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THE 1964 CIVIL RIGHTS ACT: THE CRUCIAL ROLE OF SOCIAL MOVEMENTS IN THE ENACTMENT AND IMPLEMENTATION OF ANTI-DISCRIMINATION LAW

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The 1964 Civil Rights Act¹ is the most important and potentially powerful anti-discrimination law ever enacted by the U.S. Congress. Although the majestic guarantee of equal protection was enshrined in the Fourteenth Amendment in 1868, it took nearly another century before all three branches of government were willing to act in a meaningful way to enforce it. What led the Congress to act? Why has the implementation of the Act ebbed and flowed? What do the answers to these questions suggest about its future implementation and the future of anti-discrimination law more generally?

I. THE CONVENTIONAL STORY

Most lawyers will say, as an article of faith, that the 1964 Civil Rights Act was largely the result of the 1954 *Brown* decision.² In *Brown*, the Court held that race-based segregation of elementary and secondary public schools violated the Fourteenth Amendment.³ The conventional story is that the principle announced in *Brown*, that “separate but equal” was inherently unequal, quickly spread from schools to all walks of life, leading Congress to act. Indeed, most commentators (and I assume most readers) have “little doubt”⁴ about the compelling nature of this story. As C. Herman Pritchett put it in 1964, “[I]f the Court had not taken that first giant step in 1954, does anyone think there would now be a Civil Rights Act of 1964?”⁵

The conventional story also suggests that after passage of the Act the interplay between legislation and adjudication has been the determining factor of its efficacy. In particular, judicial interpretation and enforcement of the Act

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

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

3. *Id.* at 493.

4. See Charles Lawrence, “*One More River to Cross*”—*Recognizing the Real Injury in Brown: A Prerequisite to Shaping New Remedies*, in *SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION* 49 (Derrick Bell ed., 1980).

5. C. Herman Pritchett, *Equal Protection and the Urban Majority*, 58 AM. POL. SCI. REV. 869, 869 (1964).

has determined its strength in combating discrimination. In other words, continuing implementation of the Act depends to a large extent on the reception it receives in the courts. To fight discrimination, then, the battle must be waged in the courts. This, too, is the conventional wisdom.

In this short article I suggest that the conventional story is both wrong and misleading. It is wrong because it misses the underlying structure of the battle against discrimination. The battle is, and has always been, political. Thus, the conventional story is off base on two key points. First, it under-appreciates the role of the civil rights movement in the creation of the 1964 Act. Second, it gives insufficient attention to the role of social movements in its implementation. It abstracts courts and law from the broader society in which they operate. Thus the conventional story is misleading because it suggests implementation is possible without political mobilization. In the rest of this article I elaborate on these points. In the final section, I illustrate the argument by considering how women mobilized to put teeth into the prohibition of discrimination on the basis of sex contained in Title VII of the Act.

II. THE ENACTMENT OF THE 1964 CIVIL RIGHTS ACT

Contrary to the conventional story, there is scant evidence that *Brown* contributed much to the passage of the 1964 Civil Rights Act.⁶ The Act owes its existence to the civil rights movement of the early 1960s that created a political and moral force that moved Congress and the courts. Consider, for example, how presidents reacted to the *Brown* decision. President Eisenhower refused to endorse the decision. Although he did send the 101st Airborne to Little Rock, Arkansas, in response to violence and the violation of federal court orders, he made no major effort to end discrimination. As Roy Wilkins, the Executive Secretary of the National Association for the Advancement of Colored People (NAACP), put it, “[I]f he had fought World War II the way he fought for civil rights, we would all be speaking German today.”⁷

President Kennedy was little better. During the 1960 campaign he stated that the President could end discrimination in federally assisted housing with the stroke of a pen, but it took over a year-and-a-half and an “Ink for Jack” campaign that flooded the White House with ink bottles before a “watered-down, non-retroactive order” was issued.⁸ The Kennedy administration offered no civil rights bill until February 1963, and the bill it offered then was “a collection of minor changes far more modest than the 1956 Eisenhower

6. See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 107–56 (1991).

7. ROY WILKINS & TOM MATHEWS, *STANDING FAST: THE AUTOBIOGRAPHY OF ROY WILKINS* 222 (1982).

8. VICTOR S. NAVASKY, *KENNEDY JUSTICE* 97 (1971).

program.”⁹ When a House subcommittee modified and strengthened the bill, Attorney General Robert Kennedy met with the members of the full Judiciary Committee in executive session and “criticized the subcommittee draft in almost every detail.”¹⁰ The President specifically objected to the prohibition of job discrimination that became Title VII, the provision making the Civil Rights Commission a permanent agency, the provision empowering the attorney general to sue on behalf of individuals alleging racial discrimination, and the provisions mandating no discrimination in federally funded programs and allowing fund cut-offs.¹¹ The conventional story finds no support in the tepid efforts of both Eisenhower and Kennedy in reaction to *Brown*.

President Johnson was supportive of civil rights. He lobbied hard for the Civil Rights Act. He gave several moving speeches to Congress and the nation in support of the 1964 Civil Rights Act (and the 1965 Voting Rights Act). In those speeches, however, he focused on the violence that peaceful black protesters were subjected to, the unfairness of racial discrimination, and the desire to honor the memory of President Kennedy, not Court decisions.¹²

The legislative history of the Act also provides no evidence for the conventional story. If the conventional story is correct, one would have expected at least some Senators to talk about the constitutional mandate in *Brown* as an argument for passing the bill during the Senate debate, but this is not the case. In the lengthy Senate debates there was hardly a mention of *Brown*. Among the approximately four million words spoken in the Senate, references to *Brown* can be found on only a few dozen out of many thousands of pages of debate.¹³ While much of the focus of the debate was on the constitutionality of the proposed legislation, and on the Fourteenth Amendment, the concern was not with how *Brown* mandated legislative action, or even how *Brown* made such a bill possible. This is surprising because it would have been very easy for pressured and uncertain members of Congress to shield their actions behind the constitutional mandate announced by the Court. That they did not credit the Court with affecting their decisions prevents the debates from providing evidence for the conventional story. Thus, there does not appear to be evidence for the influence of *Brown* on legislative action.

9. GARY ORFIELD, *THE RECONSTRUCTION OF SOUTHERN EDUCATION: THE SCHOOLS AND THE 1964 CIVIL RIGHTS ACT* 24 (1969).

10. DANIEL M. BERMAN, *A BILL BECOMES A LAW: CONGRESS ENACTS CIVIL RIGHTS LEGISLATION* 21–22 (2d ed. 1966); see also CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* 44–45 (1985).

11. BERMAN, *supra* note 11, at 22–23; Jack Greenberg, *Preface to Blacks and the Law*, 407 *ANNALS AM. ACAD. POL. & SOC. SCI.* ix, ix (1973).

12. ROSENBERG, *supra* note 6, at 121.

13. *Id.*

What, then, led to congressional action and the passage of the Act? The answer is the civil rights movement and the political pressure it created. From the Montgomery bus boycott to the sit-ins to the Freedom Rides to the Birmingham demonstrations of 1963 to the March on Washington, the civil rights movement raised the issue of racial discrimination in a way that was impossible to ignore. This was especially the case when peaceful protestors were met with violence from local whites and from local police, and when the press covered it. When Birmingham, Alabama Police Commissioner Bull Connor's police unleashed vicious attack dogs and sprayed high-power water cannons on unarmed, peaceful protestors, some of whom were children, and the national media recorded it, the nation was aghast. It was the courage of the protestors, and the national unmasking of the viciousness of racial segregation, that created the pressure for civil rights. Civil rights action, especially in the 1960s, was based in large part on the elite belief that, unless there was federal action on civil rights, mass bloodshed would occur. As Berman notes, "First President Kennedy and then President Johnson, as well as the bipartisan leadership in Congress, came to the conclusion that only a strong civil rights bill could possibly prevent widespread racial bloodshed and utter catastrophe for the nation."¹⁴ The fear of violence, not the inspiration of Court action, was most clearly a major impetus for federal action.

The lesson to be drawn from this brief history is that enacting powerful anti-discrimination law requires political mobilization. Members of Congress are unlikely to take courageous positions unless they are pressured to do so. *Brown* was decided in 1954, but the Congress did not act for a decade. What was missing was powerful political mobilization. When that mobilization occurred, Congress responded.

III. IMPLEMENTATION

If the enactment of the 1964 Civil Rights Act was the result of political mobilization, what about its implementation? Here, too, the evidence points to political mobilization as key.

The conventional story abstracts courts and judges from the social and political world in which they live. Judges do not come out of thin air; they are appointed through a decidedly political process. The more political mobilization there is around anti-discrimination law, the more likely it is that judges will be appointed who are sympathetic to its aims. This suggests that the future of anti-discrimination law largely depends on political mobilization. The movement that pressured Congress to act in 1964 has never again reached the same level of power and thus influence. The result has been a fluctuation in the Act's implementation. The point is simple: without the kind of political

14. BERMAN, *supra* note 11, at 139.

mobilization that led to passage of the Act, the battle to end discrimination is unlikely to make major strides.

The crucial role of political mobilization is well illustrated by the treatment of sex discrimination in Title VII.¹⁵ Interestingly, although the Act was designed to end discrimination against African-Americans, women have greatly benefited. This is largely because of the political mobilization of women that occurred in the late 1960s and early 1970s.

The inclusion of the prohibition of sex discrimination in Title VII appears to have resulted in large part from the failure of a tactical move by opponents of the civil rights bill.¹⁶ The thinking was that prohibiting sex discrimination in hiring was such a silly idea that its inclusion in the bill would doom it. The amendment was introduced as “my little amendment” by Representative Howard W. Smith, chairman of the House Rules Committee and an implacable opponent of civil rights.¹⁷ In support of his amendment, Smith read a letter to the House from a woman complaining that there were 2,661,000 more women than men and asking Congress to do something about it.¹⁸ “I read that letter,” Smith said on the floor of the House, “just to illustrate that women have some real grievances.”¹⁹ After this action that, Caroline Bird reports, “brought down the house,”²⁰ Smith opposed transferring the amendment to Title X, Miscellaneous, because, as he put it, “women are entitled to more dignity than that.”²¹ The sex amendment was supported by a host of Southern members distinguished by their historic opposition to civil rights and was opposed by strong liberal supporters of the bill such as Representatives John Lindsay, Frank Thompson, and Edith Green, author of the Equal Pay Act.²² Unions supportive of making racial discrimination illegal opposed the amendment, as did Esther Peterson, Director of the Women’s Bureau and Assistant Secretary of Labor.²³ Yale law professor Alexander Bickel criticized the amendment in the *New Republic* as likely to lead to the bill’s defeat.²⁴

Given this background, it is perhaps not surprising that although the amendment passed, the newly created Equal Employment Opportunity

15. 42 U.S.C. §§ 2000e–2000e-17 (2000).

16. For a fascinating study of the passage of the sex amendment, see generally Carl M. Brauer, *Women Activists, Southern Conservatives, and the Prohibition of Sex Discrimination in Title VII of the 1964 Civil Rights Act*, 49 J. S. HIST. 37 (1983).

17. CAROLINE BIRD & SARA WELLES BRILLER, *BORN FEMALE: THE HIGH COST OF KEEPING WOMEN DOWN* 3 (1968).

18. *Id.* at 4–5.

19. *Id.* at 5.

20. *Id.*

21. 88 CONG. REC. 2578 (1964) (statement of Rep. Smith); see also Brauer, *supra* note 19, at 45 (arguing fairly convincingly that Smith’s motives were “mixed”).

22. Brauer, *supra* note 19, at 50–51.

23. See *id.* at 51–52.

24. *Id.*

Commission (EEOC) decided to treat the prohibition on sex discriminations as a joke. Herman Edelsberg, its first executive director, publicly stated that the sex amendment was a “fluke” that was “conceived out of wedlock.”²⁵ He stated that he and others at the EEOC believed that men were “entitled” to female secretaries.²⁶

An EEOC member attending a White House conference on equal opportunity in August 1965 trivialized sex discrimination, saying it was unclear if the law would require Playboy clubs to hire male bunnies. The *New York Times* got into the act, labeling a Commission official the “Deputy Counsel on Bunnies.”²⁷ The *Times* editorialized: “[B]etter if Congress had just abolished sex itself . . . A maid can now become a man. Girl Friday is an intolerable offense. . . . The classic beginning of many wondrous careers in the Horatio Alger fashion—Boy Wanted—has reached its last chapter.”²⁸ Summing up the first few years of EEOC action on sex discrimination, Representative Martha Griffiths, speaking on the floor of the House, said that the EEOC had “started out by casting disrespect and ridicule on the law” but that its “unprofessional” and “wholly negative attitude” had “changed for the worse.”²⁹

The result of this attitude was inaction on the part of the federal government. For the next four years, the Justice Department did not file a single sex discrimination suit. The reason for this inaction, a Justice Department lawyer told the President’s Task Force on the Status of Women, was that the Justice Department responds to “social turmoil” and “[t]he fact that women have not gone into the streets is indicative that they do not take employment discrimination too seriously.”³⁰ That was soon to change.

Less than a decade later, however, “legal experts on women’s rights could aptly characterize Title VII ‘the most comprehensive and important of all federal and state laws prohibiting employment discrimination.’”³¹ How did this happen? It happened because the women’s movement exploded in the years following the passage of the Act, creating pressure for change to which judges and elected officials responded. The National Organization for Women (NOW), for example, was founded in 1966, in large part in reaction to this negative response to Title VII. Other groups were created as well, ranging from organizations of professional women to consciousness-raising groups of mostly younger women. Through mass demonstrations, protests, and

25. 89 CONG. REC. 13,689 (1966) (statement of Rep. Griffiths).

26. *Id.*

27. BIRD & BRILLER, *supra* note 20, at 13.

28. Editorial, *De-Sexing the Job Market*, N.Y. TIMES, Aug. 21, 1965, at 20.

29. 89 CONG. REC. 13,689 (1966) (statement of Rep. Griffiths).

30. JO FREEMAN, *THE POLITICS OF WOMEN’S LIBERATION: A CASE STUDY OF AN EMERGING SOCIAL MOVEMENT AND ITS RELATION TO THE POLICY PROCESS* 79 (1975).

31. Brauer, *supra* note 19, at 37.

lobbying, these groups brought the issue of sex discrimination squarely into public debate.

Both Congress and the courts responded. In 1972, for the first time and with large majorities, the Congress passed and sent to the states for ratification the Equal Rights Amendment to the Constitution. The Ninety-second Congress (1971–1973) “passed a bumper crop of women’s rights legislation—considerably more than the sum total of all relevant legislation that had been previously passed in the history of this country.”³² Included among this legislation, for example, was Title IX of the Education Amendments Act of 1972, which prohibits educational institutions that receive federal funds from discriminating on the basis of sex.³³ The courts, too, responded to the political mobilization, as the Supreme Court began the process of raising the bar over which gender-based classifications had to jump to survive scrutiny under the Equal Protection Clause of the Fourteenth Amendment.³⁴

The necessity as well as the success of this political pressure is illustrated by the treatment of pregnancy under disability plans. In *General Electric Company v. Gilbert*, the Supreme Court faced the question of whether a disability plan that excludes coverage for pregnancy and childbirth violates Title VII; the Court held that it did not.³⁵ In response, Congress enacted the Pregnancy Discrimination Act in October 1978, amending Title VII to make pregnancy discrimination a type of forbidden sex discrimination.³⁶ Women won protection against a form of sex discrimination not because of judges but rather in spite of them. They won because they were able to exert sufficient political pressure on Congress to override the Court.

IV. CONCLUSION

Overcoming discrimination is a good news/bad news story. The bad news is that discrimination is deeply enmeshed in the fabric of American life; it is hard to change. But there is good news. The good news is that change is possible. The enactment of the 1964 Civil Rights Act was a milestone, far more important than the *Brown* decision of 1954, in the battle against discrimination. It was made possible by widespread political mobilization. Similarly, the implementation of the Act has ebbed and flowed with the strength of the political pressure its supporters have been able to muster. This

32. FREEMAN, *supra* note 33, at 202.

33. 20 U.S.C. § 1681 (2000); *see also* FREEMAN, *supra* note 33, at 203.

34. The Court started with *Reed v. Reed*, 404 U.S. 71 (1971), which invalidated an Idaho law that preferred men to women as executors. Although the Court purported to employ a rational-relations test, the decision could only be explained by some sort of heightened scrutiny. *See id.* at 76. This was soon followed by *Craig v. Boren*, 429 U.S. 190 (1976), in which the Court adopted intermediate scrutiny as the constitutional test for gender-based classifications. *Id.* at 197.

35. 429 U.S. 125, 127–28 (1976).

36. 42 U.S.C. § 2000e(k) (2000).

is most clearly illustrated by the effectiveness of the women's movement. When women organized, implementation occurred.

If what I have argued is right, then the future of anti-discrimination law largely depends on political mobilization. Looking to courts to fight discrimination without the support of a political movement will work only sporadically, at best. There will be few supportive decisions, and those that are supportive are unlikely to be fully implemented. The challenge that advocates of anti-discrimination face today is that the political movement that pressured Congress to act in 1964 has never again reached the same level of power. Without the kind of political mobilization that led to passage of the Act, the battle to end discrimination is unlikely to make major strides. With that political mobilization, change is possible.