)

The following morning, Dr. Martin Luther King, Jr. was murdered on the balcony at the Lorraine Motel.[[128]](#footnote-129) At King’s funeral, Dr. Mays delivered the second eulogy, stating “[Dr. King] believed especially that he was sent to champion the cause of the man farthest down. He would probably say that, if death had to come, I’m sure there was no greater cause to die for than fighting to get a just wage for garbage collectors.”[[129]](#footnote-130)

By the end of the 1980s, the generational conversation about equal opportunity soon turned to the rights of persons with disabilities to lead economically independent and productive lives.[[130]](#footnote-131) In this photo from a disability rights march in the eighties, the marchers carry a banner quoting Dr. King’s Letter from the Birmingham Jail, “Injustice everywhere is a Threat to Justice Everywhere.”[[131]](#footnote-132) This energy led to the passage of the Americans with Disabilities Act in 1990.[[132]](#footnote-133)

In 2014, the broad purpose of the ADA, to achieve economic independence for persons with disabilities, converged with the EEOC’s longstanding efforts to ensure civil rights protections for the most vulnerable workers in an astonishing case in Iowa.[[133]](#footnote-134) In Atalissa, Iowa, an old school house was home to thirty-two intellectually disabled workers brought there by Hill Country Farms (a for-profit company located in Texas) to work in a turkey evisceration plant, until it was closed down by the state of Iowa for rodent infestation and decrepit conditions.[[134]](#footnote-135) While here, the men were denied access to medical care, dental care, locked in their rooms and subject to verbal, and sometimes physical abuse.[[135]](#footnote-136)

When our Dallas Regional Attorney, Robert Canino learned about this situation from a parishioner at his church, he vowed to chase them to the ends of the Earth.[[136]](#footnote-137) First, he filed for summary judgment based on discriminatory wage disparities between the disabled workers and the non-disabled workers.[[137]](#footnote-138) We won.[[138]](#footnote-139) Next, he focused on the horrible employment and living conditions and tried the case on the basis on discrimination with respect to the terms and conditions of their employment before a federal jury in Davenport, Iowa. The jury came back with a verdict of $240 million, the largest won under the ADA, the largest won by the EEOC, and the second largest won under any federal anti-discrimination statute.[[139]](#footnote-140) However, under federal statutory caps, the verdict was reduced to about .67% of the jury’s verdict.[[140]](#footnote-141)

Nonetheless, the jury’s verdict sent a powerful statement heard internationally that what happened to the men in Atalissa, should never occur in Muscatine County, the United States, or anywhere on this planet. This case received enormous attention from the human rights community worldwide.[[141]](#footnote-142) Even though the workers were American, they shared many characteristics with trafficking victims, such as extreme vulnerability and misplaced trust. Recently, the *New York Times* did an above the fold article on this case, called “Boys in the Bunkhouse,” asking what the people in Muscatine County knew and when did they know it.[[142]](#footnote-143) The article calls Robert Canino “the men’s last, best hope for justice,”[[143]](#footnote-144) and I believe the Commission has aspired and proved to be just that for the past fifty years.

The thirty-two men, whose stories we told, also stand on the shoulders of those young students marching for freedom and opportunity in Birmingham, Alabama.

**VII. Final Thoughts**

This is our legacy at the EEOC and we carry it with us from the intake room to the courtroom.[[144]](#footnote-145) To close, let me return to one of the mysteries of this story. This march to greater freedom and opportunity has been the product of countless anonymous patriots: teachers and students; veterans – like Medgar Evers; grandmothers and grandfathers; parents and children. It has been the product of Dr. King and Cesar Chavez, lionized as titans,[[145]](#footnote-146) their complexities and humanity frequently subordinated to a grander story of heroic self-sacrifice and moral focus. It is the product of Willie Griggs, Lily Ledbetter, Samantha Elauf, and countless unnamed others, who had the courage and endurance to stand up for great principles that opened doors for us all.[[146]](#footnote-147)

And we remember the efforts of President Lyndon Johnson, who led the way for enactment of the Civil Rights Act, though historians have treated him much less reverentially. Indeed, he was a complex man, and perhaps the most Shakespearean of all of our presidents. He was sometimes mean, he was sometimes insecure, and in a very real way flawed.[[147]](#footnote-148) Growing up in South Texas, his father wanted him to be a great man, his mother wanted him to be a good man.[[148]](#footnote-149) In this imperfect man, perhaps we find the greatest lessons in this story for us all. That beneath the many complex foibles of a deeply flawed man, there is a transcendent sense of justice and humanity that can change the world. Why did he push so hard for the passage of the civil rights bill? Was he trying to emulate his hero Franklin Roosevelt in his historical impact? I do not know. Here is what he said though in 1965 when he signed the Voting Rights Act, the other great piece of civil rights legislation passed in the Sixties.

My first job after college was as a teacher in Cotulla, Texas, in a small Mexican-American school. Few of them could speak English and I couldn't speak much Spanish. My students were poor and they often came to class without breakfast and hungry. And they knew even in their youth the pain of prejudice. They never seemed to know why people disliked them, but they knew it was so because I saw it in their eyes. I often walked home late in the afternoon after the classes were finished wishing there was more that I could do. But all I knew was to teach them the little that I knew, hoping that I might help them against the hardships that lay ahead. And somehow you never forget what poverty and hatred can do when you see its scars on the hopeful face of a young child. I never thought then, in 1928, that I would be standing here in 1965. It never even occurred to me in my fondest dreams that I might have the chance to help the sons and daughters of those students, and to help people like them all over this country. But now I do have that chance. And I'll let you in on a secret— I mean to use it. And I hope that you will use it with me.[[149]](#footnote-150)

Perhaps it is fitting that we close with Johnson, who struggled to summon his better angels to transcend his fallibility.  This has been the story of our country’s ongoing freedom march - sometimes rocky and sometimes violent - toward full opportunity and dignity for all.  Looking back over the past fifty years, everyone one of us who dares to dream stands on the shoulders of those young people in Birmingham and the previous generations who gave their time and sometimes their lives, to open hearts, minds, and opportunity.

 This story makes clear though that the progress has been inchoate at best: our benevolent self-interest in ensuring opportunities for ourselves or loved ones has impelled much forward movement, while creative empathy for those viewed as “other” has proven to be a more checkered catalyst. Consider the issue of race - the original catalyst for the Act. While progress in eradicating race discrimination is difficult to deny, redressing racial discrimination remains a persistent and central challenge of our times.

Thus, looking forward to our unfinished business over the next fifty years, it is necessary to remember whatever progress has been achieved was not inevitable, nor was it smooth and free from demoralizing setbacks, nor is it irrevocable. The Civil Rights Act (and the subsequent legislation it inspired) remains a bulwark. By expanding ideas of equality “as old as the scriptures and . . . as clear as the American Constitution”[[150]](#footnote-151) to the economic sphere, it enshrined them in the ideals of American civil society. This triggered an ongoing American and increasingly international conversation about the scope and substance of these fundamental human rights, which in my humble opinion, are as concretely and more consciously integral to our daily lives than even the Magna Carta itself!

1. \* David Lopez is the General Counsel, Equal Employment Opportunity Commission. Andréa Amaya, a law student at Tulane University Law School, is currently a law intern at the Equal Employment Opportunity Commission. Although General Counsel Lopez prepared the presentation and wrote the original manuscript for this book chapter, Ms. Amaya’s work on this manuscript has been so thorough and helpful that, in the General Counsel’s views, she deserves recognition as a co-author. I would also like to extend may appreciation for the invaluable research of Bartholomew Sheard, Erin Welch, Nina Martinez, Catherine Stohler, Martha Kellogg, Noelle Yasso, and Jordan Harvey. [↑](#footnote-ref-2)
2. Archives 1964, *Magna Carta of Rights* NYTimes, Jul. 3, 1964, *available at* <http://www.nytimes.com/1964/07/03/magna-carta-of-rights.html?_r=0>. Perhaps ironically, in a final speech before voting on the civil rights bill, Sen. Robert Byrd had a different view than Wilkins as to how the Magna Carta related to the Civil Rights Act. Taylor Brach, Pillar of Fire 334 (1998). He read into the senate record the entirety of the Magna Carta of 1215 then employed that oft-invoked charter to argue that the civil rights bill “fatally undermined” fundamental liberties (*e.g.* property rights) endowed to America through the Anglo-Saxon tradition. *Id.* [↑](#footnote-ref-3)
3. Tom S. Purdum, An Idea Whose Time Has Come 318 (2014). *See* Bruce J. Dierenfield, *Conservative Outrage: The Defeat in 1966 of Representative Howard W. Smith of Virginia*, 89 The Virginia Magazine of History and Biography, no.2, 181, 181-82 (Apr. 1981) http://www.jstor.org/stable/4248479. Born in Fauquier County in 1883, Smith earned his law degree from the University of Virginia and rapidly experienced success in running for local offices including councilman of Alexandria, Commonwealth’s attorney for Alexandria and was a corporation and circuit court judge; additionally he was a successful banker and dairy farmer. *Id.* He retained the name “Judge Smith” when he ceased being a judge. *Id.* He was a member of the House of Representatives from 1930-1966, serving as Chairman of the Rules Committee from 1955. *Id.* In 1966, Smith was upset during the democratic primary elections by a young, extroverted and liberal lawyer, George C. Rawlings, Jr. in part due to the 1964 removal of the poll tax requirement by the Twenty-fourth Amendment, as well as1965 Voting Rights Act and congressional redistricting in Virginia, encouraging a strong African American turnout. *Id.* at 184-85. We shall hear more about Judge Smith *infra* notes 79-83 and accompanying text. [↑](#footnote-ref-4)
4. Interestingly, this year’s celebration of the 800th Anniversary of the Magna Carta provided an occasion to examine more closely the actual scope and import of this document. According to Harvard Professor of History, Jill Lepore, the Magna Carta of 1215 was a promise by King John of England to his rebelling barons that he would obey the law. Jill Lepore, *The Rule of History*, New Yorker, Apr. 20, 2015, available at <http://www.newyorker.com/magazine/2015/04/20/the-rule-of-history>. Notably, the next day the King requested the document be nullified and he died in infamy shortly thereafter. *Id.* Not until the eighteenth-century did the document acquire symbolic stature as a battle cry for “liberties granted to all men by nature” in America. *Id.* Lepore argues that the Magna Carta’s influence on the founding of America is “wildly overstated” and is not tracked by the Bill of Rights. *Id.* Rather, she believes this “very old charter, is on occasion taken out of the closet, dusted off, and put on display to answer a … generally political [and] often profound [need].” *Id.* According to University of Chicago Professor, Tom Ginsberg, the Magna Carta is more myth than real, but “the myth . . . seems to matter more than the reality.” Tom Ginsberg, *Stop Revering the Magna Carta*, NYTimes, June 14, 2015, *available at* <http://www.nytimes.com/2015/06/15/opinion/stop-revering-magna-carta.html>. [↑](#footnote-ref-5)
5. Looking back though, several scholars have noted that this movement has not been uniform but instead has been punctuated by periods of expansion followed by periods of stasis or retrenchments. Recently, Donald Tomaskovic-Devey testified to this observation stating that there were three critical periods of history in which the EEOC’s enforcement efforts have made powerful advances for protected classes, especially for African Americans and women. U.S. E.E.O.C., Written Testimony of Donald Tomaskovic-Devey, Professor of Sociology, University of Massachusetts, Amherst, *EEOC at 50: Progress and Continuing Challenges in Eradicating Employment Discrimination*, Jul. 1, 2015, available at <http://www1.eeoc.gov//eeoc/meetings/7-1-15/devey.cfm?renderforprint=1>. Professor Tomaskovic-Devey observed that 1960-72, 1972-80 and today, are periods of “regulatory uncertainty for corporations, produced by the expanding definition of discrimination, coupled by the real regulatory and legal threats to business as usual.” *Id.* *See* Philip A. Klinkner and Rogers M. Smith, Unsteady March: The Rise and Decline of Racial Equality in America 289 (2002) (offering the theory that civil rights advancements have not been continuous, and that perhaps we tell ourselves a story that racial equality is a fundamental American value). Political Scientists Phillip Klinkner and Rogers Smith noted that periods of war, particularly the Cold War, increased political motivation and international pressure to advance racial reforms. *Id.* The question raised on the fiftieth anniversary of the EEOC and the fifty-first anniversary of the Civil Rights Act, is whether the Act is an idiosyncratic, romantic Magna Carta ultimately endowed with a beautiful but largely impossible, (and historically unsteady pursuit of its) mission? Like the Magna Carta, do we turn to Civil Rights solely in times of political and profound need? We appear to invoke the rhetoric of Civil Rights at select moments inducing punctuated, rapid, and expansive anti-discrimination protections under Title VII. Alternatively, is the Civil Rights Act something more than a beautiful, mythical point of America pride? Should we celebrate the accomplishments of Title VII? Can we maintain hope by acknowledging all of the reform that has been achieved under incredibly adverse prospects, while simultaneously recognizing the largely overstated ideal of equality? [↑](#footnote-ref-6)
6. Purdum, *supra* note 2, at 318 (stating Smith was Chairman of the House of Representatives’ “all-powerful Rules Committee” and a “staunch segregationist” from Virginia). [↑](#footnote-ref-7)
7. The racial attitudes of the First President and the Confederate General have been the source of much scholarship and inquiry. *See* Erica Armstrong Dunbar, *George Washington, Slave Catcher*, NYTimes, Feb. 16, 2015, available at <http://www.nytimes.com/2015/02/16/opinion/george-washington-slave-catcher.html?_r=0> (noting that Washington inherited his first ten slaves at age eleven. Although, upon his death, George Washington emancipated his slaves; Martha Washington left her slaves to her inheritors.);Ta-Nehisi Coates, *Arlington, Bobby Lee, and the ‘Peculiar Institution,’* Atlantic, Aug. 13, 2010, *available at* <http://www.theatlantic.com/national/archive/2010/08/arlington-bobby-lee-and-the-peculiar-institution/61428/> (reviewing Elizabeth Brown Pryor’s biography on Robert E. Lee which details Lee’s relationship to slavery as cutting more than one way, and arguing that a “dislike [of] the institution” of slavery is but the shallowest understanding of Lee’s views on slavery). [↑](#footnote-ref-8)
8. Like many part of the United States, the demographic profile of Virginia’s 8th District has changed dramatically since the days when it was represented by Congressman Smith. *See* *Immigrants in Virginia’s 8th Congressional District*, Commonwealth Institute for Fiscal Analysis, Apr. 2013, *available at* <http://www.thecommonwealthinstitute.org/wp-content/uploads/2013/04/CD8Profile.pdf> (27.2% are foreign-born, 37.9% originating from Latin America, 35.5% from Asia, 15.6% from Africa and 9.3% from Europe. *See, e.g.*, *Alexandria 2010 Census Data Profile* City of Alexandria, Dept. of Planning and Zoning, Feb. 2012, *available at* https://alexandriava.gov/uploadedFiles/planning/info/StatisticsDemographics/Alex2010DataProfileWeb.pdf. In 2010, Alexandria City’s population was about 24% foreign-born, including naturalized, temporary migrants, lawful permanent residents, refugees and unauthorized migrants. *Id.* Like much of the entire Washington, D.C. metropolitan area, Arlington County has also seen a rapid increase in immigrants from all over the world. *See Annual Report*, Arlington Public Schools 3, Aug. 20, 2014, *available at* [http://www.apsva.us/cms/lib2/VA01000586/Centricity/Domain/8/APS%20Progress%20Report.pdf](http://www.apsva.us/cms/lib2/va01000586/centricity/domain/8/aps%252520progress%252520report.pdf) (finding that “APS Students hail from 111 nations, speak 98 languages and are richly diverse”). [↑](#footnote-ref-9)
9. *See generally* Diane McWhorter, Carry Me Home (2001). [↑](#footnote-ref-10)
10. *Letter from a Birmingham Jail*, Stanford, Apr. 16, 1963, *available at* <https://kinginstitute.stanford.edu/king-papers/documents/letter-birmingham-jail>; *Letter from a Birmingham Jail*, University of Pennsylvania African Studies Center, Apr. 16, 1963, (full text) *available at* <http://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html>. At the EEOC’s 50th Celebration, Commissioner Charlotte Burrows interviewed Willie King, a former EEOC employee and the transcriber of Dr. King’s *Letter from a Birmingham Jail*. U.S. E.E.O.C., *Interview with Willie King*, *Celebration of the 50th Anniversary of the EEOC*, Jul. 2, 2015, (author’s notes). She shared her story as a 21-year-old woman working for the SCLC. She described the difficulty of transcribing and typing Dr. King’s response on scraps of toilet paper and the margins of newspapers. *Id.* She also described how she threw out the scraps without any idea that one day they would be valuable artifacts of his perseverance. *Id. See also* Sylvia Carignan, *A Colleague Remembers Dr. Martin Luther King Jr.*, Gazette, Jan. 15, 2013, *available at* [http://www.gazette.net/article/20130115/NEWS/130119652/1022/a-colleague-remembers-dr-martin-luther-king-jr&template=gazette](http://www.gazette.net/article/20130115/NEWS/130119652/1022/a-colleague-remembers-dr-martin-luther-king-jr%26template%3Dgazette). [↑](#footnote-ref-11)
11. Brach, *supra* note 1, at 42. [↑](#footnote-ref-12)
12. *Id.* James Bevel had to talk King into employing the children using the logic that “if someone was old enough to belong to a church – to have made a decision of that importance to their life and soul – then they were old enough to fight for a cause of great importance to their life and soul.” Malcolm Gladwell, David and Goliath 187 (2013). King accepted children as young as six or seven to participate because under the tenets of Baptism, at school age, a child could join the church. *Id.*  [↑](#footnote-ref-13)
13. Clay Risen, The Bill of the Century 44, 77 (2014). *See also* Diane McWhorter, Carry Me Home 376 (2001). [↑](#footnote-ref-14)
14. Risen, *supra* note 12, at 40. [↑](#footnote-ref-15)
15. Brach, *supra* note 1, at 47 [↑](#footnote-ref-16)
16. Risen, *supra* note 12, at 77-78. [↑](#footnote-ref-17)
17. *See* Charles Moore, *Demonstrators seek protection from the assault by firemen in Birmingham, Ala., in 1963* (photograph), *in* Week in Review, *Charles Moore’s Civil Rights Photographs Week in Review*, NYTimes, Mar. 21, 2010, available at [http://www.nytimes.com/slideshow/2010/03/21/weekinreview/20100321-CHARLESMOORE-SS\_index.html?\_r=0](http://www.nytimes.com/slideshow/2010/03/21/weekinreview/20100321-charlesmoore-ss_index.html?_r=0). *See also* Gladwell, supra note 11 at 188-89 (arguing that the iconic photographs were not captured by happenstance, and the children photographed were not simply anonymous bystanders, rather the photograph was strategic and necessary to propel the civil rights movement forward). The photograph of three teenagers has been the subject of some controversy. At the NYU Conference and other speaking engagements, I previously identified the young woman as Carolyn McKinstry. McKinstry herself stated the photograph was taken of her during public interviews; Francis X. Donnelly, *Detroiter Reclaims Moment in Civil Rights History*, Detroit Press, May 2, 2013, *available at* [http://www.detroitnews.com/article/20130502/METRO/305020375/1409/metro/Detroiter-reclaims-moment-civil-rights-history](http://www.detroitnews.com/article/20130502/metro/305020375/1409/metro/detroiter-reclaims-moment-civil-rights-history); Shelley Tougas et al., Birmingham 1963: How a Photograph Rallied Civil Rights Support 32 (2011). However, in 2013 McKinstry retracted an earlier claim that she was the young woman in the photograph after Mamie Chambers identified herself as the woman in the photo to *The Detroit Press*. In a statement from a now removed personal website McKinstry issued a gracious statement that she made a mistake and that the photograph is symbolic. Greg Garrison, *Civil Rights Activist Carolyn McKinstry Drops Claim*, AL.com (updated August 27, 201, 7:16 AM)

 <http://www.al.com/living/index.ssf/2013/08/civil_rights_activist_carolyn.html>. Though, McKinstry is not *the* woman in the photo, she found her story in the photo as a child participant of the Birmingham Campaign and a survivor of the 16th Street church bombing. The photo itself is recognized as a symbol and “way in” for all Americans to discuss a difficult historical and contemporary theme – race discrimination. The photograph by Charles Moore is part of a larger celebrated body of iconic civil rights photos that continues to educate and recall a recent past we as a nation must learn from. The identities of the two young men have never been revealed, thus, illustrating the enormous contributions to the civil rights struggle by countless activists forgotten to history. [↑](#footnote-ref-18)
18. George Wallace served as district judge for five years, governor of Alabama for four terms, placed his wife in the governor position during which she passed away, and ran for president in 1968, 1972 and 1976. Howell Raines, *George Wallace Segregation Symbol Dies at 79*, NYTimes, Sept. 14, 1998, *available at* <http://www.nytimes.com/1998/09/14/us/george-wallace-segregation-symbol-dies-at-79.html>. His last presidential race ended promptly while shaking hands with supporters when Arthur Breemer, his second assassination attempt, shot Wallace three times leaving him paralyzed. *Id.* Wallace went on to serve as Alabama governor for two more terms. *Id.* His power was “built entirely on his promise to Alabama's white voting majority to continue the historic oppression of its disfranchised and largely impoverished black citizens,” thus his hatred seemed to be a vehicle to achieve his political aspirations, even more than a true belief. *Id.* In his later life he disavowed any racist tendencies, stating, “segregation wasn’t about hate” and even apologizing to some civil rights leaders. *Id.* Upon his death many felt that “[a]t the height of his powers, [he] denied moral responsibility for the violence in his state. And in his Bible-haunted state, many said a terrible judgment had been visited upon him.” *Id. See also* Leonard Pitts Jr., *Did Wallace Truly Change His Racist Views?*, Chicago Tribune, Sept. 22, 1999, <http://articles.chicagotribune.com/1998-09-22/news/9809220030_1_george-wallace-bland-segregation-tomorrow> (recounting a story of Joan Bland, a child during ‘Bloody Sunday,’ who encountered Wallace as an old man during a visit to the museum dedicated to the Voting Rights Campaign where she worked and questioning whether he truly could have a change of heart and turn away from his prior “policies of hatred”). *See generally* Rick Perlstein, *Before the Storm* (2009). *See* Photograph of Wallace in the Schoolhouse Door, *in* Debbie Elliott, *Gov. George Wallace Blocks the Doorway to Foster Auditorium*, NPR, June 11, 2003, *available at* <http://www.npr.org/2003/06/11/1294680/wallace-in-the-schoolhouse-door>. A witness and quiet activist, President John F. Kennedy induced Wallace, the South's most defiant segregationist, to capitulate, thus writing Kennedy’s legacy as a formidable ally in the civil rights movement. Debbie Elliott, *Gov. George Wallace blocks the doorway to Foster Auditorium*, NPR, June 11, 2003, *available at* <http://www.npr.org/2003/06/11/1294680/wallace-in-the-schoolhouse-door>. [↑](#footnote-ref-19)
19. James Reston, *Kennedy’s Victory Won by Close Margin*, NYTimes, Nov. 10, 1960, *available at* <http://www.nytimes.com/learning/general/onthisday/big/1108.html> (reporting that Kennedy “split the East Central States, winning Illinois by a whisker and Michigan, but lost Ohio and Indiana” and “had a plurality of 245,000 in the South, where he won everything except Florida, Oklahoma, Kentucky, Tennessee and Virginia”). Candace Allen, *How John F. Kennedy’s Assassination Spurred the Drive for Racial Equality*, Guardian, Nov. 19, 2013, *available at*  <http://www.theguardian.com/world/2013/nov/19/john-f-kennedy-assassination-racial-equality-jfk> (finding that contrary to expectations and African American communities’ fears that their movement died with Kennedy, a president who appeared so promising for civil rights, rather, it is argued that “the most important thing [Kennedy] did for civil rights was die for them,” allowing LBJ’s ascent to the presidency and passage of the Civil Rights Act). [↑](#footnote-ref-20)
20. *See* *The Kennedy’s and Civil Rights*, PBS <http://www.pbs.org/wgbh/americanexperience/features/general-article/kennedys-and-civil-rights/> (last visited Jul. 13, 2015). During the presidential campaign, Kennedy made a point of calling Mrs. King to offer his sympathy when Dr. King was arrested in Atlanta for a sit-in protest. *Id.* This act spurred the African American community to vote for Kennedy, winning for him crucial swing states. *Id.* Though, after entering office Kennedy was much more hesitant to take up the civil rights cause until circumstances forced him and his brother Robert Kennedy (the attorney general) to act. *Id.* [↑](#footnote-ref-21)
21. Risen, *supra* note 12 at 67. [↑](#footnote-ref-22)
22. *Id.* at 69. *See* Michael O’Donnell, *How LBJ Saved the Civil Rights Act*, Atlantic, Apr. 2014, *available at* <http://www.theatlantic.com/magazine/archive/2014/04/what-the-hells-the-presidency-for/358630/>. [↑](#footnote-ref-23)
23. *See* *Medgar and Mrylie Evers Institute*, <http://www.eversinstitute.org/> (last visited Jul. 12, 2015). [↑](#footnote-ref-24)
24. Risen, *supra* note 12 at 69. [↑](#footnote-ref-25)
25. *Id.* at103-05. [↑](#footnote-ref-26)
26. *Id.* at104. [↑](#footnote-ref-27)
27. *Id.* [↑](#footnote-ref-28)
28. *Id.* at103. David Matthews (CNN), *Kennedy White House had Jitters Ahead of 1963 March on Washington,* Atlantic Voice, *available at* <http://theatlantavoice.com/news/2013/aug/28/kennedy-white-house-had-jitters-ahead-1963-march-w/?page=1> (recalling that the Kennedy administration was afraid if and when the march became violent it would prevent the recently introduced Civil Rights Act from passing) (last visited Jul. 26, 2015). [↑](#footnote-ref-29)
29. Risen, *supra* note 12, at 104. [↑](#footnote-ref-30)
30. *Id. at* 104-05. Behind the scenes, however, there was considerable unease and some fractiousness. Margalit Fox, *Dorothy Height, Largely Unsung Giant of the Civil Rights Era, Dies at 98*, NYTimes, Apr. 20, 2010, *available at* <http://www.nytimes.com/2010/04/21/us/21height.html> (last visited Jul. 26, 2015). All the speakers the day of the March were men. *Id.* Dorothy Height, a central organizer of the March and a “prize winning orator herself,” was not invited to make a speech. *Id.* The day of the March she “sat on the platform an arm’s length from Dr. King as he delivered his epochal ‘I Have a Dream’ speech.” *Id.* *See also* Wash. Post, *Transcript: John Lewis on the March on Washington*, Wash. Post, Aug. 22, 2013, *available at* http://www.washingtonpost.com/lifestyle/style/transcript-john-lewis-on-the-march-on-washington/2013/08/22/f6ee9968-0a8d-11e3-8974-f97ab3b3c677\_story.html (recounting how John Lewis was asked to edit the revolutionary tone of his March on Washington speech to focus on the idea of “unity”) (last visited Jul. 26, 2015); Michael Eric Dyson, I May Not Get There with You: The True Martin Luther King, Jr., 15 (2000) (arguing that King’s iconic status is a conservative appropriation and that King’s iconic speeches are radical messages for societal change). [↑](#footnote-ref-31)
31. Claude Sitton, *Birmingham Bomb Kills 4 Negro Girls in Church; Riots Flare; 2 Boys Slain*, NYTimes, Sept. 16, 1963, *available at* <http://www.nytimes.com/learning/general/onthisday/big/0915.html>.

*See* Spike Lee, *Four Little Girls* (1997). *See also* Brach, *supra* note 1 at 137-138; Andrew Cohen, *The Speech that Shocked Birmingham the Day After the Church Bombing*, Atlantic, Sept. 13, 2013, *available at* <http://www.theatlantic.com/national/archive/2013/09/the-speech-that-shocked-birmingham-the-day-after-the-church-bombing/279565/>. The recent murders of nine black individuals during worship has been analyzed alongside the Birmingham church bombing and, at least one writer pointed out, that violence inside of a church is especially egregious where historically, for African American Christians, sanctuary carried a double meaning—the “spiritual aims of worship were paired with the distinctly secular necessity of a place in which not just common faith but common humanity could be taken for granted.” Jelani Cobb, *Murders in Charleston*, New Yorker, June 18, 2015, *available at*  <http://www.newyorker.com/news/news-desk/church-shooting-charleston-south-carolina>. It has also been argued that while there are some signs that America is better-handling violent hate crimes by white supremacists, it is not widespread, comparing Birmingham Church bombing, church burnings across the south during the 1990’s and most recently the church shooting in South Carolina. *See* David A. Graham, *How Much Has Changed Since the Birmingham Bombing?,* Atlantic, June 18, 2015, *available at* <http://www.theatlantic.com/politics/archive/2015/06/historical-background-charleston-shooting/396242/>. At the time of the Birmingham church bombing George Wallace offered a $5,000 reward for the arrest of the criminal actors. *Id.* However, it was not until 1977, over ten years later that Robert Chambliss was convicted, and not until 2002, nearly 40 years later that the last four suspects were convicted. *Id.* The case was closed without prosecution in 1965 and later discovered that “some essential evidence gathered by the FBI had been ordered sealed by [J. Edgar] Hoover himself.” *Id*. [↑](#footnote-ref-32)
32. Risen, *supra* note 12, at 112. [↑](#footnote-ref-33)
33. *Kennedy is Killed by Sniper as He Rides in Car in Dallas*, NYTimes, Nov. 23, 1963, *available at* <http://www.nytimes.com/john-f-kennedy-assassination-coverage/89977680.html>. [↑](#footnote-ref-34)
34. Purdum, *supra* note 2, at 160. [↑](#footnote-ref-35)
35. *Id.* at 158-59. [↑](#footnote-ref-36)
36. *See* *id.* at 151. [↑](#footnote-ref-37)
37. *Id.* at 6. [↑](#footnote-ref-38)
38. *Id.* at 6-7. [↑](#footnote-ref-39)
39. Risen, *supra* note 12, at 112, 188. [↑](#footnote-ref-40)
40. *Id.* at 217-19. [↑](#footnote-ref-41)
41. *See* Robert A. Caro, Master of the Senate: The Years of Lyndon Johnson 451-52 (2003). *See also* Risen, *supra* note 12, at 4 (arguing that with regard to the Civil Rights Act of 1964 President Johnson was not playing the “master of the senate,” rather passage was a plural effort on the part of many congress members, e.g. William McCulloch, Everett Dirksen). One of the central debates during the 50th Anniversary centered on the importance of President Johnson to the passage of the Act. Many supporters of Johnson used the anniversary to highlight President Johnson’s strong commitment to the passage of civil rights legislation, in part to rehabilitate a legacy marked by the escalation of American involvement in Vietnam. *See* Don Gonyea, *LBJ Legacy: Vietnam War Often Overshadows Civil Rights Feat*, NPR (Apr. 9, 2014) <http://www.npr.org/2014/04/09/300836769/civil-rights-act-anniversary-may-polish-lbj-s-image>. In a speech at the LBJ Presidential Library, marking the 50th Anniversary of the Civil Rights Act, President Obama stated, “I have lived out the promise of LBJ’s efforts.” However, he resisted sanctifying Johnson, reflecting on the two-fold complexity of Johnson’s legacy, – “he understood that poverty and injustice are as inseparable as opportunity and justice are joined” and at the same time, he was a deeply ambitious and powerful politician. *Transcript: Obama’s Remarks at LBJ Library Civil-Right Event*, WSJ, Apr. 10, 2014, <http://blogs.wsj.com/washwire/2014/04/10/transcripts-obamas-remarks-at-lbj-library-civil-rights-event/>. *See* *also* Andrew Kragie, *Lyndon Johnson on Civil Rights: Moral Leader or Political Follower?* Duke Univ. (Apr. 2015) <http://www.academia.edu/12158630/LBJ_on_Civil_Rights_Moral_Leader_or_Political_Follower>. This debate on Johnson’s legacy played out again this past year in the controversy over the depiction of President Johnson in the movie Selma. The portrayal catalyzed many objections by former associates who vigorously defended Johnson’s central role in the passage of both the Civil Rights Act of 1964 and the Voting Rights Act of 1965. *Bill Moyers on Selma: Powerful But Flawed Portrayal of LBJ’s Civil Rights Record*, In These Times, Jan. 15, 2015, *available at* <http://inthesetimes.com/article/17537/bill_moyers_lbj_selma> (stating in an interview that the film’s portrayal of Johnson’s relationship to Martin Luther King, Jr. and the Civil Rights demonstrations is “exaggerated and misleading”). *See also* Amy Davidson, *Why “Selma” is More Than Fair to L.B.J.*, New Yorker, Jan. 22, 2015, *available at* <http://www.newyorker.com/news/amy-davidson/selma-fair-l-b-j>. [↑](#footnote-ref-42)
42. Robert Dallek, Lyndon B. Johnson: The Portrait of a President 87 (2005). [↑](#footnote-ref-43)
43. *Id.* *See also* Tom Wicker, *Remembering the Johnson Treatment*, NYTimes, May 9, 2002, *available at* <http://www.nytimes.com/2002/05/09/opinion/remembering-the-johnson-treatment.html>. [↑](#footnote-ref-44)
44. Purdum, *supra* note 2, at 7. [↑](#footnote-ref-45)
45. Jack Valenti, *Lyndon Johnson: An Awesome Engine of a Man* 39, *in* Lyndon Johnson Remembered (Thomas W. Cowger, Sherman Markman, eds., 2003). [↑](#footnote-ref-46)
46. *See* Brach, *supra* note 1, at 300. [↑](#footnote-ref-47)
47. Risen, *supra* note 12, at 217-19 (“it is likely the losing votes came from firebrands like Thurmond and Ervin, who opposed the bill with blind hatred and, more important, feared that any weakness on the bill would make them fodder for an attack from the segregationist right back home”). [↑](#footnote-ref-48)
48. In 1954 Thurmond won the Senate election as a write-in candidate – the only person to ever to do this. He resigned and won again, and he served until his death in 2003 at 100 years old. *See* U.S. Senate, *Strom Thurmond: A Featured Biography*, *available at* http://www.senate.gov/artandhistory/history/common/generic/Featured\_Bio\_Thurmond.htm (last visited Jul. 16, 2015). Perhaps serving as a bellwether for his entire region, Senator Thurmond switched his party affiliation from Democrat to Republican in 1964 and continued to represent South Carolina for a total of 48 years of service. *See id.* Senator Thurmond’s change in party affiliation represented a dramatic shift in party identity in the South, validating Senator Russell’s predictions with a fury. *See* Joseph Crespino, Strom Thurmond’s America (2012) (arguing that Thurmond has a twin legacy as a fierce segregationist and as the father of modern conservative politics, offering uncomfortable insight into race in conservative politics today, and not simply the history of political realignment). In 1964, all but two of the Southern Senators were Republican (John Tower (Texas) and Thurmond (South Carolina)). Purdum, *supra* note 2, at 306. *See also* *Statistically Notable Votes*,HR. 7152. PASSAGE, Govtrack.us <https://www.govtrack.us/congress/votes/88-1964/s409> (last visited Jul. 20, 2015). Fifty years later, following the 2014 elections, the entire Southern Senate delegation was Republican. Also of note, on Senator Thurmond’s death, his fiery rhetoric about interracial relationships opened him up to charges of hypocrisy when it was revealed that he had a child as the result of a long-term relationship with an African-American assistant. *See* Crespino, *supra*. *Cf.* Lee Edwards, *The Last Dixiecrat*, WSJ, Aug. 31, 2012, 5:39 P.M. (book review of Joseph Crespino’s biography of Senator Strom Thurmond), *available at* <http://www.wsj.com/articles/SB10000872396390444508504577595433195614946> (criticizing Professor Crespino, finding that Thurmond was neither “saint” nor “sinner,” evidenced by the fact that he was “no deadbeat dad.” Essie May Washington-Williams, his daughter, publicly acknowledged that Thurmond supported her by sending her to college and helping her son through medical school). [↑](#footnote-ref-49)
49. *See* Risen, *supra* note 12, at 217-19 (Thurmond, holding the Senate’s all-time filibuster record against the Civil Rights bill in 1957, stated in debate over the civil rights bill in 1964 that “[t]oday the Negro is almost a favored class of citizen in America”). [↑](#footnote-ref-50)
50. Today in Civil Liberties History, *Filibuster Against 1964 Civil Rights Bill Begins*, <http://todayinclh.com/?event=anti-civil-rights-filibuster-begins> (last visited Jul. 26, 2015). [↑](#footnote-ref-51)
51. Risen, *supra* note 12, at 221 (“Whatever his motive, over the next two weeks Dirksen worked assiduously to win over the twenty-five or so Republican votes he needed to deliver to guarantee cloture”). [↑](#footnote-ref-52)
52. Purdum, *supra* note 2, at 302. [↑](#footnote-ref-53)
53. *See id.* at 221. [↑](#footnote-ref-54)
54. *Id.* at 267, 299. *See* Risen, *supra* note 12, at 221. [↑](#footnote-ref-55)
55. Purdum, *supra* note 2, at 299-303 (observing the final tally was 71 to 29, four votes more than the required two-thirds [needed to pass the Civil Rights Act bill]”). [↑](#footnote-ref-56)
56. *Id.* at 312-13. [↑](#footnote-ref-57)
57. Photograph of President Johnson signing the Civil Rights Act as Senators and Civil Rights Leaders Look On, Jul. 2, 1964, *in* Risen, *supra* note 12; *See* *President Johnson Signs Civil Rights Act of 1964*, C-span, <http://www.c-span.org/video/?300956-1/civil-rights-act-50th-anniversary> (signing the bill into law, President Johnson gives nearly 100 pens as a keepsake to such individuals as Hubert H. Humphrey, Dr. Martin Luther King, Jr., Everett Dirksen, the Kennedy family, and the Attorney General Robert Kennedy) (last visited Jul. 26, 2015). [↑](#footnote-ref-58)
58. MLK must have held close the pain and hardship necessarily lay ahead for civil rights workers Chaney, Schwerner and Goodman were missing in Mississippi and presumed dead. Jason Sokol, *The Power Broker’s Other Voice*, Slate, <http://www.slate.com/articles/arts/books/2011/06/the_power_brokers_other_voice.html> (discussing the disappearance of James Chaney, Andrew Goodman, and Mickey Schwerner in Mississippi between the end of the Senate debate of the Civil Rights Act on June 10, 1964 and the date President Johnson signed the bill into law and analyzing tape recordings of his conversations to argue that though he signed the greatest civil rights legislation ever, Johnson remained suspicious of the movement and foremost concerned with his political position and power) (last visited Jul. 17, 2015). [↑](#footnote-ref-59)
59. Photograph of President Johnson speaking to a nationwide television audience from the White House just before signing the Civil Rights Act of 1964 (Jul. 2, 1964) National Archives (LBJ Library), *in* Ted Gittinger and Allen Fisher, Prologue Magazine (Summer 2004 Vol. 36, No. 2) *available at* <http://www.archives.gov/publications/prologue/2004/summer/civil-rights-act-2.html> (last visited Jul. 26, 2015). In a wide perspective of the photograph there is at least one identifiable woman present– Lady Bird Johnson, the First Lady. *Id.* [↑](#footnote-ref-60)
60. *See, e.g.*,Civil Rights Act of 1964 §703(a), 42 U.S.C. §2000e-2 (2012). *But see* Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2012). The absence of women participants at the signing of the Civil Rights Act of 1964 does not appear to indicate there was not growing support during this era for enhanced workplace equality for women. Rather, I would suggest that women as a class were not the immediate focus of the Act in 1964. [↑](#footnote-ref-61)
61. Photograph of President Obama signing into law the Lily Ledbetter Fair Pay Act, White House Blog, Apr. 14, 2015, 8:02 PM, <https://www.whitehouse.gov/blog/2015/04/14/day-history-equal-pay-trailblazer-lilly-ledbetter-turns-77> (hereinafter Lily Ledbetter Act Photograph); *See also* *From the Archives: President Obama Signs the Lilly Ledbetter Fair Pay Act*, White House Blog, Jan. 30, 2012, 1:41 PM, <https://www.whitehouse.gov/blog/2012/01/30/archives-president-obama-signs-lilly-ledbetter-fair-pay-act>. [↑](#footnote-ref-62)
62. *See* Lily Ledbetter Act Photograph, *supra* note 60. [↑](#footnote-ref-63)
63. *See* Risen, *supra* note 12, at 4. [↑](#footnote-ref-64)
64. However, the bi-partisanship frayed with Lily Ledbettter. On January 22, 2009, Lily Ledbetter Fair Pay Act passed with a 61-36 Senate vote, including all Democrats present and five Republicans (including all four women Republicans) and a 250-177 House vote. *See* 155 Cong. Red. H546-56 (Jan. 27, 2009). Lani Guinier, *Courting the People: Demosprudence and the Law/Politics Divide*, 89, n.21 B.U. L. Rev. 539, 561 (2009) (The initial bill passed the House in Jul. 2007, but never came up for a vote in the Senate). *See also* Lori Montgomery, *Senate Republicans Block Pay Disparity Measure*, Wash. Post, Apr. 24, 2008, *available at* [http://www.washingtonpost.com/wp-dyn/content/article/2008/04/23/AR2008042301553.html](http://www.washingtonpost.com/wp-dyn/content/article/2008/04/23/ar2008042301553.html) (arguing that all but six Senate Republicans voted to block the bill, as a politically aggressive and partisan act against Senators Hillary Clinton and Barack Obama, both campaigning Democratic presidential candidates at the time for the upcoming 2008 election). [↑](#footnote-ref-65)
65. *See* *Remarks of President George Bush at the Signing of the Americans with Disabilities Act,* EEOC (last visited Jul. 17, 2015) <http://www.eeoc.gov/eeoc/history/35th/videos/ada_signing_text.html>. The ADA of 1990 was resolved and passed in the Senate on Jul. 13, 1990 with a 91-6 vote. 136 Cong. Rec. S9695 (daily ed. Jul. 13, 1990). A true act of bipartisanship, the ADA was co-sponsored by Sen. Harkin, a Democrat from Iowa, who made a heartfelt speech on the Senate floor, first addressing his brother Frank who is deaf, in American Sign Language. *Senator Harkin Delivers Floor Speech in American Sign Language Upon Passage of the ADA*, YouTube, Apr. 5, 2013, available at https://www.youtube.com/watch?v=BomPo6fPOOo; Steven A. Holmes, *Rights Bill for Disabled is Sent to Bush*, NYTimes, Jul. 14, 1990, *available at* <http://www.nytimes.com/1990/07/14/us/rights-bill-for-disabled-is-sent-to-bush.html>. [↑](#footnote-ref-66)
66. *See* *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999);*Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999) [hereinafter *The Sutton Trilogy*]. *See also Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) With the Supreme Court rulings in *The Sutton Trilogy*, the impact was to essentially eviscerate the statute’s protection. Chai R. Feldblum, Definition *of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 Berkeley J. Emp. & Lab. L. 91, 156 (2000). Feldblum observed that “Part of what is so remarkable and disturbing about cases such as Robinson is the disjuncture between the type of people that advocates of the ADA presumed would be covered under the law, and the practical reality of the protection currently afforded by the law.” *Id.* Feldblum herself was a key supporter and contributor to both the ADA and the ADAAA, testifying on behalf of both pieces of legislation in front of Congress. *See, e.g.,* Chai R. Feldblum, *The Americans with Disabilities Act and the ADA Amendments Act of 2008: Hearing before the S. Comm. on Health, Education, Labor & Pensions*, *110th Cong*., Jul. 15, 2008 (Statement of Chai R. Feldblum) *available at* <http://works.bepress.com/chai_feldblum/8>. Paul Miller, a University of Washington Professor of Law, an expert in disability law, a commissioner at the EEOC from 1994-2004 and a principal champion of the ADA and GINA, also quickly recognized the shortcomings of the statute. He noted as early at 2000 that "advances in genetic research and technology portend tremendous benefits for humankind in medicine and science, [but] adequate protections must be in place to insure that such technology will not be used for the wrong reasons." Paul Steven Miller, *Is There A Pink Slip in My Genes? Genetic Discrimination in the Workplace,* 3 J. Health Care L. & Pol'y 225, 265 (2000). Miller led the way as a lawyer, scholar, lobbyist and humanist to greater protection from discriminatory use of genetic information and ultimately saw the Genetic Information Nondiscrimination Act of 2008 signed into law. *See* Michael Waterstone, Paul Steven Miller: A Life of Influence, 64 J. Legal Educ. 492 (2015). *See also* Kevin Barry, *Toward Universalism: What the ADA Amendments Act of 2008 Can and Can’t do for Disability Rights*, 31 Berkeley J. Emp. & Lab. L. 203 (2010) (arguing that the 2008 expansion of the definition of disability under the ADAAA, a unique bipartisan resolution, provides near universal coverage, thus creating more positive relationships with ourselves and each other). Furthermore, we must consider that the longer arc of civil rights law in American history has frequently been subject to the same cycle of broad and idealistic congressional laws, later subject to narrow and limiting interpretation by the Courts. [↑](#footnote-ref-67)
67. The bill was reintroduced in 2008 as a bi-partisan effort of Republican Congressman Jim Sensenbrunner (Wisconsin) and then Democrat, House Majority Leader Steny Hoyer (Maryland). Congressman Jim Sensenbrenner, Press Release and Statements, *Sensenbrenner Statement on ADA Bill*, Sept. 17, 2008 [http://sensenbrenner.house.gov/news/documentsingle.aspx?DocumentID=102681](http://sensenbrenner.house.gov/news/documentsingle.aspx?documentid=102681) (last visited Jul. 26, 2015). *See* ADA Amendments Act of 2008 (ADAAA), Pub. L. 110-325, 122 Stat. 3553 (2008) (codified at 42 U.S.C. §12101) (explicitly rejecting *Sutton* and *Toyata* *Motor Manufacturing* in the stated Purposes of the amendment). On September 25, 2008 the ADAAA was signed into law. *Id.* On passing the ADAAA, Senators Hoyer and Sensenbrunner stated they were proud of the “alliance of business and disability representatives who worked together… throughout the bill’s legislative process.”154 Cong. Rec. H8294 (daily ed. Sept. 17, 2008) (Hoyer-Sensenbrenner Statement). In the statement, they thanked the communities of disability organizations, members of the business community lawyers, and legal scholars, former members of congress and an extensive list of individuals. *See* 154 Cong. Rec. H8295. [↑](#footnote-ref-68)
68. The statute prohibits an employer from either:

1. fail[ing] or refus[ing] to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual’s race, color, religion, sex, or national origin; or

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

Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII §703(a) (codified as amended at 42 U.S.C. §2000e-2 (2012)). [↑](#footnote-ref-69)
69. *See generally* Robert Belton, The Crusade for Equality in the Workplace (2014). *See* U.S. E.E.O.C., Testimony of David Cashdan, *Celebrating the 40th Anniversary* *of Title VII*, June 22, 2004, *available at* <http://www.eeoc.gov/eeoc/history/40th/panel/40thpanels/panel1/transcript.html>; David Cashdan, *The First Five Years*, Cashdan Kane *available at* <http://www.cashdankane.com/the-first-five-years.html>. [↑](#footnote-ref-70)
70. William L. (Bill) Robinson, one of the pioneer NAACP litigators and General Counsel of the EEOC, spoke at the 40th Anniversary Celebration, stating that at the outset, expectations for Title VII were “extremely high” and today we think very little of all that has been accomplished since its passage. U.S. E.E.O.C., *Testimony of William Robinson*, *Celebrating the 40th Anniversary of Title VII*, Jun. 22, 2004, *available at* <http://www.eeoc.gov/eeoc/history/40th/panel/40thpanels/panel1/transcript.html> (last visited Jul. 24, 2015). Robinson noted that the language of the statute itself presented immediate procedural problems for the charging party, as deadlines for filing a charge were tight and the EEOC had to issue cause, or the charge likely wouldn't be allowed to proceed to court. *Id.* Most problematic of all, the EEOC, the agency entrusted with the primary responsibility for enforcing the statute, didn't have enforcement authority. *Id.* He observed the court’s willingness to render “receptive, sympathetic, courageous, creative decisions” played a vital role to early enforcement efforts. *Id. See* National Organization of Women (NOW), *Honoring our Founders and Pioneers*, (last visited Jul. 24, 2015) <http://now.org/about/history/honoring-our-founders-pioneers/> (recalling that Sonia Pressman Fuentes – the first woman attorney in the EEOC Office of the General Counsel – expressed to Betty Friedan – early second-wave-feminist activist – an idea that women needed to organize to fight for their rights, just like the NAACP fought for African American’s rights). [↑](#footnote-ref-71)
71. *Memorandum from Sonia Fuentes on Use of Statistics in Title VII Proceedings* (May, 31, 1966) (on file with Schlesinger Library, Radcliffe Institute, Harvard University and the EEOC’s Office of General Counsel). In an attempt to give meaning to the sparse Title VII protections, Fuentes looked to constitutional cases and principles. *Id.* She argued statistical evidence could be used in regard to Title VII  as it had been in cases regarding “voter registration, jury selection, and teacher pay cases.” *Id.* at 4. These principles were argued by the EEOC in many cases most notably in *Griggs v. Duke Power*. Brief for United States as Amicus Curiae at 4, *Griggs v. Duke Power Co.*, 401 U.S. 424, (1970) (No. 124). Despite the EEOC’s reliance on constitutional analysis to fill in the new statute’s blank spaces, the Supreme Court by the mid-seventies balked at applying analysis drawn from Title VII analysis to constitutional questions. *See Washington v. Davis*, 426 U.S. 229 (1976). [↑](#footnote-ref-72)
72. *See* Belton, *supra* note 69; Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074 (codified as amended in 42 U.S.C. § 2000e-2(k)(1)(A)(i)(2006)). [↑](#footnote-ref-73)
73. *Griggs*, 401 U.S. at 853 (noting that “[t]he Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation”). Subsequent to Supreme Court’s decision in *Griggs v. Duke Power*, the disparate impact theory greatly expanded the possibility to eradicate discriminatory practices against African Americans, *as well as* women, Latinos/as, Asian Americans and Native Americans. Belton, *supra* note 69, at 3. Richard Belton has stated that this class-based approach transformed not only enforcement practices, but also discussions and meaning of the word equality. *Id.* at 3, 29. These advancements created a viable disparate impact theory, including challenging subjective criteria, use of statistics as proof, burden shifting, and legitimate testing criteria, legally mandated the upheaval of the social paradigm. *Id.* at 189-207. However, by 1989, , the Supreme Court “massacred” the disparate impact theory in a series of cases. *Id.* at 282. In a pair of cases, *Watson v. Fort Worth Bank and Trust Co.* and *Wards Cove Packing Company, Inc. v. Atonio*, the Supreme Court effectively jettisoned their prior ruling in *Griggs* and its hard-fought years of jurisprudence. *Id.* at 282-286. In *Ward’s Cove*, the Court, without expressly overruling *Griggs*, significantly elevated the requirements for plaintiffs, essentially retaining the shell of disparate impact theory and discarding the substantial protections it promised to women and minorities. *Id.* at *286*. In 1991, Congress corrected the Court’s decision in *Ward’s Cove*, codifying the disparate impact theory and setting a clarified rule for damages. *Id.* at 310-311. [↑](#footnote-ref-74)
74. U.S. E.E.O.C., *Written Testimony of Honorable Cari M. Dominguez Former Chair, EEOC Senior Vice President and Chief Talent and Diversity Officer Loma Linda University Health*, Jul. 1, 2015, *available at* <http://www.eeoc.gov/eeoc/meetings/7-1-15/dominguez.cfm>. [↑](#footnote-ref-75)
75. *See* 110 Cong. Rec. 2577 (1964) (statement of Rep. Smith). *See also* Cary Franklin, *Inventing the “Traditional Concept” of Sex Discrimination*, 125 Harv. L. Rev. 1307, 1318 (2012) (noting that Smith's amendment was discussed for only a few hours, and thereafter legal commentators, judges, lawyers and scholars characterized his intervention as “a last-ditch, if ultimately unsuccessful, attempt to derail a piece of legislation to which he was fiercely opposed”). [↑](#footnote-ref-76)
76. *But see* Franklin, *supra* note 74; Rachel Osterman, *Origins of A Myth: Why Courts, Scholars, and the Public Think Title VII's Ban on Sex Discrimination Was an Accident*, 20 Yale J.L. & Feminism 409, 416 (2009). [↑](#footnote-ref-77)
77. Franklin D. Roosevelt, Jr. was the son and namesake of the former president. *Franklin D. Roosevelt, Jr. First Chairman of the EEOC*, EEOC 35th Anniversary (last visited Jul. 15, 2015) <http://www.eeoc.gov/eeoc/history/35th/bios/roosevelt.html>. Significantly his mother, Eleanor Roosevelt is well-regarded as a founding supporter of woman’s rights and instrumental drafter of the Universal Declaration of Human Rights. *Biography: Eleanor Roosevelt’s Life*, PBS (last visited Jul. 15, 2015) <http://www.pbs.org/wgbh/americanexperience/features/biography/eleanor-biography/>. [↑](#footnote-ref-78)
78. Osterman, *supra* note 75, at 416. [↑](#footnote-ref-79)
79. *See* *id.* at 409. *See also* Robert C. Bird, *More Than A Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 Wm. & Mary J. Women & L. 137, 138 (1997) (arguing that legal commentators, who have concluded that Congress amended Title VII's list of prohibited discriminatory bases to include sex discrimination as a joke, misconstrues history). [↑](#footnote-ref-80)
80. Osterman, *supra* note 75, at 409. *See also* Brach, *supra* note 1, at 232 (noting that eleven of twelve women representatives supported Howard Smith’s inclusion of “sex” in the face of laughter by fellow male representatives during debate). [↑](#footnote-ref-81)
81. Osterman, *supra* note 75, at 414. *See* Franklin, *supra* note 74, at 1307. By contrast, the overt and thinly coded sexism of many of the Civil Rights Act’s strongest supporters is (I hope) shocking to us in the 21st Century. Emmanuel Cellar, a liberal Democrat from New York was the leader of a bipartisan coalition to pass the Civil Rights Bill, but simultaneously, as chair of House Judiciary Committee, he prevented the Equal Rights Amendment (ERA) from reaching the house floor on more than one occasion. Robert C. Bird, *More Than A Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 Wm. & Mary J. Women & L. 137, 161 & n. 36 (1997). *See also* 110 Cong. Rec. H2577 (1964) (Remarks of Rep. Cellars) (stating, as an opening joke, that he has experienced nearly 50 years of harmonious marriage with his wife because he “usually [has] the last two words. . . “yes, dear”). [↑](#footnote-ref-82)
82. Osterman, *supra* note 75, at 414. [↑](#footnote-ref-83)
83. *Id*. [↑](#footnote-ref-84)
84. *Id*. at 417 (noting early EEOC leadership promoted and publicized the “fluke” narrative to slow the enforcement of Title VII’s sex provision). [↑](#footnote-ref-85)
85. U.S. E.E.O.C., History, *Shaping Employment Discrimination Law*, (last visited Jul. 17, 2015) <http://www.eeoc.gov/eeoc/history/35th/1965-71/shaping.html> (noting 33.5% of all charges in 1966 were for discrimination on the basis of sex); *See* David J. Garrow, *Toward A Definitive History of Griggs v. Duke Power Co.*, 67 Vand. L. Rev. 197, 204 (2014) (stating that the main provision would not take effect until after one full calendar year, thus “equal employment enforcement considerations took a decided back seat [to] implementation of Title II's prohibition of racial discrimination in public accommodations”). In 1965, when Title VII did take effect (with the creation of the EEOC), the Legal Defense Fund with the NAACP, filed *more than fifty* complaints alleging racially discriminatory employment practices within the first four weeks. *Id*. at 205. [↑](#footnote-ref-86)
86. Osterman, *supra* note 75, at 417. [↑](#footnote-ref-87)
87. *Id.* [↑](#footnote-ref-88)
88. *Id.* [↑](#footnote-ref-89)
89. Franklin, *supra* note 74, at 1342. *See also* Louis Menand, *The Sex Amendment*, New Yorker, Jul. 21, 2014, *available at* <http://www.newyorker.com/magazine/2014/07/21/sex-amendment> (reporting that immediately NOW sought a writ of mandamus against the E.E.O.C., compelling it to enforce Title VII, as it “was the only statutory weapon the women’s movement had”). *See generally* Sonia Pressman Fuentes, Eat First – You Don't Know What They'll Give You (1999). [↑](#footnote-ref-90)
90. Franklin, *supra* note 74, at 1350-51 (stating that Commissioner Hernandez issued a memo pressing the EEOC to denounce airline policies of hiring only young, single and female as flight attendants, and when the EEOC eventually agreed with Hernandez in a 1966 ruling, a federal court enjoined the EEOC from releasing the ruling). *See* *The Civil Rights Act @ 50: The Pioneering Role of Flight Attendants in Fighting Sex Discrimination*, Youtube, 57:00 minutes, Oct. 23, 2014, *available at* <https://www.youtube.com/watch?v=cwmNip_Ua_Y> (Sonia Fuentes) (stating “I joined the EEOC three months after they commenced operations. . . most [employees] had joined the EEOC to fight employment discrimination based on race or color, and they did not want the EEOC’s resources diverted to issues of gender discrimination and furthermore they did not know how to interpret the sex discrimination prohibitions of Title VII which raise more difficult questions. . . in short order, I became *the* EEOC staffer who spoke out about the need to enforce the sex pro of the act, and my boss took to calling me a “sex maniac”). *See also* NOW, *Honoring Our Founders & Pioneers*, <http://now.org/about/history/honoring-our-founders-pioneers/> (last visited Jul. 17, 2015). [↑](#footnote-ref-91)
91. NOW, *Founding*, Jul. 2006, *available at* <http://now.org/about/history/founding-2/> (stating that both commissioners, [Aileen Hernandez and Robert Graham] and EEOC attorney Sonia Fuentes joined to support the creation of NOW in 1966). [↑](#footnote-ref-92)
92. *See* NOW, *1966 Statement of Purpose*, <http://now.org/about/history/statement-of-purpose/>. [↑](#footnote-ref-93)
93. *Id.* [↑](#footnote-ref-94)
94. Notably, in 1971, the Court first recognized sex stereotyping as sex discrimination in *Phillips v. Martin Marietta*. 400 U.S. 542 (1971). However, it was not until 1986 in *Meritor Sav. Bank, FSB v. Vinson*, that the Court ruled and affirmed the EEOC’s Guidelines, stating “that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment.” 477 U.S. 57, 63 (1986). Franklin, *supra* note 74, at 1356. *See* *also* Osterman, *supra* note 75, at 417 (quoting the EEOC’s new guidelines, that “the Commission has proceeded with caution. . . [and that the Commission resisted] an overly literal interpretation of the prohibition [against sex discrimination]”). Flight Attendants who brought a series of sex discrimination charges to the EEOC were instrumental in the early development of sex discrimination. *See* *The Civil Rights Act @ 50: The Pioneering Role of Flight Attendants in Fighting Sex Discrimination*, Youtube, 58:00 minutes, Oct. 23, 2014, *available at* <https://www.youtube.com/watch?v=cwmNip_Ua_Y> (Testimony of Sonia Fuentes) (recalling that when the EEOC decided to consider the “flight attendant” cases, and concluded that the airlines practices violated Title VII, she was assigned the task of writing the lead decision, for which the then Vice Chairman of the EEOC, called her boss, Charlie Dunken, withdraw the assignment from her, because she was “prejudiced,” “in favor of women’s rights”). *See id.* (including testimony of plaintiffs, Mary Celeste Lansdale Brodigan, plaintiff in *Lansdale v. United Air Lines, Inc.*; Mary Pat Laffey-Inman,plaintiff in *Laffey v. Northwest Airlines, Inc.*). Interestingly, concern about airline policies of hiring single, but not married women harks all the way back to legislative debate about adding the provision of “sex” to Title VII. 155 Cong. Rec. 2578 (Feb. 8, 1964) (Remarks of Sen. Bass) (supporting the addition of “sex,” specifically stating he just got off of an airplane and presenting the hypothetical of discrimination against the married woman stewardess). [↑](#footnote-ref-95)
95. *See, e.g., Meritor*, 477 U.S. at 63. The early history of the Act and Commission is fraught with what looks like interest-group lobbying for significance, but developments with respect to one prohibited basis are often used to address discrimination under another. The developments are never contained in their silo. In *Meritor*, the push to invigorate the prohibition against sex discrimination resulted in a victory for an African-American woman, and the hostile work environment theory has since been used to address race, religion or national origin discrimination. [↑](#footnote-ref-96)
96. *See, e.g., Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (holding that the statutory language “because of sex” includes same-sex sexual harassment). Justice Scalia in a momentous opinion, reignited the Magna Carta spirit stating,

[w]e see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII. As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But 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. Title VII prohibits “discriminat[ion]. . . because of . . . sex” in the “terms” or “conditions” of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.

*Id*. at 79-80. *See also* *E.E.O.C. v. Boh Bros. Const. Co.,* 731 F.3d 444, 456 (5th Cir. 2013) (holding that a plaintiff may establish a sexual harassment claim with evidence of sex-stereotyping, in effect, marrying *Price Waterhouse* and *Oncale*) *See, e.g.,* *id*. at n. 7. [↑](#footnote-ref-97)
97. *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974) (holding that the employer violated the EPA by paying male night-shift inspectors at a higher base rate than female day-shift inspectors). Note, when the practice was adopted, around 1925 to 1930, state law prohibited women from working at night. This differential “became illegal once Congress enacted into law the principle of “equal pay for equal work.” *See also* *County of Washington v. Gunther*, 452 U.S. 161 (1981); *King v. Acosta Sales & Mktg., Inc.*, 678 F.3d 470 (7th Cir. 2012). [↑](#footnote-ref-98)
98. *See, e.g.,* *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989). [↑](#footnote-ref-99)
99. *See, e.g.,* *E.E.O.C. v. Boh Bros. Const. Co.,* 731 F.3d 444, 456 (5th Cir. 2013). [↑](#footnote-ref-100)
100. *Foxx*, Decision No. 0120133080, at 6 (E.E.O.C. Jul. 12, 2015) (ruling that, when “a complainant alleges that an that an agency took his or her sexual orientation into account in an employment action necessarily alleges that the agency took his or her sex into account”). *See also,* *Macy v. Holder,* No. 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012) (the Commission ruled that discrimination against employees because they are transgender, because of their gender identity, and/or because they have transitioned (or intend to transition) is discrimination because of sex in violation of Title VII). Following *Macy*, the Commission in December 2012 approved the Strategic Enforcement Plan specifically designated LGBT discrimination (under Title VII’s sex discrimination provisions) as an emerging and developing issue priority. *See Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008); *Examples of Court Decisions Supporting Coverage of LGBT-Related Discrimination Under Title VII*, EEOC (last visited Jul. 20, 2015) <http://www1.eeoc.gov//eeoc/newsroom/wysk/lgbt_examples_decisions.cfm?renderforprint=1>; William N. Eskridge, Jr., *Sexual and Gender Variation in American Public Law: From Malignant to Benign to Productive*, 57 UCLA L. Rev. 1333, 1345 (2010) (mapping the history of discrimination and understanding of LGBT individuals and noting they were “[p]rofoundly inspired by the African American civil rights movement, these Americans saw the natural law model as a product of prejudice and stereotypes that denied women and minorities equal treatment”). [↑](#footnote-ref-101)
101. In *General Electric Co. v. Gilbert*, the Court found that a disability plan that covered all conditions except pregnancy was not discrimination against women because of sex. 429 U.S. 125 (1976). Pregnancy Discrimination Act (PDA) Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. §2000e (2012); 123 Cong. Rec. 29664 (Sept. 16, 1977) (Senate votes 75-11 to pass the PDA). *See* *Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669, 679-680 (1983) n. 17. The Court in *Newport News* cited to Representative Hawkins’ logic that “it seems only commonsense, that since only women can become pregnant, discrimination against pregnant people is necessarily discrimination against women, and that forbidding discrimination based on sex therefore clearly forbids discrimination based on pregnancy.” *Id;* *See* 123 Cong. Rec.(*Extensions of Remarks*) 10581-3 (Apr. 5, 1977). The Court also noted, inter alia, Senator Williams’ remarked that “this bill is simply corrective legislation, designed to restore the law with respect to pregnant women employees to the point where it was last year, before the Supreme Court's decision in *Gilbert*. . .” *Newport News,* 462 U.S. at 679-680, n. 17. *See also* 123 Cong. Rec. 29387 (1977). [↑](#footnote-ref-102)
102. In a well-known and often-cited law review article, *Jane Crow*, Pauli Murray and Mary O. Eastwood, argued that antifeminism and racism are parallels that may illuminate how to interpret the law to better protect women from discrimination. Pauli Murray & Mary O. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 Geo. Wash. L. Rev. 232, 232 (1965). [↑](#footnote-ref-103)
103. Amended in 1972, section 701 (j) “‘religion’ includes…observance… practice…and…belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.” Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103 (codified as amended at 42 U.S.C. §2000e(j) (1994)). *See* Debbie N. Kaminer, *Title VII's Failure to Provide Meaningful and Consistent Protection of Religious Employees: Proposals for an Amendment*, 21 Berkeley J. Emp. & Lab. L. 575, 580 (2000) (arguing Congress intended § 701(j) to guarantee a higher level of accommodation than the Supreme Court has provided, and a congressional amendment is necessary because the statutory language has failed to provide guidance to employers and protection to employees). [↑](#footnote-ref-104)
104. In one of the first cases to apply the religious discrimination protection, in *Dewey v. Reynolds* the Supreme Court, in an equally divided court, affirmed the Sixth Circuit holding that there was no burden on an employer to uphold a duty to accommodate an employee’s religious beliefs. 402 U.S. 689 (1971) (affirming in a 4-4 split decision per curiam). Congress thereafter clarified the statute, defining “religious” broadly. *Id.* *See* 118 Cong. Rec. 705 (1972). [↑](#footnote-ref-105)
105. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977) (ruling, in absence of a clear statutory definition of a reasonable accommodation, that requiring employer to “bear more than a de minimis cost” is an undue hardship and an *un*reasonable accommodation). In 1978, Commission conducted public hearings on religious discrimination in New York City, Milwaukee, and Los Angeles in order to respond to the concerns raised by *Hardison*. U.S. E.E.O.C., Guidelines On Discrimination Because Of Religion 29 C.F.R. Part 1605 (Jul. 1, 2011), available at [http://www.gpo.gov/fdsys/pkg/CFR-2011-title29-vol4/xml/CFR-2011-title29-vol4-part1605.xml](http://www.gpo.gov/fdsys/pkg/cfr-2011-title29-vol4/xml/cfr-2011-title29-vol4-part1605.xml) (raising concerns about the extent of the accommodation under *Hardison*, practices not being accommodated, and employer’s anticipatory concerns about business hardship with no or little actual experience of hardship). [↑](#footnote-ref-106)
106. *See* Jennifer Ann Drobac & Jill L. Wesley, *Religion and Employment Antidiscrimination Law: Past, Present, and Post Hosanna-Tabor,* 69 N.Y.U. Ann. Surv. Am. L. 761, 785 (2014) [↑](#footnote-ref-107)
107. *See* Brief for Petitioner at 5-6, *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015). [↑](#footnote-ref-108)
108. *Id.* at 4-5. [↑](#footnote-ref-109)
109. *Id.* at 6-7. [↑](#footnote-ref-110)
110. *E.E.O.C. v. Abercrombie & Fitch Stores, Inc*., 798 F. Supp. 2d 1272, 1283 (N.D. Okla. 2011) *rev'd and remanded,* 731 F.3d 1106 (10th Cir. 2013) *rev'd and remanded,* 135 S. Ct. 2028 (2015). [↑](#footnote-ref-111)
111. *Id.* [↑](#footnote-ref-112)
112. *Abercrombie*, 135 S. Ct. at 2033 (ruling if the applicant actually requires an accommodation of that religious practice, and the employer's desire to avoid the prospective accommodation is *a* motivating factor in its decision, the employer violates Title VII.) [↑](#footnote-ref-113)
113. *Id.* at 2033. Only Justice Clarence Thomas dissented, explaining that he would have found that the store’s Look Policy did not constitute intentional religious discrimination because the policy applies to all employees, not just Muslims. *Id.* at 2037. [↑](#footnote-ref-114)
114. Richard Darby, *Photograph of Helen Chavez, Cesar Chavez and Robert F. Kennedy*, Wayne State University, Walter P. Reuther Library, posted Jul. 24, 2008, (captioned “On March 10, 1968, Cesar Chavez breaks his twenty-five-day fast by accepting bread from Senator Robert Kennedy, Delano, California),” available at <http://reuther.wayne.edu/node/171> (last visited Jul. 26, 2015). *See* Nathan Heller, *Hunger Artist: How Cesar Chavez Disserved His Dream*, New Yorker, Apr. 14, 2014 (hereinafter Heller), available at <http://www.newyorker.com/magazine/2014/04/14/hunger-artist-2> (last visited Jul. 26, 2015). [↑](#footnote-ref-115)
115. As with the prohibition against sex discrimination, the EEOC’s early enforcement of Title VII’s enforcement of the prohibition against national origin discrimination generated enormous criticism. This criticism reached its apex in 1966 with the “Albuquerque walkout,” when several representatives of Latino groups walked out of an EEOC public hearing on national origin discrimination when only one Commissioner showed up. *See* Craig Kaplowitz, LULAC, Mexican Americans, and National Policy102 (2005). This walkout led to demands for more vigorous enforcement of Title VII on behalf of Latinos and unprecedented unity with Latino advocacy groups. *See* *id.*; *see also* Julie Leininger Pycior, LBJ and Mexican Americans: The Paradox of Power Paperback (1997). [↑](#footnote-ref-116)
116. Civil Rights Act of 1964 §703 (codified as amended 42 U.S.C. 2000e-2 (2012)) (The statutory term “national origin” is not defined in the 1964 Act). In a solitary statement, Congressman Roosevelt, noted “[national origin] means the country from which you or your forebears came. . . . You may come from Poland, Czechoslovakia, England, France, or any other country.” 110 Cong. Rec. 2549 (1964). The Supreme Court agreed in *Espinoza,* the only Supreme Court case examining the scope of the prohibition, holding that prohibitions based on “citizenship” did not violate Title VII’s prohibition against “national origin” discrimination. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88 (1973). The Court ruled that “the term ‘national origin’ on its face refers to the country where a person was born, or . . . the country from which his or her ancestors came” whether they are a citizen or not). *Id.* The EEOC compliance manual states that national origin discrimination can manifest as discrimination based on “ethnicity,” “physical, linguistic, or cultural traits” or “perception.” U.S. E.E.O.C., EEOC Compliance Manual*, Section 13: National Origin Discrimination*, Dec. 2, 2002, available at <http://www.eeoc.gov/policy/docs/national-origin.html> (last visited Jul. 26, 2016). The courts generally have been reluctant to expand the concept of “national origin” to extend to discriminatory conduct and barriers believed to be based on immigration status. Even though the EEOC has stated that language and national origin are linked, the courts have also struggled with that relationship particularly in the context of workplace language prohibitions. *Id.* In two early cases, *Spun Steak* and *Gloor*, the courts upheld English-only policies that applied to the work area, but allowed exceptions to the policy during breaks or personal time. *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1490 (9th Cir. 1993), *reh’g denied*, 13 F.3d 296 (9th Cir. 1993), *cert. denied*, 512 U.S. 1228 (1994) (finding that there may be some circumstances in which English-only policies could, along with other discriminatory acts “contribute to an overall environment of discrimination”); *Garcia v.* *Gloor,* 618 F.2d 264, 270 (5thCir. 1980) (stating that when “a person speaks only one [language] or to a person who has difficulty using another language than the one spoken in his home, language might well be an immutable characteristic like skin color, sex or place of birth” thus, finding that bi- or multi- lingual employees have a choice). *But* *see* [*Maldonado v. City of Altus, 433 F.3d 1294, 1304 (10th Cir.2006)*](https://a.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2008126095&pubNum=506&originatingDoc=I030c18b5e09b11ddb5cbad29a280d47c&refType=RP&fi=co_pp_sp_506_1304&originationContext=document&transitionType=DocumentItem&contextData=%2528sc.DocLink%2529#co_pp_sp_506_1304) (stating that “English-only policies are not always permissible; each case turns on its facts”), *overruled on other grounds by* [*Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006)*](https://a.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2009404759&pubNum=708&originatingDoc=I030c18b5e09b11ddb5cbad29a280d47c&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=%2528sc.DocLink%2529); *EEOC v. Premier Operator Servs.*, 113 F. Supp. 2d 1066, 1069-1070 (N.D. Tex. 2000) (rejecting *Gloor*, deferring to EEOC guidelines to find that the blanket English only policy imposed on *bilingual* employees was discriminatory, and stating that expert testimony regarding “code-switching,” an unconscious act of alternating between languages, suggests that speaking English only was not a matter of choice). Though there has been much insightful scholarship exploring the contours of national origin discrimination, the practical development of the protections in the courts has been slow relative to the prohibitions against race and sex discrimination. *See, e.g.*, Ming Hsu Chen, *Governing by Guidance: Civil Rights Agencies and the Emergence of Language Rights*, 49 Harv. C.R.-C.L. L. Rev. 291 (2014) (noting that the EEOC’s non-precedential, progressive guidance on national origin discrimination is valuable in advancing civil rights); Mark Colón, *Line Drawing, Code Switching, and Spanish As Second-Hand Smoke: English-Only Workplace Rules and Bilingual Employees*, 20 Yale L. & Pol'y Rev. 227, 229 (2002) (reviewing early cases that analyzed English-only workplace rules and concluding that those cases “understated the discriminatory impact of English-only workplace rules on all national origin language minorities, particularly those that the leading cases describe as fully bilingual”); Juan F. Perea, *Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII*, 35 Wm. & Mary L. Rev. 805, 807 (1994) (noting that “[d]espite [national origin’s] parallel status and equal longevity in Title VII [with race and sex], the prohibition against ‘national origin’ discrimination remains, as it began, largely undeveloped and ineffective.”) ; Mari Matsudi, *The Voices of America: Accent, Anti-discrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 Yale L. J. 1329 (1991) (reviewing accent discrimination as a form of national origin discrimination). Recently, the EEOC held a meeting discussing the emerging issues involving national origin discrimination. U.S. E.E.O.C., *Written Testimony of Thomas A. Saenz, MALDEF*, Nov. 13, 2013, <http://www.eeoc.gov/eeoc/meetings/11-13-13/saenz.cfm> (noting some new issues in national origin, specifically Latino/a discrimination include, multiple-bases discrimination and customer preference or “business image” discrimination, which effectively bar minorities from public contact jobs. Relegated to the backroom, kitchen or laundry staff, he argues Latinos suffer harms including perpetuation of stereotypes, lower compensation and lost opportunities, such as promotions.). [↑](#footnote-ref-117)
117. Miriam Pawel, The Crusades of Cesar Chavez: A Biography 159 (2014). *See* Heller, *supra* note 113. [↑](#footnote-ref-118)
118. Pawel, *supra* note 116, at 159. [↑](#footnote-ref-119)
119. *Id.* [↑](#footnote-ref-120)
120. *Id.* [↑](#footnote-ref-121)
121. The King Center, *Telegram from MLK to Cesar Chavez*, Jul. 8, 2015 4:00 pm, *available at* <http://www.thekingcenter.org/archive/document/telegram-mlk-cesar-chavez> [hereinafter Telegram]. [↑](#footnote-ref-122)
122. Telegram, *supra* note 120. [↑](#footnote-ref-123)
123. The EEOC has provided longstanding leadership in this area. *See* P. David Lopez & Stephanie Goulston-Madison, *Employment Discrimination Law: A Model for Enforcing the Civil Rights of Trafficking Victims,* *in* Human Trafficking Reconsidered: Rethinking the Problem, Envisioning New Solutions (Kimberly Kay Hoang and Rhacel Salazar Parreñas eds., 2014). *See, e.g.,* *Chellen v. John Pickle Co.*, 446 F. Supp. 2d 1247, 1273 (N.D. Okla. 2006) (ordering company to pay $1.24 million to 52 male victims of national origin discrimination and “human trafficking” who were recruited from India as skilled laborers and then subjected to widespread abuse, intimidation and exploitation); U.S. E.E.O.C., *Written Testimony of Anna Park EEOC Regional Attorney*, Jan. 19, 2011, *available at* <http://www.eeoc.gov/eeoc/meetings/1-19-11/park.cfm> (explaining the model of human trafficking by contracting agencies, notably in *EEOC v. Trans Bay Steel*). *See also* U.S. E.E.O.C., *Selected List of Pending and Resolved Cases Involving Farmworkers from 1999-Present,* (last updated June 2015), available at <http://www.eeoc.gov/eeoc/litigation/selected/farmworkers_august_2014.cfm> (last visited Jul. 26, 2015). At the EEOC Human Trafficking and Forced Labor Meeting, Sathaporn Pronsrisirisak, charging party in *EEOC v. Trans-Bay Steel* testified that he looked for a job in America because he wanted a better life for his wife and small child. U.S. E.E.O.C., *Written Testimony of Sathaporn Pornsrisirisak*, Jan. 19, 2011, *available at* <http://www.eeoc.gov/eeoc/meetings/1-19-11/pornsrisirisak.cfm> (last visited Jul. 26, 2015). Pronsrisirisak shared his experience of applying in Thailand for a welder position and arriving in California where he was forced to work in a restaurant, and live in a communal home with twenty-seven other workers without amenities. Their passports were seized, but ultimately some decided to escape. *Id.* The EEOC secured T-visas for the workers, brought a suit against Trans Bay Steel and ultimately prevailed, securing compensatory damage, legal status, education and job opportunities. *Id.* In 2006, Pronsrisirisak finally reunited with his wife and child. *Id.* Despite the EEOC’s pioneering work in bringing cases on behalf of vulnerable workers such as farm-workers, migrant workers, disabled workers and women, there remain many challenges barring success in eradicating such discrimination. Some of the most significant challenges include data gathering “because of the seasonal, migrant and temporary nature of agricultural work and the largely unauthorized worker population.” *See* Sara Kominers, *Working in Fear: Sexual Violence Against Women Farmworkers in the United States*, OXFAM America 1 (2015), *available at* <http://www.northeastern.edu/law/pdfs/academics/phrge/kominers-report.pdf> (last visited Jul. 26, 2016). *See also Rape in the Fields,* PBS, Jun. 25, 2013, *available at* <http://www.pbs.org/wgbh/pages/frontline/rape-in-the-fields/>; *Rape in the Night Shift*, PBS, Jun. 23, 2015, *available at* <http://www.pbs.org/wgbh/pages/frontline/rape-on-the-night-shift/>. Presently, discrimination against immigrant and vulnerable workers is a top enforcement priority. *See* *Strategic Enforcement Plan FY 2013-2016*, EEOC (last visited Jul. 17, 2015) <http://www.eeoc.gov/eeoc/plan/sep.cfm> (focusing on “disparate pay, job segregation, harassment, trafficking and discriminatory policies affecting vulnerable workers who may be unaware of their rights under the equal employment laws, or reluctant or unable to exercise them”). [↑](#footnote-ref-124)
124. Taylor Brach, At Canaan’s Edge 259-66 (2006). [↑](#footnote-ref-125)
125. *Id.* at 259-66 (2006). *See* Michael D’Orso & John Lewis, Walking with the Wind 412 (2015). [↑](#footnote-ref-126)
126. David Garrow , Bearing the Cross: Martin Luther King, Jr., and the Southern Christian Leadership Conference (2004). [↑](#footnote-ref-127)
127. Brach, At Canaan’s Edge, *supra* note 123, at 758 (2006); Philip A. Klinker & Rodgers M. Smith, The Unsteady March: the rise and Decline of Racial Equality in America, 244 (2002) (noting that this speech occurred post-passage of the “momentous civil rights bills…. Yet, the everyday condition of most African Americans was little better” and the nation was “wracked” with racial violence). [↑](#footnote-ref-128)
128. Brach, *supra* note 1, at 259-66 (2006). [↑](#footnote-ref-129)
129. D’Orso & Lewis, *supra* note 124 at 412 (2015). [↑](#footnote-ref-130)
130. Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations As Antidiscrimination*, 153 U. Pa. L. Rev. 579, 627 (2004) (noting that “much of the strength of the disability rights movement's success in gaining the ADA's passage came from what Representative Tony Coelho [who introduced the bill and is epileptic] referred to as a “hidden army” of legislators who had instinctive and personal understanding of the stigma attached to disability”). [↑](#footnote-ref-131)
131. Tari Susan Hartman, Photograph of ADA Anniversary March Participants Holding Banner that says, “Injustice anywhere is a threat to justice everywhere.” Martin Luther King Jr., Southern Disability Law Center (2015) <http://www.sdlcenter.org/>. *See* Stein, *supra* note 129, at 612 (aligning challenges defining discrimination of sex, race and disability stating that “[c]anonical scholarship also distinguishes the treatment of people with disabilities from that of other protected groups because it conceives of and discusses disability as a biologically compelled reality, rather than as a contingent social construct. In so doing, these scholars make the same error about disability that the law made about race in earlier times: they drape an issue of variable social construction in the guise of fixed scientific veracity”). [↑](#footnote-ref-132)
132. In 1990, Congress amended the ADA to correct the narrow interpretations of the statute. *See* Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 Berkeley J. Emp. & Lab. L. 19, 23 (2000) (arguing that “the pattern of narrow and begrudging interpretations of the ADA derives from the fact that the courts do not fully grasp, let alone accept, the statute's reliance on a civil rights model for addressing problems that people with disabilities face in the workplace”). [↑](#footnote-ref-133)
133. *See* *E.E.O.C. v. Hill Country Farms, Inc.*, 899 F. Supp. 2d 827, 829 (S.D. Iowa 2012) *aff'd*, 564 F. App'x 868 (8th Cir. 2014). [↑](#footnote-ref-134)
134. Brief of the E.E.O.C. as Appellee at 4, *E.E.O.C. v. Hill Country Farms, Inc.*, 564 F. App'x 868 (8th Cir. 2014). *See also* Dan Barry, *The ‘Boys’ in the Bunkhouse: Toil, Abuse and Endurance in the Heartland*, This Land Column, NYTimes, Mar. 9, 2014, (hereinafter Barry) *available at* <http://www.nytimes.com/interactive/2014/03/09/us/the-boys-in-the-bunkhouse.html?_r=0>. [↑](#footnote-ref-135)
135. Brief of the E.E.O.C. as Appellee at 5. [↑](#footnote-ref-136)
136. Regional Attorney of the EEOC’s Dallas District Office Robert A. Canino, who tried the case stated, “[t]he isolation and exploitation these men suffered for many years, while the fruits of their labor were cruelly consumed by their employer, cannot be explained away by good intentions, nor can the violations of the ADA be excused as antiquated social policy”). U.S. E.E.O.C., Press Release, *Workers with Intellectual Disabilities Abused by Texas-Based Company for Years, EEOC Charges*, Apr. 6, 2011, <http://www.eeoc.gov/eeoc/newsroom/release/4-6-11b.cfm> (last visited Jul. 26, 2015). [↑](#footnote-ref-137)
137. *Hill Country Farms*, 899 F. Supp. at 829. [↑](#footnote-ref-138)
138. *Id.* [↑](#footnote-ref-139)
139. U.S. E.E.O.C., Press Release, *Jury Awards $240 Million for Long-Term Abuse of Workers with Intellectual Disabilities***,** EEOC, May, 1, 2013, <http://www.eeoc.gov/eeoc/newsroom/release/5-1-13b.cfm> (last visited Jul. 26, 2015). [↑](#footnote-ref-140)
140. *See* Civil Rights Act of 1991, 42 U.S.C. §1981 (2012) (stating, commensurate with the employer’s number of employee’s (14 or fewer up to more than 500), compensatory damages must be capped at $50,000, $100,000, $200,000 or $300,000). *See* U.S. E.E.O.C. *Closing the Gaps - Making Title VII More Effective for All: Damages, Jury Trials, and the Civil Rights Act of 1991*, June 30, 2004, *available at* <http://www.eeoc.gov/eeoc/history/40th/panel/closinggaps.html> (observing that the Civil Rights Act of 1991’s addition of compensatory and punitive damages to the panoply of remedies available to victims of intentional discrimination was game-changer, though the damages are caped, calibrated with the size of the employer). However, 1991 was the last time the damages caps were adjusted for, making the current standard for damages inexorably outdated and arguably corporate-friendly. *See also* Lynn Ridgeway Zehrt, *Twenty Years of Compromise: How the Caps on Damages in the Civil Rights Act of 1991 Codified Sex Discrimination*, 25 Yale J.L. & Feminism 249, 316 (2014) (arguing for elimination of the statutory caps that currently “undermine Title VII's effectiveness [thus,] eliminating the two-tiered approach to damages, [and demonstrating a] clear commitment to eradicating sex discrimination”). It is worth noting that the present value of the Henry’s Turkey’s verdict in 1991 is .67 of the original verdict. Consider that the purchasing value of $300,000 in 1991 is the equivalent of $521,000 today. See Measuring Worth, <http://www.measuringworth.com/uscompare/relativevalue.php> (last visited Jul. 21, 2015). Yet, the statutory caps have not been raised since their adoption in 1991. To illustrate the vintage of the caps, in 1991, the Soviet Union had just dissolved, Baywatch was one of the most popular TV shows, digital pagers just gaining traction and Justin Bieber, Mylie Cyrus and Selena Gomez had not yet been born. *See* Rabecca Hoffman, *Remembering the Year: 1991*, New York Public Library, May 9, 2011, <http://www.nypl.org/blog/2011/05/09/remembering-year-1991>; 20 Tanner Greenring, *Incredibly Famous People Who Were Born in the 90’s*, Buzzfeed, Mar. 27, 2013, 1:09 P.M., <http://www.buzzfeed.com/awesomer/incredibly-famous-people-who-were-born-in-the-90s#.yvqBMrMgl> (last visited Jul. 26, 2015). Henry’s Turkey’s in one of a rapidly growing list of jury verdicts won by the EEOC and other plaintiffs reduced under the nearly twenty-five-year-old caps. *See,* *e.g*., Harris Farms, New Breed, Mid-American, Chuck E. Cheese, Go Daddy, and many, many more. [↑](#footnote-ref-141)
141. Emma Dessau, *The Men of Atalissa*, PBS, March 8, 2014 (interviewing Kassie Bracken & Dan Barry), <http://www.pbs.org/pov/blog/povdocs/2014/03/the-men-of-atalissa-watch-the-documentary-go-behind-the-story-with-journalists-from-the-new-york-times/> (collaborating with the New York Times to produce a documentary on the *Hill Country Farms* case); Yuki Noguchi, *A ‘Wake-Up Call’ to Protect Vulnerable Workers from Abuse*, NPR, May 16, 2013, *available at* <http://www.npr.org/2013/05/16/184491463/disabled-workers-victory-exposes-risks-to-most-vulnerable>. [↑](#footnote-ref-142)
142. Barry, supra note 133. [↑](#footnote-ref-143)
143. *Id.* [↑](#footnote-ref-144)
144. There are few prohibitions enforced by the EEOC that have not been discussed in this article including color discrimination, under Title VII and the Age Discrimination in Employment Act (ADEA), Equal Pay Act (EPA) and the Genetic Information Nondiscrimination Act (GINA). *See* U.S. E.E.O.C., *EEOC Compliance Manual on Race and Color Discrimination*, Apr. 19, 2006, *available at* <http://www.eeoc.gov/policy/docs/race-color.html> (last visited Jul. 26, 2015); Age Discrimination in Employment Act of 1967, 81 Stat. 602, (codified as amended, 29 U.S.C. §621 et seq.); Lily Ledbetter Fair Pay Act Pub. L. No. 111-2, § 3, 123 Stat. 5, 5-6 (2009) (codified at 42 U.S.C. 2000e-5 (2006) and scattered sections of 29 U.S.C.); GINA, Pub. L. No. 110-233, 122 Stat. 881 (2008) (codified at scattered sections of 42, 29 and 26 U.S.C.). [↑](#footnote-ref-145)
145. The sometimes deified images of both King and Chavez, reflected in state holiday celebrations for both and a national holiday for King, have served to rally a younger generation of social activists and enshrine them as part of a greater pantheon of “American heroes.” But as with other “historical heroes,” several revisionists approach their subjects with full humanity and complexity perhaps elevating further the scope of their accomplishments. *See generally* David Garrow, *supra* note 125; Dante Ramos, *“I May Not Get There With You: The True Martin Luther King, Jr. by* Michael Eric Dyson,*”* Salon, Dec. 24, 1999 12:00 PM, <http://www.salon.com/1999/12/24/dyson_2/> (last visited Jul. 26, 2015). [↑](#footnote-ref-146)
146. We seem to have come full circle in recent history, evidenced by President Obama’s commemoration of the March on Washington in 2013 and most recently, his eulogy in Charleston, South Carolina. Michiko Kakutani, *Obama’s Eulogy, Which Found Its Place in History*, NYTimes, Jul. 3, 2015, [http://www.nytimes.com/2015/07/04/arts/obamas-eulogy-which-found-its-place-in-history.html?src=me&module=Ribbon&version=context&region=Header&action=click&contentCollection=Most%20Emailed&pgtype=Blogs](http://www.nytimes.com/2015/07/04/arts/obamas-eulogy-which-found-its-place-in-history.html?src=me&module=ribbon&version=context&region=header&action=click&contentcollection=most%252520emailed&pgtype=blogs) (last visited Jul. 26, 2015). [↑](#footnote-ref-147)
147. Robert Caro, The Years of Lyndon Johnson: The passage of power, 176 (2012). *See also* Doris Kearns Goodwin, Lyndon Johnson and the American Dream (1991). [↑](#footnote-ref-148)
148. Caro, *supra* note 146, at 176. See Robert Dallek, Flawed Giant: Lyndon Johnson and his Times, 1961-1973 4 (1998) (“LBJ’s father, was a hard-driving, grandiose character whose two terms in the Texas lower house and activism in local politics only partly satisfied his reach for public influence. Rebekah Baines, LBJ’s mother, took pride in her prominent Texas ancestors and expected her oldest son to reach heights worthy of her family’s heritage.”). [↑](#footnote-ref-149)
149. *President’s Johnson’s Special Message to the Congress: The American Promise*, Mar. 15, 1965 LBJ Presidential Library, <http://www.lbjlibrary.org/lyndon-baines-johnson/speeches-films/president-johnsons-special-message-to-the-congress-the-american-promise> (last visited Jul. 26, 2015). [↑](#footnote-ref-150)
150. President John F. Kennedy, *Excerpt from a Report to the American People on Civil Rights*, John F. Kennedy Presidential Library & Museum, June 11, 1963, <http://www.jfklibrary.org/Asset-Viewer/LH8F_0Mzv0e6Ro1yEm74Ng.aspx> (last visited Aug. 2, 2015). [↑](#footnote-ref-151)