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TO END DIVISIONS: REFLECTIONS ON THE CIVIL RIGHTS  
ACT OF 1964

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## I. INTRODUCTION

He [Alexis de Tocqueville] defined the alternatives available to the slaveholding States with simplicity. They might emancipate the Negroes and treat them with some degree of civility, or perpetuate their serfdom for as long as possible. Emancipation, he saw, would solve few problems in the immediate future. The evidence suggested that freedom for the Negro intensified rather than alleviated the prejudice on the part of whites— United States Commission on Civil Rights, *Freedom to the Free*, 1963.<sup>1</sup>

We must not approach the observance and enforcement of this law in a vengeful spirit. Its purpose is not to punish. Its purpose is not to divide, but to end divisions— divisions which have all lasted too long. Its purpose is national, not regional. Its purpose is to promote a more abiding commitment to freedom, a more constant pursuit of justice, and a deeper respect for human dignity— President Lyndon Baines Johnson, July 2, 1964.<sup>2</sup>

In 1963, the United States Commission on Civil Rights and its chairman, John Hannah, published, *Freedom to the Free: Century of Emancipation, 1863-1963*.<sup>3</sup> The 246-page report outlined African Americans' struggle for constitutional rights and basic human dignity since the Emancipation Proclamation. Commission officials argued, "While taking into account the tremendous strides that have been made since 1863, the report also recognizes the existence of periods of disturbing lack of progress, of retrogression, and instances of violence and abuse. A gap between our recorded aspirations and actual practices still remains".<sup>4</sup> A sizeable portion of the report delineated the myriad ways that white Americans, using both law and custom, had systematically divested African Americans of their constitutional liberties.

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<sup>1</sup> U.S. COMM'N ON CIVIL RIGHTS, *FREEDOM TO THE FREE: CENTURY OF EMANCIPATION 1863 – 1963*, at 202 (1963).

<sup>2</sup> President Lyndon B. Johnson, Radio and Television Remarks Upon Signing the Civil Rights Bill (July 2, 1964).

<sup>3</sup> See *FREEDOM TO THE FREE: CENTURY OF EMANCIPATION 1863 – 1963*, *supra* note 1. The Civil Rights Act of 1957 created the Civil Rights Division of the Department of Justice. In its initial years, the Commission released numerous reports on the state of civil rights in the South prior to the Civil Rights bill and after. These reports, as it happened, became essential to policymakers' views about the problem of race in America and the South. In fact, if civil rights activism brought national attention to the problem of Jim Crow, the Commission's reports affirmed blacks' civil rights prerogatives with hard data and commentary. See *Civil Rights Act of 1957*, CIVIL RIGHTS DIGITAL LIBRARY (Nov. 20, 2013), [http://crdl.usg.edu/events/civil\\_rights\\_act\\_1957/](http://crdl.usg.edu/events/civil_rights_act_1957/); *The Commission's Early Years*, LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS & THE LEADERSHIP CONFERENCE EDUC. FUND, <http://www.civilrights.org/publications/reports/commission/early-years.html> (last visited Dec. 1, 2014); *The 60s: Laying the Foundation for Legislation*, LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS & LEADERSHIP CONFERENCE EDUCATION FUND, <http://www.civilrights.org/publications/reports/commission/the-60s.html> (last visited Dec. 1, 2014).

<sup>4</sup> See *FREEDOM TO THE FREE: CENTURY OF EMANCIPATION 1863 – 1963*, *supra* note 1, at 2.

One year after the report's publication, Washington ratified the most ambitious civil rights bill since Reconstruction, the Civil Rights Act of 1964 (CRA). On one hand, 1964's civil rights bill was the culmination of the American civil rights movement. On the other hand, policy elites and politicians designed the act to combat the very perpetuation of serfdom that Alexis de Tocqueville articulated in 1838. In fact, the authors of the 1963 report specifically relied on Tocqueville's *Democracy in America* to underscore the appalling persistence of mid-twentieth century racial apartheid in the United States.<sup>5</sup>

On the 50<sup>th</sup> anniversary of the Civil Rights Act of 1964, it's impossible to separate the CRA from the crisis that was 1960s American race relations. Resistance to Jim Crow not only led to bi-partisan support for the bill, but the civil rights movement brought national attention to racism's deepest inequities. Much has been made about the personal motives of high-ranking political figures and grass roots activists that encouraged the act's passage. Scholars such as Hugh Davis Graham emphasized how skillful politicians made the act's ratification possible and how bi-partisan support proved central to the CRA's ratification.<sup>6</sup> Experts have also shown that civil rights activists and leaders played an integral role in the bill's drafting and eventual ratification.<sup>7</sup> This reflection on 1964's civil rights bill, however, is an attempt to contextualize the act within the broader context of Jim Crowism and the deplorable state of American race relations in the 1960s. If policy-makers designed the Civil Rights Act of 1964 to subvert institutionalized bigotry and segregation, they also devised the bill to protect African Americans (and other minorities such as women) from the continuation of racist trends in American life.<sup>8</sup>

The Civil Rights Act of 1964, in many ways, was a panic reaction to the persistence of Jim Crow and the second-class citizenship of African Ameri-

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<sup>5</sup> See FREEDOM TO THE FREE: CENTURY OF EMANCIPATION 1863–1963, *supra* note 1, at 201–09.

<sup>6</sup> See generally, HUGH DAVIS GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960–1972, at 125–51 (1990) (discussing the relationship between inside politicking and the ratification of the Civil Rights Act of 1964).

<sup>7</sup> See generally TAYLOR BRANCH, PILLAR OF FIRE: AMERICA IN THE KING YEARS, 1963–65 (1998); DENNIS C. DICKERSON, MILITANT MODERATOR: WHITNEY M. YOUNG, JR. (1998); STEVEN F. LAWSON, CIVIL RIGHTS CROSSROADS: NATION, COMMUNITY, AND THE BLACK FREEDOM STRUGGLE (2003); YVONNE RYAN, ROY WILKINS: THE QUIET REVOLUTIONARY AND THE NAACP (2014) (giving examples of the relationship between civil rights activism and federal civil rights policies).

<sup>8</sup> See J. Morgan Kousser, *What Light Does the Civil Rights Act of 1875 Shed on the Civil Rights Act of 1964*, in LEGACIES OF THE CIVIL RIGHTS ACT 33, 33–40 (Bernard Grofman ed., 2000); see also Sidney M. Milkis, *The Modern Presidency, Social Movements, and the Administrative State: Lyndon Johnson and the Civil Rights Movement*, in RACE AND AMERICAN POLITICAL DEVELOPMENT 256, 258–59 (Joseph Lowndes, Julie Novkov & Dorian T. Warren eds., 2008) (discussing race and American political development).

cans that segregation engendered. By 1964, Washington policymakers realized that they needed to craft a bill that finally addressed what Michael Harrington, in 1962's *The Other America*, called "an interlocking base of economic and racial injustice".<sup>9</sup> Prior to 1964, Southern whites used the letter of state and local law to systematically obstruct blacks' upwardly mobile aspirations. Those African Americans that migrated north found little relief from the ubiquity of bigotry.<sup>10</sup> African Americans were generally undereducated, relegated to the margins of economic possibility, humiliated and terrorized in public spaces, and commonly disenfranchised. By the mid-twentieth century, African Americans' lives were demonstrably inferior to their white counterparts.

By focusing on a number of the CRA's key titles – without belittling the act's importance to Latinos, women, et al.— this commentary illustrates how the act moved beyond eliminating segregation; it addresses how the racial climate of the early 1960s shaped public policy.<sup>11</sup> Broadly, the Civil Rights Act of 1964 sought to change the balance of racial (and gender-based) power in the America by using federal law to finally protect African Americans' right to live equal lives. After 1964, for the first time since Reconstruction, race was national policy agenda.<sup>12</sup> This agenda and the Civil Rights Act of 1964 are difficult to understand without considering just how deeply entrenched American racism was in the early 1960s. By examining the political and racial climates at the time of the Civil Rights Act, it is possible to better understand what policymakers hoped to address through the federal protections under the Civil Rights Act.

## II. THE CIVIL RIGHTS ACT OF 1964: IN CONTEXT

After a tumultuous year in Congress, President Lyndon Baines Johnson signed the Civil Rights Act of 1964 into law on July 2, 1964.<sup>13</sup> Congressman Emmanuel Celler (D-New York) actually introduced the bill just days after President John F. Kennedy delivered his monumental civil rights speech on the evening of June 11, 1963.<sup>14</sup> After President Kennedy's assas-

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<sup>9</sup> MICHAEL HARRINGTON, *THE OTHER AMERICA: POVERTY IN THE UNITED STATES* 65 (1981).

<sup>10</sup>On civil rights struggles in the north, see Thomas J. Sugrue, *Sweet Land of Liberty: The Forgotten Struggle for Civil Rights in the North* (New York: Random House, 2008).

<sup>11</sup> LEGACIES OF THE 1964 CIVIL RIGHTS ACT 1 (Bernard Grofman, ed., 2000).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 26.

<sup>14</sup> H.R. 7152, 88th Cong., 109 CONG. REC. 11252 (1963) (enacted); Juan Williams, *The 1964 Civil Rights Act: Then and Now*, 31 HUM. RTS., Summer 2004, at 6–7.

sination in November of 1963, artfully portrayed himself as the primary benefactor of Kennedy's civil rights legacy, and used his legislative skills helped push the bill forward; a bill that Kennedy, who was elected with 70 percent of the black vote,<sup>15</sup> himself had actually negotiated through the House floor just prior to his assassination.<sup>16</sup> Despite the mounting racial tension in the South during the summer of 1963, Congress initially struggled to draft a bi-partisan bill that addressed America's substantive racial problems beneath the Mason-Dixon line.<sup>17</sup> On one hand, Bernard Grofman contends,

National leaders, policymakers, and civil rights activists came to grips with the issue of race through the enactment of major civil rights legislation, but drafting a bill with bipartisan support proved initially difficult... Supporters, at minimum, sought the elimination of segregation of the races in publicly supported schools, hospitals, public transportation, and other public spaces, and to end blatant racial discrimination in employment practices.<sup>18</sup>

Yet, civil rights advocates and the Act's proponents knew that Southern Democrats would never vote for a *civil rights* bill. Instead, their objective was to shore up support from Northern Democrats (African American voters helped elect a number of these Northern Democrats) and Republicans.<sup>19</sup> Indeed, after months of inside politicking, filibustering, and negotiating, the 88<sup>th</sup> Congress, which had a Democratic majority in both the House and Senate, passed the CRA on June 19, 1964.<sup>20</sup> The act passed in the Senate 73-27, 45 Democrats, 27 Republicans, and 1 unknown voted in favor of the bill.<sup>21</sup> The House passed the act 289 to 126.

## 1. Political and Racial Climate Leading up to the Civil Rights Act

It is impossible to divorce civil rights mandates from the spirit of the times. In fact, 1963 was a watershed year for American race relations. During that year, direct-action tactics, Martin Luther King Jr.'s community mo-

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<sup>15</sup> See Williams, *supra* note 13, at 6–7.

<sup>16</sup> David B. Filvaroff & Raymond E. Wolfinger, *The Origin and Enactment of the Civil Rights Act of 1964*, in LEGACIES OF THE 1964 CIVIL RIGHTS ACT 9, 26–27 (Bernard Grofman ed., 2000).

<sup>17</sup> See *id.* at 13–14; President John F. Kennedy, Report to the American People on Civil Rights (June 11, 1963), available at [http://www.jfklibrary.org/Asset-Viewer/LH8F\\_0Mzv0e6Ro1yEm74Ng.aspx](http://www.jfklibrary.org/Asset-Viewer/LH8F_0Mzv0e6Ro1yEm74Ng.aspx).

<sup>18</sup> Bernard Grofman, *Introduction to LEGACIES OF THE 1964 CIVIL RIGHTS ACT*, 1, 1 (Bernard Grofman ed., 2000).

<sup>19</sup> See GRAHAM, *supra* note 6, at 125.

<sup>20</sup> See also GRAHAM, *supra* note 6, at 152.

<sup>21</sup> *HR. 7152. Passage*. GOVTRACK.US (June 19, 1964), <https://www.govtrack.us/congress/votes/88-1964/s409>.

bilizing strategies, and white violence in the Deep South reached an apex. In the Summer of 1963, for instance, Byron de la Beckwith's murder of the National Association for the Advancement of Colored People's (NAACP) Medgar Evers, just hours after President Kennedy's civil rights address,<sup>22</sup> rattled the nation.<sup>23</sup> Birmingham, Alabama's long history of extraordinary white violence reached fever pitch in 1963 as well. City police commissioner Eugene "Bull" Connor's shameless use of violence to control demonstrators and the bombing of the 16<sup>th</sup> Street Baptist Church in 1963 helped galvanize Washington policymakers.<sup>24</sup>

Ultimately, however, nothing brought more attention to America's racial crisis than the 250,000 civil rights supporters that descended on the nation's capital in August of 1963. The March on Washington for Jobs and Freedom, as it happened, took place at very moment the CRA was before the House Judiciary Committee.<sup>25</sup> King, during his monumental "I Have a Dream" speech, castigated "the unspeakable horrors of police brutality" and the ways segregation gave rise to a vicious cycle of economic exile throughout America's black communities.<sup>26</sup> Images from 1963's Birmingham protests and rhetoric from the March on Washington are not only inscribed in most contemporary Americans' consciousness, the events also convinced Americans of the 1960s that segregation and bigotry were intolerable anachronisms.<sup>27</sup>

### III. THE CIVIL RIGHTS ACT AND INTENDED REFORMS

#### 1. Drafting and Enacting the Civil Rights Act

If President Johnson's Voting Rights Act of 1965 was the "the goddamnedest, toughest, voting rights bill" in U.S. history, the Civil Rights Act of

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<sup>22</sup> Natalie Jimenez, *The Death of Medgar Evers*, CBS NEWS, July 1, 2014, <http://www.cbsnews.com/news/the-death-of-medgar-evers>.

<sup>23</sup> Kate Bubacz, *Medgar Evers' Murder: 50 Years Later*, ABC NEWS, June 12, 2013, <http://abcnews.go.com/blogs/headlines/2013/06/medgar-evers-murder-50-years-later>.

<sup>24</sup> See WILLIAM A. NUNNELLEY, BULL CONNOR 7–8 (1991).

<sup>25</sup> *Delivering on a Dream: The House and the Civil Rights Act of 1964*, HISTORY, ART, & ARCHIVES: U. S. HOUSE OF REPRESENTATIVES, <http://history.house.gov/Exhibitions-and-Publications/Civil-Rights/1964-Essay/> (last visited Nov. 24, 2014).

<sup>26</sup> See "I Have a Dream," *Address Delivered at the March on Washington for Jobs and Freedom*, MARTIN LUTHER KING, JR. PAPERS PROJECT SPEECHES, [http://mlk-kpp01.stanford.edu/kingweb/publications/speeches/address\\_at\\_march\\_on\\_washington.pdf](http://mlk-kpp01.stanford.edu/kingweb/publications/speeches/address_at_march_on_washington.pdf) (last visited Nov. 19, 2014); see generally DAVID J. GARROW, BEARING THE CROSS: MARTIN LUTHER KING, JR. AND THE SOUTHERN LEADERSHIP CONFERENCE 231–86 (1986).

<sup>27</sup> See JOHN HOPE FRANKLIN & EVELYN BROOKS HIGGINBOTHAM, FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS 527–28 (9th ed. 2011).

1964 eclipsed, in size and scope, all of the previous civil rights legislation.<sup>28</sup> The 1964 Act both transformed the shape of American race relations and moved America toward an unparalleled era of unequivocally defined racial politics.

Over the course of 1963, Deputy Attorney General Nicholas Katzenbach and Congressman William McCulloch (R-Ohio) drafted the substance of H.R. 7152 (what became the CRA of 1964).<sup>29</sup> The final bill gave the attorneys general the power to protect American citizens from discrimination in education, public accommodations, employment, and voting. Title I prohibited the unequal application voter registration requirements such as literacy tests,<sup>30</sup> and Title VIII required federal officials to compile voter registration and voting data in areas where the Commission of Civil Rights deemed necessary.<sup>31</sup> Title II struck at the heart segregation by criminalizing racial, ethnic, and religious discrimination in public accommodations.<sup>32</sup> Title IV encouraged public school desegregation.<sup>33</sup> Title VI was an effort to preclude the addition of a Powell Amendment;<sup>34</sup> it gave Washington the means to enforce Title IV by preventing discrimination in government agencies that received federal funding.<sup>35</sup> Title V expanded the Civil Rights Commission.<sup>36</sup> Title VII, which sought to destabilize economic apartheid, prohibited certain employers (i.e., businesses with more than 15 employees) from discriminating on the basis of race, color, religion, sex, or national origin and created the Equal Employment Opportunity Commission (EEOC).<sup>37</sup> Title X

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<sup>28</sup> ABIGAIL M. THERNSTROM, *WHOSE VOTES COUNT?: AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS* 15 (1987).

<sup>29</sup> David B. Filvaroff & Raymond E. Wolfinger, *supra* note 15, at 16.

<sup>30</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, § 101(2)(C), 78 Stat. 241, 241 (codified as amended at 52 U.S.C. § 10101).

<sup>31</sup> Civil Rights Act of 1964 § 801, 78 Stat. at 266.

<sup>32</sup> Civil Rights Act of 1964 § 201(a), § 202–204, 78 Stat. at 243–44.

<sup>33</sup> Civil Rights Act of 1964 § 402–405, § 407, 78 Stat. at 246–48.

<sup>34</sup> On the Powell Amendment and Adam Clayton Powell, Jr., see CHARLES V. HAMILTON, *ADAM CLAYTON POWELL, JR.: THE POLITICAL BIOGRAPHY OF AN AMERICAN DILEMMA* 225–35, 379–80 (1991). Over the course of his Congressional career, Representative Adam Clayton Powell, Jr. (D- New York) initiated and adhered to a strategy known as the “Powell Amendment”. To obstruct weak civil rights bills, Powell often maneuvered to add an amendment that sought to deny federal funds to institutions that maintained segregated systems. As it happened, Title VI was an adaptation of the Powell Amendment.

<sup>35</sup> See Civil Rights Act of 1964, § 602, 78 Stat. at 252.

<sup>36</sup> Civil Rights Act of 1964 § 501, 78 Stat. at 249–52.

<sup>37</sup> Civil Rights Act of 1964 § 705, 78 Stat. at 258. Sex in Title VII was actually added at the last minute by Congressman Howard Smith (R- Virginia. Smith, who opposed the bill, believed that Congress would reject the bill should it grant equal rights for women. See U.S. Nat’l Archives & Records Admin., *Teaching with Documents: The Civil Rights Act of 1964 and the Equal Emp’t Opportunity Comm’n*, available at <http://www.archives.gov/education/lessons/civil-rights-act/> (last visited Dec. 1, 2014); see generally GRAHAM, *supra* note 6, at 136–40.

created the Community Relations Service, whose task was to help local people in cases of discrimination.<sup>38</sup> Ultimately, policymakers designed these titles to instigate a durable shift in the American balance of power,<sup>39</sup> but, these titles were also a referendum on the state of American race relations and black communities during the early 1960s.

## 2. Combating Educational Inequalities and Segregation

Popular memory of the Supreme Court's decision in *Brown v. Board of Education* (1954)<sup>40</sup> to desegregate public schools has often clouded the fact that 1964's Civil Rights Act was not only designed to address the continuation of deep inequalities in Southern schools; the act also sought to resolve the perpetuation of Southern apartheid in education. Although the Court held that segregated schools were unconstitutional in 1954, white resistance to public school integration proved to be one of *Brown's* most enduring legacies. In fact, the holding in *Brown II* that Southern states must desegregate schools with "all deliberate speed" ensured that racial separation (or, at the very least, token integration) in education was still largely intact by 1964.<sup>41</sup> Policymakers, who had grown weary of 'massive resistance' to public school integration, designed the Titles IV and VI to specifically give the federal government more enforcement power over the "operations of American schools".<sup>42</sup>

As it happened, by 1964, Southern schools were in disarray. Of 2,837 schools in the seventeen Southern states, 2,062 remained completely segregated at the close of the year 1960-61.<sup>43</sup> By 1963, 13,970,307 students were enrolled in seventeen Southern states and the District of Columbia.<sup>44</sup> Of the nearly 14 million students enrolled, 3,326,468 were African American and only 264,665 African American students attended desegregated schools.<sup>45</sup>

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<sup>38</sup> Civil Rights Act of 1964 § 1001-1002, 78 Stat. at 249-52; see generally GRAHAM, *supra* note 6, at 125-52.

<sup>39</sup> *Major Features of the Civil Rights Act of 1964*, DIRKSEN CONG. CTR., [http://www.congresslink.org/print\\_basics\\_histmats\\_civilrights64text.htm](http://www.congresslink.org/print_basics_histmats_civilrights64text.htm) (last visited Dec. 1, 2014).

<sup>40</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); Gary Orfield, *The 1964 Civil Rights Act and American Education*, in LEGACIES OF THE 1964 CIVIL RIGHTS ACT 89, 89 (Bernard Grofman ed., 2000).

<sup>41</sup> *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955); see Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81, 84 (1994).

<sup>42</sup> Klarman, *supra* note 41, at 82; Orfield, *supra* note 40, at 89, 91-92.

<sup>43</sup> U.S. COMM'N ON CIVIL RIGHTS, EDUCATION: 1961 UNITED STATES COMMISSION ON CIVIL RIGHTS REPORT 39 (1961).

<sup>44</sup> U.S. COMM'N ON CIVIL RIGHTS, CIVIL RIGHTS '63: 1963 REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS 65 (1963).

<sup>45</sup> *Id.*



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The United States Commission on Civil Rights reported that Alabama, Mississippi, and South Carolina did not have *any* students enrolled in segregated schools between 1962-63, and out of 198 schools districts, Georgians had integrated only one.<sup>46</sup> By 1960, the average African American completed only 8.2 years of education, compared 10.9 years for whites.<sup>47</sup>

More ominously, predominantly African American schools and school districts were often severely underfunded and demonstrably inferior to white schools. Washington officials noticed that African Americans students often lagged behind their white counterparts in terms of educational access and achievement, and they argued in 1962, “Southern Negroes, trapped in segregated schools for all their education, produce their own teachers in schools inferior in every respect to white schools.<sup>48</sup> The widespread efforts to improve schools facilities in terms of buildings and equipment did not produce immediate results with respect to academic achievement levels . . .”<sup>49</sup>

Although Title IV encouraged public school desegregation and provided a legal cause of action to enforce the act, Americans—above and beneath the Mason-Dixon line—took part in an era of passive resistance and token integration to school desegregation by initiating an unprecedented migration to America’s suburbs.<sup>50</sup> Despite this trend, public school integration doubled by 1964, tripled by 1965, and during 1966, 16 percent of African American students in the South attended integrated schools.<sup>51</sup> Civil rights policymakers’ education reforms achieved success in combating Southern resistance to integration by designing the CRA to level the playing field in public schools.

### 3. Addressing Economic Inequalities

Reforms were not merely designed to address public schools, but also inequities within the realm of economics. If the realization of equal employ-

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<sup>46</sup> *Id.* at 64–65.

<sup>47</sup> U.S. COMM’N ON CIVIL RIGHTS, *MOBILITY IN THE NEGRO COMMUNITY: GUIDELINES FOR RESEARCH AND SOCIAL ECONOMIC PROGRESS* 7 (1968).

<sup>48</sup> *See* U.S. COMM’N ON CIVIL RIGHTS, *CIVIL RIGHTS U.S.A.: PUBLIC SCHOOLS SOUTHERN STATES*, 152–53 (1962).

<sup>49</sup> *Id.* at 152.

<sup>50</sup> *See generally* KEVIN KRUSE, *WHITE FLIGHT: ATLANTA AND THE MAKING OF MODERN CONSERVATISM* (2005); MATTHEW D. LASSITER, *THE SILENT MAJORITY: SUBURBAN POLITICS IN THE SUNBELT SOUTH* (2006).

<sup>51</sup> Orfield, *supra* note 40, at 102.

ment opportunity laws was one of the civil rights movement's chief priorities, policymakers devised Title VII of the Civil Rights Act to address deep economic inequalities in American life.<sup>52</sup> In 1962, social critic Michael Harrington argued in *The Other America*, "the Negro suffers from being in, but not of, American society . . . This is the home of America's aliens. The people participate in the consumption cult of the white world . . . yet the Negroes are poor."<sup>53</sup> Although Harrington was specifically referring to African Americans' experiences in Harlem, New York, his general observations about mid-twentieth century black poverty were a discouraging reflection on the state of economic inequality.

Harrington's observations in *The Other America* also inspired Kennedy's administration to address the crises of rampant economic dispossession in America's black communities.<sup>54</sup> One in three of Americans lived in poverty during the 1950s.<sup>55</sup> African Americans, however, carried a significant amount of that burden.<sup>56</sup> In 1963, 43 percent of non-white families in the United States were near or below the poverty line (households that that survived on less than \$3,000 annually).<sup>57</sup> African American men earned 60 percent less than equally productive white men during the 1950 and 1960s.<sup>58</sup> Those African Americans that were lucky enough to find gainful employment, according to Harrington, were often:

Concentrated in the worst, dirtiest, lowest-paying jobs. A third continue to live in the rural South. . . A third live in Southern cities and a third in Northern cities, and these have bettered their lot compared to the sharecroppers. But they are still the last hired and the first fired, and they are particularly vulnerable to recessions.<sup>59</sup>

In 1960, the Department of Labor's record of African Americans employment affirmed Miller's and Harrington's contentions—only 4 percent of African Americans were employed in a professional capacity (compared to roughly 11 percent for whites) and blacks made up only 3 percent of managerial positions.<sup>60</sup> In total, 17 percent of nonwhites held white-collar

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<sup>52</sup> See also *The Civil Rights Act of 1964*, 78 HARV. L. REV. 684, 689–91 (1965).

<sup>53</sup> HARRINGTON, *supra* note 9, at 68.

<sup>54</sup> See JAMES T. PATTERSON, *GRAND EXPECTATIONS: THE UNITED STATES, 1945-1974* 533–34 (1996).

<sup>55</sup> See HARRINGTON, *supra* note 9, at 193.

<sup>56</sup> AMY K. GLASMEIER, *AN ATLAS ON POVERTY IN AMERICA: ONE NATION, PULLING APART 1960-2003*, 1 (2005), available at [http://povertyinamerica.mit.edu/download/atlas\\_of\\_poverty\\_in\\_america\\_p1.pdf](http://povertyinamerica.mit.edu/download/atlas_of_poverty_in_america_p1.pdf)

<sup>57</sup> See U. S. COMM'N ON CIVIL RIGHTS, *supra* note 48, at 5.

<sup>58</sup> HARRINGTON, *supra* note 9, at 77.

<sup>59</sup> HARRINGTON, *supra* note 9, at 77.

<sup>60</sup> HARRINGTON, *supra* note 9, at 77.

jobs.<sup>61</sup> Double-discrimination often characterized African American women's lives—in 1960, nearly one-third of black women were employed as domestics.<sup>62</sup>

Federal officials designed Title VII to meet these challenges. The EEOC, the Justice Department, and the Department of Labor effectively used Title VI's regulatory apparatus, President Johnson's Executive Order 11246,<sup>63</sup> and Title VII to desegregate employment writ large.<sup>64</sup> Although employment discrimination continued after Title VII's creation, and agents often struggled to meet the challenges of economic demand in black communities, by 1970, federal officials reported significant numbers of African Americans had moved into the ranks of the American middle class. By 1966, the U.S. Commission on Civil Rights reported that 30 percent of nonwhite males and families fell into the middle-class (near or above \$10,000 annually).<sup>65</sup> If employment discrimination had national implications, racial discrimination in places of public accommodation was generally a characteristic of Southern folkways.<sup>66</sup>

#### 4. Integrating Public Accommodations

Title II of the CRA, which attacked the very heart of the Southern segregation, transformed public life in America. It, like the previous titles, was also a referendum on the continuation of African Americans' restricted access. Over the first half of the twentieth century, African Americans met the challenges of Jim Crow by organizing strategies to either fully integrate public accommodations or finding ways to maintain a semblance of dignity in public.

There is a long and well-recorded history of African Americans' attempts to integrate public accommodations—from the NAACP's litigation strategy, which began with *McCabe v. Atchison*, to the race uplift strategies embodied by early twentieth century movements to integrate segregated trolley

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<sup>61</sup> GRAHAM, *supra* note 6, at 101.

<sup>62</sup> HARRINGTON, *supra* note 9, at 77–78.

<sup>63</sup> Exec. Order No. 11246, 3 C.F.R. 339 (1964–1965).

<sup>64</sup> Hugh Davis Graham, *The Civil Rights Act and the American Regulatory State*, in LEGACIES OF THE 1964 CIVIL RIGHTS ACT 43, 49 (Bernard Grofman ed., 2000).

<sup>65</sup> U. S. COMM'N ON CIVIL RIGHTS, *supra* note 47, at 5; see TIMOTHY J. MINCHIN & JOHN A. SALMOND, *AFTER THE DREAM: BLACK AND WHITE SOUTHERNERS SINCE 1965* 7 (Univ. Press of Ky., 2011) (discussing employment discrimination struggles and 1972 reforms of the EEOC. Employment was initially difficult to resolve—in fact, the EEOC had little actual power until 1972.).

<sup>66</sup> Randall Kennedy, *The Struggle for Racial Equality in Public Accommodations*, in LEGACIES OF THE 1964 CIVIL RIGHTS ACT 156, 161 (Bernard Grofman ed., 2000).

in places like Richmond, Virginia.<sup>67</sup> *De jure* segregation in public accommodations waned slightly over the course of the twentieth century in large part because African Americans had organized various direct-action, legal, and civil disobedience strategies to meet these challenges.<sup>68</sup> Yet, there were several examples that spoke to the contrary. In many cases, African Americans simply adjusted to segregation in public accommodations. For instance, between 1936 and 1964, Vernon H. Green's, *The Negro Motorist Green Book*, not only signified African Americans' desire for public respectability; it also embodied the humiliation blacks continued to face in public life—especially throughout the South.<sup>69</sup> Cotton Seiler contends:

Like other black business enterprises catering to black consumers in an era of eroding yet still-compelled deference, these guidebooks were rarely radical in their challenge to legal segregation...instead they mounted a decorous campaign for racial reform informed by liberal principles of market agency, cross-racial understanding, the prerogative of free mobility, and the assumption of human goodwill.<sup>70</sup>

To this day, visual representations of segregated Southern spaces inform people's understanding of Jim Crow. Student sit-in movements of the early 1960s not only directly challenged the continuation of segregated public spaces; whites' violent reactions to these non-violent demonstrations typified public anxiety over integration in general.

To this end, Title II provided that "All persons shall be entitled to the full and equal enjoyment of goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation...without discrimination on the ground of race, color, religion, or national origin".<sup>71</sup> In fact, most Americans support Title II because of its deeply Southern implications.<sup>72</sup> Civil rights activists also spent the better portion of the early 1960s directly (and publically) challenging segregation in public accommodations.<sup>73</sup> Within months of the passage of the Civil Rights Act, the De-

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<sup>67</sup> BLAIR L. M. KELLEY, RIGHT TO RIDE: STREETCAR BOYCOTTS AND AFRICAN AMERICAN CITIZENSHIP IN THE ERA OF PLESSY v. FERGUSON 117–38 (Univ. of N. C. Press, Chapel Hill, 2010) (discussing movements to desegregate Richmond's trolley cars); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 61–97 (Oxford Univ. Press, 2004) (discussing *McCabe v. Atchison* 235 U.S. 151 (1914) and progressive reformers' attempts to break the color line in public accommodation).

<sup>68</sup> KLARMAN, *supra* note 68, at 62–63.

<sup>69</sup> THE NEGRO TRAVELERS' GREEN BOOK, (Victor H. Green ed., 20th ed. 1956).

<sup>70</sup> Cotton Seiler, *So That We as a Race Might Have Something Authentic to Travel by: African American Automobility and Cold-War Liberalism*, 58 AM. Q. 1091, 1100 (Dec. 2006).

<sup>71</sup> 42 U.S.C. § 2000(a) (2012).

<sup>72</sup> See Kennedy, *supra* note 67, at 161–62.

<sup>73</sup> Kennedy, *supra* note 67, at 158–59.

partment of Justice initiated several enforcement suits that tested the constitutionality of the Title II, and the Court upheld the constitutionality of Title II in *Heart of Atlanta Motel v. United States*.<sup>74</sup>

### 5. Attempting to Curb Voter Disenfranchisement

No other form of discrimination undermined Americans' social contract more than disenfranchisement—while the CRA of 1964 did little to end direct disenfranchisement, it—much like the civil rights bills of 1957 and 1960—paved the way for the Voting Rights Act of 1965. By 1964, Southern disenfranchisement had reached critical mass.<sup>75</sup> While African Americans made limited political progress after the Second World War, pervasive disenfranchisement characterized the Southern electoral process.<sup>76</sup> Prior to the Court's decision in *Brown*, scholars contend that a sizeable number of racially moderate white and black leaders agreed to gradually modulate Jim Crow by granting blacks limited access to the political process.<sup>77</sup> The racial polarization brought on by 'massive resistance' to public school integration, however, quickly undermined these moderates' attempts to cautiously improve segregation.<sup>78</sup> Disenfranchisement and white overrepresentation on

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<sup>74</sup> *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); U.S. COMM'N ON CIV. RIGHTS, FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT: A REPORT OF THE U.S. COMMISSION ON CIVIL RIGHTS 31–32 (1970).

<sup>75</sup> See Robert Botsch, *The Politics of Caste: The Racial Struggle for Attaining "Personhood" in the South*, UNIV. OF S.C. AIKEN (June 12, 2014), <http://www.usca.edu/polisci/ahum107-web/Racial%20Struggle.htm>.

<sup>76</sup> See Nat'l Park Serv., *Civil Rights in America: Racial Voting Rights*, 1, 20 (2009), [http://www.crmvet.org/info/nps\\_voting\\_rights.pdf](http://www.crmvet.org/info/nps_voting_rights.pdf).

<sup>77</sup> On post-WWII political progress and African American voters in the South prior to the ratification of the Voting Rights Act of 1965, see Julian Maxwell Hayter, *From Intent to Effect: Richmond, Virginia, and the Protracted Struggle for Voting Rights, 1965–1977*, 26 J. OF POL. HIST. 534, 534–67 (2014); Klarman, *supra* note 41, at 81–118.

<sup>78</sup> On Richmond, Virginia and black voting prior to 1965, Hayter argues, "Richmond's African Americans were also able to challenge Jim Crowism through electoral politics because Virginia's white power brokers, under the auspices of Senator Harry F. Byrd and his reputed "machine," maintained segregation through paternalistic elitism rather than violent rigidity. By the 1950s, Byrd had assumed almost total control over Virginia politics and his organization's political power, which derived from an elaborate system of patronage, circuit court appointments, and disenfranchisement. While these power brokers used poll taxes to divest most African Americans of their constitutional rights and preserve Virginia's place as an elite white man's commonwealth, they also maintained white privilege by practicing a genteel brand of racist paternalism. Richmond's white elites maintained segregation by de-emphasizing violence and handing out piecemeal concessions to black leaders— When it came to black voting, Byrd Democrats knew they could pay lip service to limited black political participation without conceding substantive political power" Hayter, *supra* note 78, at 540.

Southern governing bodies characterized a majority of local/state-based political systems.<sup>79</sup>

When direct impediments to voting such as literacy tests, grandfather clauses, and poll taxes failed to keep blacks from polls, Southerners kept the electorate white by resorting to intimidation and violence. This violence was particularly common in the Deep South. For instance, prior to 1965, roughly 7 percent of Mississippi's voting-age black population (28,500) was registered to vote,<sup>80</sup> 27 percent of voting-age blacks were registered in Georgia,<sup>81</sup> and only 19 percent of voting-age blacks were registered in Alabama.<sup>82</sup> These numbers characterized an early twentieth century political dilemma— Southerners, emboldened by federal indifference, were able to nullify the Fifteenth Amendment's protection of African Americans' right to vote. The U.S. Commission on Civil Rights argued, "A major theme running through the history of Southern politics has been the fear of a Negro take-over of the political and governmental structure."<sup>83</sup>

The CRA of 1964 directly attacked one of the most effective forms of black disenfranchisement: literacy tests. Title I, which Democrats thought would bring more black voters into the party, barred the unequal application of voter registration requirements.<sup>84</sup> In terms of Title I and Title III, Richard Valelly argues, "Its first title provided for expedited adjudication of voting rights cases and for several federal standards (for example, written literacy tests only and presumption of literacy if the applicant had completed the sixth grade) that local registrants were required to observe. But that is all the 1964 act did for voting rights."<sup>85</sup> Title I, as written, did not apply to state and local elections and therefore did little to immediately address the problem of disenfranchisement.<sup>86</sup> However, Title I symbolized that Washington

<sup>79</sup> RICHARD M. VALELLY, *THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT* 249 (2004).

<sup>80</sup> U.S. COMM'N ON CIVIL RIGHTS, *THE VOTING RIGHTS ACT: TEN YEARS AFTER: A REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS* 43 (1975).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> U.S. COMM'N ON CIVIL RIGHTS, *POLITICAL PARTICIPATION: A STUDY OF THE PARTICIPATION BY NEGROES IN THE ELECTORAL AND POLITICAL PROCESSES IN 10 SOUTHERN STATES SINCE PASSAGE OF THE VOTING RIGHTS ACT OF 1965* 19 (1968).

<sup>84</sup> See *Blacks and the Democratic Party*, FACTCHECK.ORG (Apr. 18, 2008), <http://www.factcheck.org/2008/04/blacks-and-the-democratic-party/>;

*Major Features of the Civil Rights Act of 1964*, DIRKSEN CONGRESSIONAL CENTER, [http://www.congresslink.org/print\\_basics\\_histmats\\_civilrights64text.htm](http://www.congresslink.org/print_basics_histmats_civilrights64text.htm) (last visited Nov. 17, 2014).

<sup>85</sup> VALELLY, *supra* note 80, at 195.

<sup>86</sup> Mark Posner, *Time is Still on Its Side: Why Congressional Reauthorization of Section 5 of the Voting Rights Act Represents a Congruent and Proportional Response to Our Nation's History of Discrimination in Voting*, 10 N.Y.U. LEGIS. & PUB. POL'Y 51, 73 n.97 (2006).

policy elites and the Johnson administration were willing to pass a provision to protect blacks' right to vote.

#### IV. CONCLUSION

The Civil Rights Act of 1964 was a direct attack on American bigotry and the legacy of federal indifference to segregation. Primarily, the Act's advocates resolved to "strengthen the government's meager efforts to protect" blacks from what was tantamount to twentieth century pseudo-slavery.<sup>87</sup> In 1966, nearly 42 percent of African Americans lived at, near, or beneath the poverty line.<sup>88</sup> That number has dropped precipitously since President Johnson signed the CRA. Although African Americans still comprise a large portion of America's poor, which indicates that there is still much work to be done, the current rate, 26 percent, is decidedly lower than it was in 1966.<sup>89</sup>

There is little question that the federal government's ratification and protection of the 1964 Act not only weakened *de jure* segregation; the Act's titles helped to effectively reduce the political, economic, and social gap that characterized African American life after Reconstruction. The rise of African American activists and voters had a profound impact of civil rights legislation. Bi-partisan coalitions and institutional stability in Washington (particularly between the executive, judicial, and legislative branches) also made the Second Reconstruction possible. These factors were also essential to preservation of the civil rights legislation during the 1960s and early 1970s.<sup>90</sup> After 1964 and 1965, civil rights supporters recognized that the main task was to guarantee that Washington enforced the civil rights bills effectively. These battles often occurred not with picket signs or at lunch counters, but in America's courtrooms, city halls, and the offices of Washington policymakers.<sup>91</sup>

Recently, scholars have emphasized how the fight for civil rights in America continued long after the enactment the civil rights bills. Ordinary people, social critics, and well-organized activists not only inspired policy-makers to pass civil rights legislation, but also carried the momentum of

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<sup>87</sup> Juan Williams, *The 1964 Civil Rights Act: Then as Now*, 31 A.B.A. HUM. RTS. 6, 7 (2004).

<sup>88</sup> U.S. Dep't of Commerce, *Special Studies: Revision in Poverty Statistics, 1959 to 1958*, CURRENT POPULATION REPORTS, Series P-23, No. 28 1, 7 (1969), <http://www.census.gov/hhes/www/poverty/publications/p23-28.pdf>.

<sup>89</sup> *Poverty Rate by Race/Ethnicity*, HENRY J. KAISER FAMILY FOUND., <http://kff.org/other/state-indicator/poverty-rate-by-raceethnicity/> (last visited Nov. 18, 2014).

<sup>90</sup> See VALELLY, *supra* note 80, at 213–18.

<sup>91</sup> See MINCHIN & SALMOND, *supra* note 66, at 3–4.

civil rights reform well into the 1970s. We know now that white Americans were often made to comply with laws that few of them supported in the first place.<sup>92</sup> Employment discrimination, educational segregation, and voting rights have proven difficult to remove from American life. Given the nature of ethnic, gender-based, and racial struggles since 1964, it is often difficult to portray the enactment of the civil rights bills as a triumph narrative exclusively. Indeed, federal officials found that eradicating *de jure* segregation did little to address the practice of racial separation in custom. Yet, it is unquestionable that the CRA of 1964 effectively undermined legal apartheid in America. Federal officials, in crafting the most robust piece of civil rights legislation in the twentieth century, instigated a durable shift in American racial reforms. In this regard, Washington elites and civil rights activists initiated a new chapter in the story of American diversity.

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<sup>92</sup> See MINCHIN & SALMOND, *supra* note 66, at 7.