
PANEL I: HISTORICAL PERSPECTIVES

THE LONG CIVIL RIGHTS ACT AND CRIMINAL JUSTICE

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INTRODUCTION

From where we stand, fifty years later, the Civil Rights Act is both the culmination of seventy years of political agitation to persuade the country to accept the discipline and fundamental intent of the Reconstruction Era civil rights statutes, as well as the birth of the modern civil rights statutory regime. The civil rights acts immediately preceding the 1964 Act—one in 1957 and a second in 1960—were limited and ineffectual, and those that followed were branches from the tree planted in 1964. This Symposium focuses on the challenges of implementing the 1964 Act and the doctrinal dilemmas it has spawned, and rightfully so. I take a slightly different tack here, for I consider what the 1964 Act failed to address. I explore the relationship between what I call the “Long Civil Rights Act”¹ and the persistent denial by state authorities

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¹ The title comes with a bow to Jacqueline Dowd Hall, who argued in her influential essay on “the Long Civil Rights Movement” that historical accounts of the civil rights movement had failed adequately to appreciate the continuities between black, labor, and left activism in the 1930s and '40s and the organized protest movements of the late '50s and '60s. The essay spawned a debate over the legal and political legacies of the organizations and activists of the New Deal and World War II eras. See *The Long Civil Rights Movement*

of what I shall call “justice rights”—the rights to freedom from racial violence and from discrimination in the administration of criminal justice. The history of the Long Civil Rights Act makes clear that measures authorizing the federal government to sue to protect such rights were considered but not adopted. On the other hand, the smaller steps Congress did take demonstrate that the failure was not a question of constitutional authority but of political will. This failure to control the pervasive racial violence that sustained Jim Crow, and to remedy discriminatory criminal justice practices, reflects a legislative lapse that was never fully corrected.

In 1991, Congress failed to pass the Police Accountability Act, which would have given the Department of Justice the power to seek injunctive relief for systemic constitutional violations by police departments.² In reporting out the measure, the House Judiciary Committee noted that the bill would close a longstanding gap in the statutory regime protecting rights to personal security and to be free from racial violence.³ It was not until thirty years after the passage of the 1964 Act, when, in 1994, Congress passed the Violent Crime Control and Law Enforcement Act of 1968, empowering the Department of Justice to conduct pattern or practice investigations of police departments, as it did in 2015 of the Ferguson Police Department, and to seek equitable remedies.⁴ While the 1994 Violent Crime Control Act has not been a panacea,⁵ it did confer clear authority on the Justice Department to respond proactively to systemic law enforcement violations. One need only consider the vast body of law generated since 1964 by Title VII to imagine what the Nation’s criminal justice systems might look like today had the 1964 Act authorized meaningful federal remedies for systemic violations of justice rights.

Unlike the battles that resulted in the New Deal legal regime, the path to passage of the ’64 Civil Rights Act was, quite literally, a bloody one. President Kennedy, who was famously reluctant to support civil rights in the first two

and the Political Uses of the Past, 91 J. AM. HIST. 5 (2005). For a critical view, see Eric Arneson, *Reconsidering the “Long Civil Rights Movement,”* 10 HISTORICALLY SPEAKING 31 (2009).

² See H.R. 2792, 102nd Cong. (1992).

³ H.R. REP. NO. 102-242, at 137-38 (1991) (finding that the Justice Department’s lack of authority to address police misconduct “represent[ed] a serious and outdated gap in the federal scheme for protecting constitutional rights”).

⁴ Violent Crime Control and Law Enforcement Act of 1968, Pub. L. No. 103-322, 108 Stat. 1796 (1994) (codified at 42 U.S.C. § 14141); see U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015). The Justice Department is also authorized to investigate local and state police departments receiving federal funds under the anti-discrimination provisions of 42 U.S.C. § 3789d (Omnibus Crime Control and Safe Streets Act of 1968) and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d.

⁵ See, e.g., Rachel Harmon, *Limited Leverage: Federal Remedies and Policing Reform*, 32 ST. LOUIS U. PUB. L. REV. 33 (2012).

years of his administration,⁶ introduced the bill in June 1963, after Birmingham's police chief "Bull" Connor arrested, hosed down, and let the dogs loose on 1000 children.⁷ Yet, it was not until after the President's death in November 1963 and the Birmingham church bombing in September of that year that public opinion was sufficiently mobilized to allow the Senate to prevail over the Southern stranglehold that had buried every other civil rights proposal since Reconstruction. But while the 1964 Civil Rights Act was a direct response to the shocking televised images of anti-civil rights violence,⁸ nothing in the Act targeted racial violence or Southern law enforcement systems.⁹ Indeed, across the history of the Long Civil Rights Act, repeatedly, racial violence was evidence of the need for federal action but never the direct target of such action. It is not too much to argue that the "New Jim Crow"¹⁰ is in some critical measure the predictable consequence of the compromises that led to the exclusion of justice rights from the '64 Act.

I suggest here that as we re-examine the antecedents of the Montgomery-to-Memphis Movement, locating its origins in protest movements of the 1940s, we must correspondingly reassess the ways in which racial violence structured Jim Crow and resistance to it. As is well known, the political urgency that produced the Civil Rights Act was generated in part by the televised violence associated with the Movement, which was organically tied to the racist violence of an earlier period. Theoretical approaches to the history of civil rights that set apart the classic Montgomery-to-Memphis Movement from the protests preceding it obscure the full breadth and scope of the rights over

⁶ In 1961, Kennedy initially responded to the Freedom Rides by pleading for law and order. See HARRIS WOOFFORD, *OF KENNEDYS AND KINGS* 124-25 (1980). He also nominated segregationists to the federal bench, refused to support a legislative ban on the poll tax, and delayed signing an executive order barring discrimination in federally assisted housing. See *id.* at 124, 136-70; see also CARL M. BRAUER, *JOHN F. KENNEDY AND THE SECOND RECONSTRUCTION* 61-88 (1977) (outlining Kennedy's accomplishments and shortcomings in connection with the civil rights movement).

⁷ See ANDREW MANIS, *A FIRE YOU CAN'T PUT OUT: THE CIVIL RIGHTS LIFE OF BIRMINGHAM'S REVEREND FRED SHUTTLESWORTH* 364-84 (1999) (detailing the stand-off between "Bull" Connor and civil rights leaders).

⁸ When he introduced his bill to the nation on June 11, 1963, President Kennedy noted that "[t]he events in Birmingham and elsewhere have so increased the cries for equality that no city or State or legislative body can prudently choose to ignore them." President John F. Kennedy, Report to the American People on Civil Rights (June 11, 1963) (transcript available at http://www.jfklibrary.org/Asset-Viewer/LH8F_0Mzv0e6Ro1yEm74Ng.aspx, archived at <http://perma.cc/K723-DJTZ>).

⁹ See generally The Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C. and 42 U.S.C.).

¹⁰ The term was coined by Michelle Alexander to signal the nexus between *de jure* segregation and the discriminatory impact of neutral criminal justice practices. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 3-4 (2010).

which the battles were fought.¹¹ I argue here that justice rights were understood by racial justice activists across the mid-twentieth century to be a fundamental feature of citizenship that, much like employment, education, public services, and accommodations, required federal protection. Justice rights were “rights of belonging,”¹² identified as such, in fact, in the 1866 Civil Rights Act,¹³ but then left unaddressed by Congress until the late twentieth century.

These constitutional injuries—discrimination in the administration of law enforcement and denial of public protection for personal security—did not easily lend themselves to cure by private civil lawsuits or criminal proceedings.¹⁴ Juries were reluctant to impose civil sanctions on public

¹¹ The concept of a “long civil rights movement” characterized by a consistent set of claims has been around long before Dowd Hall’s gauntlet was thrown down. I argue here that this set of claims has always included “justice rights,” or the right to be free from violence and to equal process in criminal matters.

¹² Rebecca Zietlow describes “rights of belonging” as positive rights, protected by the 1964 Act, to be included on equal terms in public life—at schools, polling places, public facilities, and jobs. Rebecca E. Zietlow, *To Secure These Rights: Congress, Courts, and the 1964 Civil Rights Act*, 57 RUTGERS L. REV. 945, 946 (2005).

¹³ The 1866 Act explicitly protected the equal right to personal security and criminal justice. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (“[A]nd such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person [execution, imprisonment] and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, and law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.”).

¹⁴ Without explicit legislation, the Supreme Court’s rulings that proof of disparate impact is not enough to establish a denial of equal protection govern this arena. *See, e.g.*, *Washington v. Davis*, 426 U.S. 229, 239-40 (1976). Under federal civil rights statutes, however, in pattern and practice cases, proof of a discriminatory effect is usually sufficient to require the government to explain that the result is not racially tainted. For example, the 1964 Act shifts the burden to an employer to prove that race was not a factor in the employment decision if the outcome disparately and unfavorably impacts a particular racial group. 42 U.S.C. 2000e-2(k) (1964); *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) (requiring the employer to demonstrate that its use of testing “have a manifest relationship to the employment in question”). Notwithstanding the decision in *Shelby County v. Holder*, 133 S. Ct. 2612, 2632 (2013), striking the preclearance requirement under section 5 of the Voting Rights Act, a violation can still be established under section 2 of the Act on a “totality of the circumstances” test. *Thornberg v. Gingles*, 478 U.S. 30, 46 (1986); *see also* *Inclusive Communities Project v. Texas Dep’t Hous. and Cmty. Affairs*, 747 F.3d 275 (5th Cir. 2014), *argued*, No. 13-1371 (S. Ct. argued Jan. 21, 2015). Some of the Justices on the current Court have questioned whether the disparate impact framework itself violates Equal Protection. *See, e.g.*, *Ricci v. DeStefano*, 557 U.S. 557, 594-96 (2009) (Scalia, J., concurring) (suggesting that the disparate impact claim leads to race-conscious decisionmaking that should be subject to strict scrutiny). But this was not a concern in 1964.

officials, much less convict them for civil rights violations, and the inability to win convictions in turn chilled the appetite of federal prosecutors. Nor were the victims of justice rights violations well-positioned to protect their rights. Federal civil rights suits require private counsel, and in the mid-twentieth century only a handful of lawyers scattered across the South were willing to take on such suits.¹⁵ Moreover, constitutional claims were often tethered to state court factual determinations that were patently unsupportable but hard to dislodge.¹⁶ Arming the Justice Department with the tools to aggressively

While in *Batson v. Kentucky*, 476 U.S. 79, 94 (1986), the Supreme Court opened peremptory challenges to judicial inspection upon a prima facie showing of discrimination, the Supreme Court has declined to apply the discriminatory effects analysis to outcomes in the criminal justice system. *See, e.g., McCleskey v. Kemp*, 481 U.S. 279, 292 (1987) (refusing to accept an empirical study of disparate impact in death sentencing because the defendant bears the burden of showing “discriminatory purpose” in his individual case). And the Court has rejected on standing grounds suits seeking broad remedies for police misconduct, *see, e.g., City of L.A. v. Lyons*, 461 U.S. 95, 105-06 (1983) (concluding that no case or controversy existed because the plaintiff could not demonstrate a likelihood that he would again be stopped by police and choked in the future); *O’Shea v. Littleton*, 414 U.S. 488, 497 (1974) (finding no standing because the Court could “only speculate whether respondents will be arrested, either again or for the first time, for violating a municipal ordinance or state statute”), and systemic discrimination in the administration of bail and sentencing, *see Rizzo v. Goode*, 423 U.S. 362, 372-73 (1976) (finding that plaintiff lacked standing because he could not show that he faced a risk of discriminatory bond pricing going forward and because he lacked an interest in the outcome of the case, “overhauling police disciplinary procedures”).

¹⁵ Anthony Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793, 796-97 (1965) (reporting that only three attorneys were willing to take on civil rights cases in Mississippi).

¹⁶ *See, e.g., Garner v. Louisiana*, 368 U.S. 157, 176 (1961) (reversing convictions of sit-in demonstrators for disturbing the peace where the evidence failed to support the charge); *Thompson v. City of Louisville*, 362 U.S. 199, 199 (1960) (reversing state conviction for loitering and disorderly conduct where the record below was “so totally devoid of evidentiary support as to render [it] unconstitutional”); *Norris v. Alabama*, 294 U.S. 587, 595 (1935) (reversing conviction for rape where the evidence did not justify the trial court’s conclusion that the names of blacks were on the list from which the indicting jury was selected).

Years ago, Anthony Amsterdam elegantly captured the need for federal judicial intervention in spurious state court proceedings affecting civil rights. *See Amsterdam, supra* note 15, at 796-97. By the same reasoning, remediating systemic state court violations of civil rights should not be left to private litigants:

[The] power and obligation of federal courts to intervene exists whether one views the state criminal process . . . as one enormous malignant conspiracy of all official state organs leagued in massive resistance and dedicated to the destruction of federal civil rights, or merely as the product of prosecutorial perversity coupled with the heavy-fisted clumsiness and inefficiency that is characteristic of American state criminal administration (and not alone in the South), or as the mindless and inevitable, unhappy

protect justice rights was the answer to these problems, and 1964 would have been the right year.

I. REDRESSING RACIAL VIOLENCE AND THE LONG CIVIL RIGHTS ACT

If, as now seems well established, the modern civil rights movement commenced in the early 1940s¹⁷—as African Americans moved into urban spaces both in the South and in the North; as they began nationalizing, coordinating, and radicalizing their demands for citizenship; as they found allies in the labor movement;¹⁸ as they encountered the socialist and anti-colonialist movements;¹⁹ and as they established anchors in Washington²⁰—

creature of pervasive bigotry and popular intolerance, tugging along alike state prosecutors, juries and judges (again, not alone in the South), or sometimes one or another or a combination of these things.

Id. at 800.

¹⁷ See, e.g., RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* (2007); Hall, *supra* note 1, at 1245 (marking the 1940s as the crest of the social movement that sparked the classic civil rights movement); see also KENNETH W. MACK, *REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER* (2012) (tracking the story of a group of four civil rights lawyers from the 1920s to '40s).

¹⁸ See, e.g., MICHAEL HONEY, *SOUTHERN LABOR AND BLACK CIVIL RIGHTS* 9 (1993) (contending that the American labor movement's successes and failures rested on how effectively workers and their unions dealt with the issue of racial justice); ROBIN D.G. KELLEY, *HAMMER AND HOE: ALABAMA COMMUNISTS DURING THE GREAT DEPRESSION* 92-116 (1990) (describing the role of African American communists in the Alabama labor movement of the 1930s); BRUCE NELSON, *DIVIDED WE STAND: AMERICAN WORKERS AND THE STRUGGLE FOR BLACK EQUALITY*, at xxv (2000) (analyzing how workers and employers shaped racially segmented hierarchies in the workplace and how labor unions interacted with the struggle for black equality).

¹⁹ See, e.g., MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS* (2000) (chronicling the ways in which civil rights victories were shaped by the politics of the Cold War); BRENDA GAYLE PLUMMER, *RISE WIND: BLACK AMERICANS AND U.S. FOREIGN AFFAIRS, 1935-1960* (1996) (documenting how racial identity influenced African American views on foreign policy, and in particular, the interplay of the Civil Rights Movement and the Cold War); GERALD HORNE, *BLACK & RED: W.E.B. DU BOIS AND THE AFRICAN-AMERICAN RESPONSE TO THE COLD WAR, 1944-1963* (1986) (detailing the latter years of Du Bois' life and his involvement in Cold War politics); PENNY VON ESCHEN, *RACE AGAINST EMPIRE: BLACK AMERICANS AND ANTICOLONIALISM: 1937-1957* (1997) (explaining the evolution of anti-colonial politics during the Cold War).

²⁰ See, e.g., WILLIAM C. BERMAN, *THE POLITICS OF CIVIL RIGHTS IN THE TRUMAN ADMINISTRATION* (1970) (detailing President Truman's evolving response to the Civil Rights Movement over the course of his presidency); MERL E. REED, *SEEDTIME FOR THE MODERN CIVIL RIGHTS MOVEMENT: THE PRESIDENT'S COMMITTEE ON FAIR EMPLOYMENT PRACTICE, 1941-1968* (1991) (tracing the events and circumstances that gave rise to the 1941 President's Committee on Fair Employment Practice); HAROLD SITKOFF, *A NEW DEAL FOR BLACKS: THE EMERGENCE OF CIVIL RIGHTS AS A NATIONAL ISSUE* (1978) (providing a detailed history of the Civil Rights Movement during the 1930s and the individuals and groups involved); PATRICIA SULLIVAN, *LIFT EVERY VOICE: THE NAACP AND THE MAKING*

then we need to examine closely the nature, effects, and resistance to racial violence during that period. A number of scholars have taken on this challenge.²¹ As the data on racial violence during this era accumulates, it should be possible to paint a fuller picture of the relationship between the Department of Justice and state and local law enforcement,²² the organizing efforts of African Americans and their allies to control the violence,²³ and the long-range impact of these traumatic events on families and communities. Although researchers have considered the anti-civil rights violence of the classic Montgomery-to-Memphis Movement,²⁴ we have yet fully to grasp the connections between this reactive violence that was often captured by the media, and the entrenched violence linked to state actors and broad scale violation of justice rights of the 1940s.²⁵ This Essay argues that the anti-civil

OF THE CIVIL RIGHTS MOVEMENT (2009) (documenting the growth of the NAACP, its public campaigns, and the role of W.E.B. Du Bois).

²¹ Among the scholars re-examining Jim Crow era racial violence are DAVID CUNNINGHAM, *KLANSVILLE, U.S.A.: THE RISE AND FALL OF THE CIVIL RIGHTS ERA KU KLUX KLAN* (2013) (examining the rise and fall of the Klan in North Carolina in response to the threat of civil rights, lax policing, and the absence of mainstream outlets for resistance), JASON MORGAN WARD, *DEFENDING WHITE DEMOCRACY: THE MAKING OF A SEGREGATIONIST MOVEMENT AND THE REMAKING OF RACIAL POLITICS, 1936-1965* (2011) (providing an historical account of the segregationist movement dating back well before the well-documented backlash to the *Brown v. Board of Education* decision), and Geoff Ward, *The Slow Violence of State Organized Race Crimes*, *THEORETICAL CRIMINOLOGY* 1 (2014) (explaining how the politicization of crime influences criminology and leads to the under-regulation of the “slow violence” of “state organized race crime”). I count myself among this group of researchers. With Melissa Nobles, Political Science, MIT, I am creating an archive and database that will inform some of this work. CIVIL RIGHTS & RESTORATIVE JUSTICE, <http://www.northeastern.edu/civilrights/> (last visited Feb. 10, 2015).

²² Scholarship on the topic includes MICHAL R. BELKNAP, *FEDERAL LAW AND SOUTHERN ORDER: RACIAL VIOLENCE AND CONSTITUTIONAL CONFLICT IN THE POST-BROWN SOUTH* (1987) (explaining how federalism arguments delayed interference in Southern law enforcement), ROBERT K. CARR, *FEDERAL PROTECTION OF CIVIL RIGHTS: QUEST FOR A SWORD* (1947) (documenting the birth and history of the Civil Rights Section of the Department of Justice), and JOHN T. ELLIFF, *THE UNITED STATES DEPARTMENT OF JUSTICE AND INDIVIDUAL RIGHTS, 1937-1962* (1987) (providing an in-depth chronicle of the Department of Justice’s involvement in the civil rights movement, including discussions of the ways in which local law enforcement hindered investigations).

²³ See, e.g., ADAM FAIRCLOUGH, *RACE AND DEMOCRACY: THE CIVIL RIGHTS STRUGGLE IN LOUISIANA, 1915-1972* (2007) (chronicling the Long Civil Rights Movement at the state level in Louisiana); SULLIVAN, *supra* note 20; NAN WOODRUFF, *AMERICAN CONGO: THE AFRICAN AMERICAN FREEDOM STRUGGLE IN THE DELTA* (2006) (discussing early battles for equality in the Mississippi River Valley); ROBERT L. ZANGRANDO, *THE NAACP CRUSADE AGAINST LYNCHING, 1909-1950* (1980) (charting the NAACP’s effort to pass a federal anti-lynching law).

²⁴ See generally BELKNAP, *supra* note 22.

²⁵ In addition to the massive literature on lynching, scholars have focused on racial

rights violence²⁶ associated with the Montgomery-to-Memphis period links back to the racial violence of the 1940s “bridge” decade in ways that affected the trajectory of the Long Civil Rights Act.

The sociologist Steven Barkan has argued that the 1963 demonstrations in Birmingham, Alabama exemplify the link between anti-civil rights violence and legal reform.²⁷ According to this account, the Birmingham civil rights movement took to the streets with its demands for desegregated public facilities in May 1963, with some apprehension that the protests would be met with police and private violence (as indeed they were), but with the express purpose of attracting federal intervention.²⁸ President Kennedy did threaten to send federal troops to restore the peace in Birmingham.²⁹ Shortly thereafter, on June 19, Kennedy referred to Birmingham when he introduced what would become the 1964 Civil Rights Act.³⁰ In a matter of weeks, the principal demands of the Birmingham movement had been won.³¹ Comparing the favorable outcome in Birmingham to the losses in other cities like Albany, Georgia, and Danville, Virginia, Barkan has sought to establish the dynamic sequential triad of black protest, ensuing white violence, and federal intervention.³²

Theories such as Barkan’s about violence and the Movement tend to ignore the relationship between the institutional violence that led to the anti-lynching

violence during particular time periods, *see, e.g.*, Harvard Sitkoff, *Racial Militancy and Interracial Violence in the Second World War*, 58 J. AMER. HIST. 661 (1971) (contending that racial violence during World War II sparked the modern Civil Rights Movement), and in particular regions, *see, e.g.*, GAIL WILLIAMS O’BRIEN, *THE COLOR OF THE LAW: RACE, VIOLENCE, AND JUSTICE IN THE POST-WORLD WAR II SOUTH 2* (1999) (detailing a story of racial unrest in Columbia, Tennessee, in 1946 and its connections to World War II).

²⁶ Michal Belknap coined the term in his study on racial violence in the post-*Brown* South. *See generally* BELKNAP, *supra* note 22.

²⁷ *See generally* Steven E. Barkan, *Legal Control of the Southern Civil Rights Movement*, 49 AM. SOC. REV. 552, 559-60 (1984).

²⁸ *Id.*

²⁹ PAUL J. SCHEIPS, *THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDER 1945-1992*, at 138 (2005) (describing Kennedy’s vow to “do what must be done to preserve order,” the stationing of forces in nearby bases, and the preliminary steps taken to call the Alabama National Guard into service).

³⁰ President John F. Kennedy, *Address on Civil Rights* (June 11, 1963) (transcript available at <http://millercenter.org/president/speeches/speech-3375>, archived at <http://perma.cc/9EM4-KDM4>).

³¹ *See, e.g.*, GLEN T. ESKEW, *BUT FOR BIRMINGHAM: THE LOCAL AND NATIONAL MOVEMENTS IN THE CIVIL RIGHTS STRUGGLE* 299 (1997) (maintaining that the Birmingham children’s crusade broke the stalemate in both local and national race relations); DIANE MCWHORTER, *CARRY ME HOME: BIRMINGHAM, ALABAMA: THE CLIMACTIC BATTLE OF THE CIVIL RIGHTS REVOLUTION* 25 (2001) (describing the Act as a remedy to the events in Birmingham and the “end [of] legalized racism in America”).

³² *See generally* Barkan, *supra* note 27.

campaigns of the 1930s and the anti-police brutality campaigns of the 1940s on the one hand, and the anti-civil rights violence of the late 1950s and early 1960s on the other. If one considers the patterns and practice of violence from 1940 to 1964, what emerges is not the episodic, tactical, and responsive violence described in well-known civil rights histories and by scholars like Barkan, but rather a totalizing practice of violence that is commonplace, enduring, and deeply embedded in the social and political fabric.

The lives of two Alabama brothers who were unknown to each other tell us much about the endemic, cross-generational experience of racial violence from 1940 to 1964. Frederick Shuttlesworth, who died in 2011, was one of the principal architects of the Birmingham Movement.³³ Even before he asked Martin Luther King and the Southern Christian Leadership Conference to come to town in 1963, Shuttlesworth's civil rights work was legendary. When the NAACP was enjoined from operating in the state in 1956, Shuttlesworth was one of those served with the injunction.³⁴ After Montgomery's buses were ordered desegregated in 1956, Shuttlesworth launched a movement to do the same in Birmingham, and on Christmas night of that year, a bomb exploded in his bedroom.³⁵ The next day, he was thrown in jail and sentenced to thirty days' hard labor for violating the bus segregation ordinance, one of many sentences meted out to him before King's arrival in 1963.³⁶ As part of the judgment against him in the *New York Times v. Sullivan*³⁷ case, Shuttlesworth's car was impounded in 1961.³⁸

Unbeknownst to him, Rev. Shuttlesworth had a half-brother, Edward Green, who was the victim of a racial killing in 1943.³⁹ He, too, was a minister. Located in the archives of the Justice Department's Civil Rights Section were two pieces of correspondence in a file labeled "Edward Green."⁴⁰ The first, dated September 1943 and addressed to the Section Chief, Victor Rotnem, was from the Committee Against Racial Discrimination ("CARD"), an organization chaired by Pearl Buck and launched under the auspices of the ACLU.⁴¹ CARD

³³ See generally MANIS, *supra* note 7.

³⁴ *Id.* at 92-93.

³⁵ *Id.* at 106-12.

³⁶ David Benjamin Oppenheimer, *Kennedy, King, Shuttlesworth and Walker: The Events Leading to the Introduction of the Civil Rights Act of 1964*, U.S.F. L. REV. 645, 647 (1995).

³⁷ 376 U.S. 254, 257 (1964) (reversing the Alabama Supreme Court's judgment in favor of the commissioner of Montgomery in a libel action brought over a full-page newspaper advertisement that listed the names of several civil rights leaders and ministers).

³⁸ See MANIS, *supra* note 7, at 238.

³⁹ Telephone Interview with Carolyn Shuttlesworth, daughter of Rev. Shuttlesworth (Oct. 17, 2014).

⁴⁰ Department of Justice, Record Group 60. Investigative File 144, at 2-6 (on file with author) [hereinafter Investigative File].

⁴¹ See *id.*; see also SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU 163 (1990).

informed Rotnem that one Rev. Edward Green of Montgomery, Alabama had been killed and many other Negroes terrorized because they refused to pick cotton “at a low price.”⁴² Assistant United States Attorney Tom Clark replied that the Department knew nothing of the events, and in effect, closed the file.⁴³ Alabama vital records confirm that Edward Green, a World War II serviceman, died in September 1943, and that his body was found near a bridge in Montgomery.⁴⁴

So far as is known, Fred Shuttlesworth never knew that he had a brother named Edward Green,⁴⁵ much less that his brother had come back from the war only to be killed because, apparently, he refused to pick cotton cheaply. Both men were victims of a form of violence that was at once personal, social, and institutional, a practice of violence that lay at the heart of white rule and served as the substratum of subordination. Edward Green’s murder reflected the random cruelty and banality of these fatal assaults, at once hierarchizing, producing, and fracturing daily life. The televised images of the Birmingham uprising, featuring Shuttlesworth’s heroic leadership, unrealistically decontextualized anti-civil rights violence by divorcing it from this past. Missed was the truth of how black communities experienced the 1963 attacks—not as singular and exceptional, but rather as iterative, seemingly distinct and historically specific but existentially connected, like branches on a tree, each trauma remembered not so much as a fixed event, but as part of an intractable and inevitable, intergenerational cycle of subordination, inscription, and protest.

II. THE SLOW DEATH OF PART III OF THE LONG CIVIL RIGHTS ACT

A. *The Civil Rights Act of 1957*

Because legislative efforts to advance the civil rights agenda in the 1940s had been repeatedly stymied in the Senate by Southern Democrats, civil rights advocates of the period put some of their stock in executive orders⁴⁶ and

⁴² Investigative File, *supra* note 40.

⁴³ *Id.*

⁴⁴ Death Certificate for Edward Green (on file with author).

⁴⁵ Green and Shuttlesworth shared a father. Shuttlesworth’s mother brought two children into her marriage with Fred’s stepfather and gave Fred and his sister her new husband’s name. MANNIS, *supra* note 7. Shuttlesworth’s children state that he never mentioned his half-brother. Interview with Carolyn Shuttlesworth, *supra* note 39.

⁴⁶ In 1941, Franklin Delano Roosevelt mandated fair employment practices in the national defense industry. *See* Exec. Order No. 8802, 6 C.F.R. 3109-01 (1941). In 1946, Harry Truman established the President’s Commission on Civil Rights. *See* Exec. Order No. 9808, Fed. Reg. 14,153 (Dec. 5, 1946). And in 1948, he desegregated the federal work force, *see* Exec. Order No. 9980, 13 Fed. Reg. 4311 (July 26, 1948), and the Armed Forces, *see* Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948).

Supreme Court rulings.⁴⁷ Measures offering piecemeal solutions were considered by Congress, but none of them could survive the Southerners' lock-hold on the Senate.⁴⁸ Anti-poll tax and soldier voting measures that would have expanded political participation were defeated, as were fair employment measures and an amendment conditioning federal support for school lunches on non-discriminatory allocation of the funds in segregated systems.⁴⁹

By 1957, the Department of Justice was well aware that existing federal law was too deeply flawed to combat racial violence effectively and that Congress had the power to address the topic.⁵⁰ That racially discriminatory state law enforcement practices were subject to congressional regulation under its Reconstruction powers, in accordance with which Congress could enforce rights to due process and equal protection, was evident from the adoption of the Civil Rights Act of 1866.⁵¹ For instance, Congress could apply its Reconstruction powers to remedy discriminatory practices by state actors affecting persons charged with crimes and the victims of crimes. Furthermore, Congress could at that time have defined its Reconstruction powers to regulate private conduct.⁵² The failure to address justice rights in the 1964 Act was,

⁴⁷ The Supreme Court struck racial qualifications to party membership and primary elections in 1944, *see* *Smith v. Allwright*, 321 U.S. 649, 664-65 (1944), and in 1948 it ruled that racially restrictive covenants in property deeds were unenforceable, *see* *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948).

⁴⁸ Michael Klarman suggests that when it has been difficult to engage Congress in civil rights reform because of the Senate's counter-majoritarian practices, the Supreme Court has sometimes, as in the 1940s, filled the breach. *See* Michael J. Klarman, *Court, Congress and Civil Rights*, 7-10 (Univ. of Va. School of Law Public Law and Legal Theory, Research Paper No. 02-12, 2002), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=353363.

⁴⁹ From 1945 until 1957, Congress considered a civil rights bill each year. The House voted in 1945, 1947, and 1949 to abolish the poll tax, but the measure was defeated in the Senate. For a description of the campaigns to eliminate the poll tax, federalize soldier voting, institute a Fair Labor Practices Commission, and tie federally sponsored state programs to equitable distribution of funding, *see* Jeffery A. Jenkins and Justin Peck, *Building Toward Major Policy Change: Congressional Action on Civil Rights, 1941-1950*, 31 *LAW & HIST. REV.* 139, 144-45 (2013).

⁵⁰ *See* BELKNAP, *supra* note 22, at 26-52 (discussing generally the obstacles the Department of Justice faced in the 1950s as local and state officials resisted integration).

⁵¹ *See* Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27; *see also supra* note 13 and accompanying text. The "security of person and property" language, and the term "like punishment, pains, and penalties" were aimed at the Black Codes, but by analogy, any systemic discrimination affecting justice rights could be redressed by Congress. Edward White argues that the Fourteenth Amendment was adopted because of uncertainty over whether the Thirteenth Amendment gave Congress the power to enact the 1866 Act. *See* G. Edward White, *The Origins of Civil Rights in America*, 64 *CASE W. RES. L. REV.* 755, 775 (2014) ("[T]he Fourteenth Amendment seemed to have been designed to remove any uncertainty about the constitutional basis of the [1866 Act].").

⁵² Congress could have acted under the Thirteenth Amendment, which contains no state

therefore, not a question of legislative power, but of political will. The seeds of this disaster were sown six years before the debate over the 1964 Act, when Congress rejected proposals to grant to the federal government the power to sue to remedy and prevent justice rights violations in the Civil Rights Acts of 1957 and 1960.

President Dwight Eisenhower's attorney general, Herbert Brownell, who argued *Brown v. Board of Education*,⁵³ introduced what would become the Civil Rights Act of 1957 to the House of Representatives on April 9, 1956.⁵⁴ At that time, the only federal laws directly targeting civil rights were the Reconstruction-era statutes. Some of these laws were merely declarative of rights, while others created a civil cause of action for private parties, and a third set criminalized behavior that contravened certain federally conferred civil rights.⁵⁵ In drafting the new legislation, which in 1957 would become the first major civil rights measure to win congressional approval since 1875, the Justice Department decided not to include an anti-lynching provision,⁵⁶ not so

action requirement, as it did when it passed the 1866 Civil Rights Act. See George Rutherglen, *State Action, Private Action, and the Thirteenth Amendment*, 94 VA. L. REV. 1367, 1371-76 (2008) (explaining why the Thirteenth Amendment does not require state action). It could also have reached some private conduct under the *Shelley v. Kraemer* approach to state action. See U.S. CONST. amend. XIII; *Shelley*, 334 U.S. at 19 (1947) (finding state action for purposes of the Fourteenth Amendment where racially restrictive covenants were enforced by court order). For an illuminating argument that the Reconstruction power was meant to reach private conduct and to insulate far-reaching congressional action to protect civil rights from Supreme Court review, see Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801 (2010).

⁵³ 347 U.S. 483 (1954).

⁵⁴ JAMES L. SUNDQUIST, *POLITICS AND POLICY: THE EISENHOWER, KENNEDY, AND JOHNSON YEARS* 259-71 (1968) (discussing the historical and legislative processes behind the 1957 Act); see also ROBERT A. CARO, *THE YEARS OF LYNDON JOHNSON: MASTER OF THE SENATE* 862-1012 (2002) (chronicling Lyndon Johnson's involvement in the 1957 Act and its influence on later civil rights legislation).

⁵⁵ The relevant statutes were 42 U.S.C. § 1982 (2012), establishing equal civic rights and aimed at the Black Codes; 42 U.S.C. § 1983, conferring on private parties a right to sue for violations committed by persons acting under color of law; 42 U.S.C. § 1985, providing a cause of action for conspiracy to interfere with federal rights; 42 U.S.C. § 1971, protecting the right to vote from infringement by public officials; 18 U.S.C. § 241 (2012), criminalizing conspiracies to deprive individuals of certain specified constitutional rights; 18 U.S.C. § 242, authorizing prosecution of persons acting under color of law to deprive individuals of certain constitutional rights; and 18 U.S.C. § 243, forbidding interference with the right to jury service because of race. Although many justice rights, such as the rights to equal jury service and to personal security, were recognized by these laws, adequate remedies were not provided for.

⁵⁶ The focus of the congressional civil rights agenda in the 1920s and 1930s was anti-lynching legislation. Three bills, which were largely sponsored by Republicans, passed the House in 1922, 1937, and 1940, but were filibustered to death in the Senate. For this history, see ROBERT ZANGRANDO, *supra* note 23, at 51-72, 139-61.

much because it had doubts about its constitutionality but rather because Brownell did not consider it to be politically wise,⁵⁷ especially in light of the decline in lynching. Also scrapped before the administration presented its package to the House were three significant changes to the two Reconstruction Era criminal civil rights acts, 18 U.S.C. § 241 and § 242. The proposed amendments would have (1) authorized the Department of Justice to enforce through civil litigation the rights guaranteed by these two statutes; (2) relaxed the intent requirement established in *Screws v. Georgia*⁵⁸ and specified the constitutional rights protected by the laws;⁵⁹ and (3) heightened the penalties.⁶⁰ But all of these provisions to strengthen the bill were taken off the table before it reached Congress.

One section of President Eisenhower's proposed bill did call upon Congress to amend other non-criminal laws in order to confer on the Justice Department the power to initiate civil suits to protect constitutional rights.⁶¹ The provision would become known as "Part III" of the 1957 bill.⁶² In his 1957 State of the Union message, President Eisenhower explicitly urged Congress to "amend[] the laws so as to permit the Federal Government to seek from the civil courts preventive relief in civil rights cases."⁶³ The administration's proposed bill also called for the appointment of a new assistant attorney general to coordinate the Justice Department's civil rights activities and the elevation of the Civil Rights Section to a division dedicated to the issue,⁶⁴ as had been recommended by President Harry Truman in 1948.⁶⁵

⁵⁷ See BELKNAP, *supra* note 22, at 40 (discussing how Brownell's refusal to appear at subcommittees to speak about anti-lynching legislation was inconsistent with his claims that the Department of Justice's inaction was due to weak laws).

⁵⁸ 325 U.S. 91 (1941).

⁵⁹ In *Screws v. Georgia*, the Supreme Court narrowed the reach of 18 U.S.C. § 242 by reading the statute to require a showing of a specific intent to deprive the victim of the violation of a constitutional right. *Id.* at 101. Justice Douglas noted in his opinion for the majority that if Congress "desires to give the Act wider scope, it may find ways of doing so," *id.* at 105, and this invitation may explain why the Justice Department sought initially to address *Screws* in the 1957 legislative proposals.

⁶⁰ See BELKNAP, *supra* note 22, at 41.

⁶¹ SUNDQUIST, *supra* note 54, at 222-38.

⁶² Part III would bear the same designation in the debates over the 1957 and 1964 civil rights measures. *See id.* at 226-27.

⁶³ Dwight D. Eisenhower, Annual Message to the Congress on the State of the Union, January 10, 1957, available at <http://www.presidency.ucsb.edu/ws/?pid=11029>, archived at <http://perma.cc/DC3M-NUPQ>.

⁶⁴ *See id.* (outlining the administration's "four-point program to reinforce civil rights").

⁶⁵ President Harry Truman established the President's Commission on Civil Rights by Executive Order 9808 in 1946. *See* Exec. Order. No. 9808, *supra* note 46. For the Committee's full set of recommendations, see PRESIDENT'S COMM. ON CIVIL RIGHTS, TO SECURE THESE RIGHTS (1947), available at <http://www.trumanlibrary.org/civilrights/srights1.htm>, archived at <http://perma.cc/AS49->

In introducing the bill to Congress, Attorney General Brownell described the weaknesses of the Reconstruction-era statutes and proposed expanding the authority of the Justice Department to allow it to bring civil suits against persons acting under color of law in order to remedy practices that violated equal protection.⁶⁶ As for 42 U.S.C. § 1971, which protected the right to vote from infringement by public officials, the administration's bill called for amending it to authorize the government to institute civil law suits to protect voting rights.⁶⁷ And, under the proposed changes, civil suits could be pursued for a range of additional equal protection violations against both private actors and public officials.⁶⁸

Describing cases encountered by the Department's civil rights attorneys, Brownell amply illustrated why new federal civil remedies were necessary when he introduced the bill to the House Judiciary Committee on April 10, 1956⁶⁹ and to the Senate Judiciary Committee on February 14, 1957.⁷⁰ Section Three of the Eisenhower bill became known as "Part III," and the term was used as a shorthand in the debates on the subsequent civil rights measures in 1960 and 1964, even when the concept had a different title in the later proposals.⁷¹ The need for Part III in the voting rights area was fairly straightforward, Brownell told the legislators. He described a case from North Carolina in which a registrar subjected only black registrants to a particularly rigorous test, asking them to answer twenty questions, which included naming all the candidates for office and revealing whether they were members of the

5FBN.

⁶⁶ Attorney General Brownell observed that the criminal statutes, 18 U.S.C. § 241 and § 242, were of limited utility because they came into play only after a violation, and federal officials were understandably reluctant to impose criminal sanctions on state public officials. And the existing civil remedies, 42 U.S.C. § 1971 and § 1983, created causes of action for private parties only and were not designed to correct patterns of unconstitutional behavior. *See generally* Letter from Attorney General Herbert Brownell, Jr. to Vice President Richard M. Nixon, The Civil Rights Program (April 10, 1956), available at http://www.eisenhower.archives.gov/research/online_documents/civil_rights_act/1956_04_01_Cabinet_Paper.pdf, archived at <http://perma.cc/M43Q-TVPC>.

⁶⁷ The bill would have amended the Reconstruction-Era voting rights statute in three respects: (1) applied the law to private parties as well as persons acting under color of law; (2) authorized the Attorney General to bring civil suits for preventive relief; and (3) expressly eliminated the necessity to exhaust state remedies before bringing federal lawsuits. *See id.* at 8.

⁶⁸ *See id.*

⁶⁹ *Statement and Analysis by the Attorney General Concerning the Proposed Civil Rights Act of 1949 Before the H. Comm. on the Judiciary*, 84th Cong. 157-79 (1956).

⁷⁰ *Statement of Hon. Herbert Brownell, Jr., Attorney General of the United States, Before Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 85th Cong. 1-220 (1957).

⁷¹ *See supra* note 44 and accompanying text.

NAACP.⁷² In a civil proceeding brought by the federal government, Brownell advised the Judiciary subcommittee, “the constitutionality of the election practice could be quickly determined and appropriate relief awarded.”⁷³ On the other hand, “criminal remedies,” he explained, “come after the harm has been done. . . . Jurors are reluctant to indict and convict local officials As a result, not only are the election officials freed, but also the government is not able to get an authoritative determination regarding the constitutionality of what was done.”⁷⁴

More interesting for our purposes, however, were Brownell’s illustrations outside of the voting rights arena. In one case, he related, the Supreme Court reversed a death sentence because of the systematic exclusion of blacks from the defendant’s petit and grand juries.⁷⁵ In an investigation it conducted some time after the Court’s decision, the Justice Department found that the unconstitutional jury selection practices that gave rise to the reversal no longer prevailed in the county.⁷⁶ But, Brownell queried, would it not be better to correct such violations by civil litigation rather than by criminally prosecuting the public officials whose wrongful acts resulted in the deprivation?⁷⁷ He offered a second example from the school desegregation arena.⁷⁸ In the Hoxie, Arkansas school district, when in 1955 the local board sought to desegregate its schools, hundreds of protesting segregationists flooded the area, and some threatened to attack the board members.⁷⁹ Support from Governor Faubus was not forthcoming. An overwhelmed school board pursued a successful action for injunctive relief in federal court.⁸⁰ Had the administration’s proposals been the law, Brownell asserted, the Attorney General could have brought suit against the private conspirators directly on behalf of the board rather than intervening as a friend of the court in the board’s lawsuit.⁸¹

Hence, the Eisenhower Administration had solid grounds to support an effective federal civil rights program that would give adequate standing and resources to the Justice Department’s civil rights program and provide it with the necessary legislative tools to address justice rights. Brownell’s proposals to confer on the Justice Department new powers—including Part III of House Bill

⁷² *Statement of Hon. Herbert Brownell, supra* note 70, at 5 (1957).

⁷³ *Id.* at 6.

⁷⁴ *Id.* at 5.

⁷⁵ *Id.* at 6-7.

⁷⁶ *Id.*

⁷⁷ *Id.* at 7.

⁷⁸ *Id.* at 7-8.

⁷⁹ *Id.* at 8; *see Brewer v. Hoxie Sch. Dist. No. 4*, 238 F.2d 91, 93-94 (8th Cir. 1956).

⁸⁰ *Brewer*, 238 F.2d at 98.

⁸¹ *Statement of Hon. Herbert Brownell, Jr., Attorney General of the United States, Before Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 85th Cong. 8 (1957). Congress could reach private actors under its Thirteenth Amendment power. *Griffin v. Breckenridge*, 403 U.S. 88 (1971).

6172, authorizing its lawyers to commence civil litigation, which was approved by the House of Representatives—would have fundamentally transformed the civil rights legislative arena.⁸² If, for example, the 1943 murder of Edward Green was designed to intimidate black farmhands seeking to leave the cotton fields in Alabama, the Justice Department could have sought equitable relief, at least against state actors. Similarly, if the attacks on Rev. Fred Shuttlesworth in Birmingham were part of a conspiracy to punish blacks for their civil rights advocacy, Part III would have authorized a federal civil action. In each instance—as with Brownell’s jury discrimination and racial violence examples—Part III would give the Justice Department a green light to investigate and prosecute. In sum, under Brownell’s proposed Part III, the Justice Department could challenge violations of justice rights—state-sponsored racial violence, conspiracies to attack civil rights advocates, racially discriminatory police practices, prosecutions, trial procedures, jury selection, sentencing, and prison practices. But this was not to be. When Part III of House Bill 6172 was debated in the Senate, its provisions were raked over by the Southern filibusters, ultimately to be buried atop the heap of civil rights bills that had succumbed to the same fate since 1875.⁸³ Arguing against Part III on behalf of the Southern Caucus, Georgia Senator Richard Russell invoked the specter of Reconstruction.⁸⁴ Senator Russell claimed that Part III would, when read in combination with 42 U.S.C. § 1993, which authorized the President to use armed forces to enforce any judicial order under § 1985,⁸⁵ permit the use of the United States army to require the “white people of the South . . . to do away with any separation of the races in any phase of public life.”⁸⁶ Russell told his fellow senators that “the bill is cunningly designed to vest in the Attorney General unprecedented power to bring to bear the whole might of the Federal Government, including the Armed Forces if necessary, to force a commingling of white and Negro children in the State-supported public

⁸² See Robert D. Loevy, *Introduction* to THE CIVIL RIGHTS ACT OF 1964, at 28 (Robert D. Loevy ed., 1997) (explaining that the House of Representatives passed all four of Brownell’s recommended provisions, including Part III, because there is no filibuster rule in that chamber).

⁸³ See *id.* at 29-30 (“Incredibly to civil rights supporters, this southern filibuster . . . lasted for almost three weeks With Part III eliminated, the southerners no longer considered the bill a threat and let the other three provisions pass into law without a filibuster.”).

⁸⁴ See 103 CONG. REC. 10773 (1957) (“The South was finally freed of the bayonet rule of reconstruction days I shall appeal to my colleagues . . . to let the whole people of this country pass upon this question before millions of white people in the South are subjected to the outrageous and un-American treatment contemplated by this bill.”).

⁸⁵ 42 U.S.C. § 1993 provided that the President could employ the armed forces to aid in the execution of judicial process under 42 U.S.C. § 1985. See 42 U.S.C. § 1993 (1952) (repealed 1957).

⁸⁶ 103 CONG. REC. 10773 (1957).

schools of the South.”⁸⁷ The Senate, with the approval of Attorney General Brownell, voted to repeal § 1993, but this did not tamp down the Southern war on Part III. Ultimately, the Eisenhower administration agreed to drop the proposal to grant the government the power to bring civil suits.⁸⁸ For his part, Russell called the defeat of Part III the “sweetest victory in my twenty-five years as a Senator.”⁸⁹ The Senate did approve an amendment to 42 U.S.C. § 1971, an impoverished alternative to Part III that granted the Attorney General the power to proceed civilly against persons “about to engage in an act or practice” that would interfere with the right to vote for federal officer holders.⁹⁰ However, this provision would offer no protection to individuals like Fred Shuttlesworth, his brother Edward Green, the school board members in Hoxie, Arkansas, or to death penalty defendants whose fate turned on the decisions of grand and petit juries from which blacks had been systematically excluded.

B. *The Civil Rights Act of 1960*

Again in 1958, Congress considered expanding federal power to control racial violence and protect civil rights. The bombing campaigns that lit up black neighborhoods in cities like Birmingham and Montgomery and destroyed synagogues across the country were the principle impetus for the various proposals before the House and Senate.⁹¹ The Eisenhower administration’s proposal, one of several before Congress, made it a federal crime to travel interstate to avoid prosecution for bombing a school or religious facility.⁹² But none of the proposals under consideration in 1959 included the Part III language of Attorney General Brownell’s 1957 bill that would have conferred

⁸⁷ *Id.* at 10771.

⁸⁸ See BELKNAP, *supra* note 22, at 44.

⁸⁹ 103 CONG. REC. 16661 (1957).

⁹⁰ Civil Rights Act of 1957, Pub. L. 85-315, § 131(c), 71 Stat. 634, 637 (codified at 52 U.S.C. § 10101 (2012)).

⁹¹ See BELKNAP, *supra* note 22, at 53-55 (“Many public officials saw the wave of bombings which swept the South as a problem that transcended state boundaries and, consequently, required a federal solution.”).

⁹² *Civil Rights: Hearings on H.R. 300, 351, 352, 353, 400, 430, 461, 617, 618, 619, 759, 913, 914, 1202, 2346, 2479, 2538, 2786, 3090, 3147, 3148, 3212, 3559, 4169, 4261, 4338, 4339, 4342, 4348, 4457, 5008, 5170, 5189, 5217, 5218, 5276, 5323, 6934, 6935 Before the H. Subcomm. No. 5 of the Comm. on the Judiciary*, 86th Cong. 209-10 (1959) (statement of William P. Rodgers, Att’y Gen. of the United States) (explaining that the purpose of these federal proposals to address the bombings was “to provide a Federal deterrent to the bombing of schools and places of worship, a type of outrage that has shocked all decent, self-respecting people”); *Civil Rights – 1959: Hearings on S. 435, S. 456, S. 499, S. 810, S. 957, S. 958, S. 959, S. 960, S. 1084, S. 1199, S. 1277, S. 1848, S. 1998, S. 2001, S. 2002, S. 2003, and S. 2041 Before the H. Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 86th Cong. 186, 189-91 (1959) (statement of William P. Rodgers, Att’y Gen. of the United States) (making the same argument).

on the Justice Department the power to act affirmatively to prevent bombings and other crimes of racial violence.⁹³ NAACP Secretary Roy Wilkins expressed dismay that there seemed to be no appetite for more muscular federal power with regard to civil rights, as did Joseph Rauh, counsel to the Leadership Conference on Civil Rights.⁹⁴ The modest proposal the Justice Department did consider regarding affirmative federal intervention would have allowed the Attorney General to sue if the victim of a civil rights violation was likely to suffer reprisals, but the House never considered even this proposal.⁹⁵

In response to the 1959 lynching of Charles Mack Parker in Poplarville, Mississippi, Congressman Emmanuel Celler crafted an anti-lynching bill that won the support of several legislators, but the administration refused to support the initiative, and the proposals of the House bill targeting bombing were eliminated in a Judiciary subcommittee.⁹⁶ Nevertheless, the measure was debated on the House floor.⁹⁷ In the Senate, a pared-down version of Part III that would apply only to school cases was floated, but Everett Dirksen shot it down.⁹⁸ The surviving provisions of these proposals would become the Civil Rights Act of 1960. Title I of the Act made it a crime to interfere with the exercise of rights or enforcement of a federal court order,⁹⁹ and Title II created three new criminal offenses aimed at the bombing problem.¹⁰⁰

C. *The Civil Rights Act of 1964*

The phoenix that was Part III, badly wounded in 1957 and 1960, would rise again in the debates over the Civil Rights Act of 1964. That bill, which would ultimately become House Bill 7152, was initially submitted to the House by President Kennedy.¹⁰¹ It was drafted by Attorney General Robert F. Kennedy, his Assistant Attorney General for Civil Rights, Burke Marshall, and Civil

⁹³ See BELKNAP, *supra* note 22, at 60.

⁹⁴ See *id.* According to Belknap, several civil rights and civil liberties organizations complained about the failure to include Part III in the 1960 bill, including the American Civil Liberties Union, the Anti-Defamation League, the American Veterans Committee, the AFL-CIO, and the United Auto Workers. *Id.*

⁹⁵ See *id.* (explaining that the Justice Department's "proposal was deleted from the president's recommendations during a White House meeting on February 3, 1959").

⁹⁶ See *id.* at 61-63.

⁹⁷ *Id.* at 63.

⁹⁸ See *id.* at 63.

⁹⁹ See *id.* at 63-64, 68.

¹⁰⁰ See *id.* at 64-68. On the 1960 debate, see generally DANIEL M. BERMAN, A BILL BECOMES A LAW: THE CIVIL RIGHTS ACT OF 1960, at 52-112 (1962).

¹⁰¹ See CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 3-4 (1985). For a legislative history of the 1964 Civil Rights Act, see generally ROBERT D. LOEVY, TO END ALL SEGREGATION: THE POLITICS OF THE PASSAGE OF THE CIVIL RIGHTS ACT OF 1964 (1990); CLAY RISEN, THE BILL OF THE CENTURY: THE EPIC BATTLE FOR THE CIVIL RIGHTS ACT (2014), and WHALEN & WHALEN, *supra*.

Rights Division staff attorney Harold Greene. The drafters were acutely aware that to terminate the inevitable filibuster, they had to persuade sixty-seven senators to support the bill.¹⁰² Its provisions addressed the right to vote, public accommodations, public education, discrimination in federal programs, and equal employment opportunities.¹⁰³ It would be a full year from the time Robert Kennedy introduced the bill to the House of Representatives on June 20, 1963, until President Johnson signed the Act on July 2, 1964.¹⁰⁴ While the bill the Kennedy administration initially introduced did confer on the Attorney General the power to sue to enforce its public accommodations provisions, there was no general grant of authority to pursue civil actions to enforce civil rights.¹⁰⁵ Further, the bill's key supporters in Congress never squarely addressed the question of whether there should be remedies for discriminatory practices in the criminal justice arena or for anti-civil rights violence.¹⁰⁶ As discussed previously in this Article, President Kennedy acted in the wake of the Birmingham crusade launched by Martin Luther King in the spring of 1963.¹⁰⁷ On February 28, 1963, Kennedy sent a message to Congress that legislative action on civil rights would be required, reminding Americans that "the [black baby] born in America today . . . has about one-half as much chance of completing high school as a white baby born in the same place on the same day[,] . . . a life expectancy which is seven years less[,] . . . and the prospects of earning only half as much."¹⁰⁸ The legislative proposals he put forth in February 1963, however, fell far short of the Democratic platform,

¹⁰² See Zeitlow, *supra* note 12, at 962. On the battle to obtain cloture, see, e.g., LOEVY, *supra* note 101, at 7 ("[I]n the Senate, and by far the largest obstacle of all, was the filibuster."), NINA M. MOORE, GOVERNING RACE: POLICY, PROCESS, AND THE POLITICS OF RACE 64-65 (2000) (suggesting that the civil rights bills provoked "arguably the fiercest active opposition ever pitted against a set of legislative proposals"), and SUNDQUIST, *supra* note 54, at 222 (naming the filibuster as the "one insurmountable obstacle").

¹⁰³ See WHALEN & WHALEN, *supra* note 101, at 1-2.

¹⁰⁴ *Id.* at 3-4, 227-28.

¹⁰⁵ *Id.* at 14.

¹⁰⁶ See BELKNAP, *supra* note 22, at 104. The House leaders were Emanuel Celler (D-N.Y.) and William McCulloch (R-Ohio), see WHALEN & WHALEN, *supra* note 101, at 3-4, and the leaders in the Senate were Hubert Humphrey (D-Minn.), Michael Mansfield (D-Mt.), and Everett Dirksen (R-Ill.), see *id.* at 126-29. Nonetheless, scores of amendments were considered by the House and the Senate. See, e.g., John G. Stewart, *The Civil Rights Act of 1964: Tactics I*, in THE CIVIL RIGHTS ACT OF 1964: THE PASSAGE OF THE LAW THAT ENDED RACIAL SEGREGATION 232-52 (Robert D. Loevy ed., 1997) (considering various amendments before both the House of Representatives and the Senate, including the Talmage Amendment, the Mansfield-Dirksen Substitute Amendment, the Morton Amendment, and the Dirksen Amendments).

¹⁰⁷ See Zeitlow, *supra* note 12, at 962.

¹⁰⁸ President John F. Kennedy, Special Message to Congress on Civil Rights (Feb. 28, 1963), available at <http://www.presidency.ucsb.edu/ws/?pid=9581>, archived at <http://perma.cc/6683-UJHE>.

which called for a Fair Employment Practices Commission, general authority for the Attorney General to file civil suits in civil rights cases (Part III), and accelerated school desegregation.¹⁰⁹ Disregarding the implementation tools that were in the platform on which he won election, the President was instead offering wan measures that would amend existing legislation on voting, extend the Civil Rights Commission Eisenhower had established in 1957, and offer federal assistance to school districts seeking voluntarily to desegregate.¹¹⁰

The Leadership Conference on Civil Rights protested vigorously that the President's proposals were far weaker than those of some Republican legislators, who were calling for a strong public accommodations bill.¹¹¹ As Birmingham heated up, civil rights leaders urged Kennedy to take a more robust stand by sending Congress a bill that covered employment, public accommodations, voting, and education, and that gave the Attorney General the power to sue to protect civil rights demonstrators like those in Birmingham.¹¹² On June 20, 1963, the President's revised bill arrived in Congress but without anything resembling a Part III.¹¹³

Congressional debate on the bill proceeded across the summer months and was in full swing when thousands gathered at the Lincoln Memorial on August 28, 1963, for the March on Washington with a list of demands including, among other things, a civil rights law conferring authority on the Attorney General to seek equitable relief to protect civil rights.¹¹⁴ John Lewis, Chairman of the Student Non-Violent Coordinating Committee, told the marchers that "[u]nless title three is put in this bill,¹¹⁵ there's nothing to protect the young children and old women who must face police dogs and fire hoses in the South

¹⁰⁹ See *Democratic Party Platform of 1960*, THE AMERICAN PRESIDENCY PROJECT (July 11, 1960), <http://www.presidency.ucsb.edu/ws/?pid=29602>, archived at <http://perma.cc/M5TG-EHC9>. The 1960 Democratic Party Platform specifically called for the Attorney General to be "empowered and directed to file civil injunction suits in Federal courts to prevent the denial of any civil right on grounds of race, creed, or color." *Id.*

¹¹⁰ See, e.g., Kennedy, *supra* note 108; Joseph L. Rauh, Jr., *The Role of the Leadership Conference, in THE CIVIL RIGHTS ACT OF 1964*, *supra* note 106, at 51 ("[I]nstead of . . . implement[ing] the Democratic platform promises of a Fair Employment Practices Commission . . . law, authority for the attorney general to file civil injunctive suits in civil rights cases (the old Part III deleted from the 1957 bill), and immediate first-step school desegregation, the president limited himself to recommending patchwork improvements.").

¹¹¹ See Rauh, *supra* note 110, at 51.

¹¹² The Leadership Conference urged the administration to include a "Part III" provision conferring on the Attorney General power to enjoin state interference with peaceful protests. See Rauh, *supra* note 110, at 52.

¹¹³ *Id.* at 53.

¹¹⁴ See MARCH ON WASHINGTON FOR JOBS AND FREEDOM: LINCOLN MEMORIAL PROGRAM (1963), available at <http://www.crmvet.org/docs/mowprog.pdf>, archived at <http://perma.cc/3QNS-MU9W>.

¹¹⁵ Title III was the old Part III, authorizing the attorney general to file civil suits against state or local officials. See WHALEN & WHALEN, *supra* note 101, at 35.

while they engage in peaceful demonstration.”¹¹⁶ The Kennedy administration initially declined to add the proposed Title III to its bill,¹¹⁷ but the bombing on September 15, 1963, of Birmingham’s Sixteenth Street Baptist Church added new urgency to the deliberations over the bill, and ten days later, on September 25, Part III was restored to the bill then under consideration by Subcommittee No. 5 of the Judiciary Committee.¹¹⁸

Looking ahead to the battle in the Senate, where “Mrs. Murphy’s boarding house” would likely find defenders among both Southern Democrats and Republicans,¹¹⁹ the administration opposed Part III for, at least in part, strategic reasons. To circumvent opposition that a measure relying on broadly defined Section Five powers under the Fourteenth Amendment would likely invite, the administration based its bill on the Commerce Clause.¹²⁰ If the *Wickard v. Filburn*¹²¹ filiation arguments could be distinguished away,¹²² the Commerce Clause matchup would put small businesses like Mrs. Murphy’s boarding house beyond the reach of federal regulations.¹²³ And equally

¹¹⁶ See John Lewis, Student Non-Violent Coordinating Committee Chairman, Speech Given at the March on Washington (Aug. 28, 1963) (transcript available at <http://www.crmvet.org/info/mowjl2.htm>, archived at <http://perma.cc/BM2N-95CM>). Lewis also proclaimed that Kennedy’s bill failed to address “police state” tactics and the wrongful convictions of civil rights activists. See *id.*

¹¹⁷ See Rauh, *supra* note 110, at 51.

¹¹⁸ See *id.* at 58 (explaining that the Subcommittee Chairman, Emanuel Celler, called a press conference on September 25 announcing that the Subcommittee No. 5 had approved a “very strong bill” including “Part III, all public accommodations, and even some secondary items requested by the Leadership Conference”); WHALEN & WHALEN, *supra* note 101, at 34-35.

¹¹⁹ See Rauh, *supra* note 110, at 55 (describing the public accommodations exception for “Mrs. Murphy’s boarding house” with a few rooms” where “her right of privacy cut across the [black person’s] right to a room”). To the bill’s detractors, “Mrs. Murphy” represented a zone of private conduct constitutionally insulated from federal regulation. See Loevy, *supra* note 101, at 52. To its supporters, the simple and sympathetic image reflected “the absurd lengths to which the opponents of the bill would go in order to seek a basis for attacking the bill.” *Id.* at 51-52.

¹²⁰ The administration relied heavily on a brief authored by Paul A. Freund for the argument that the bill’s antidiscrimination provisions—which would be vulnerable under the Court’s state action ruling in *The Civil Rights Cases*, 109 U.S. 3 (1883)—could be supported under the Commerce Clause. See generally *Civil Rights: Public Accommodations: Hearings on S. 1732 Before the S. Comm. on Commerce*, 88th Cong. 1183-90 (1963) (brief of Paul A. Freund, Professor at Harvard Law School). Freund argued that there was ample Supreme Court authority for congressional regulation of private enterprises, including prohibitions against discrimination. See *id.* at 1190.

¹²¹ 317 U.S. 111 (1942).

¹²² See *id.* at 124-25 (establishing that Congress may reach even local activity under the Commerce Clause if “it exerts a substantial economic effect on interstate commerce”).

¹²³ As it turned out, of course, in endorsing the Commerce Clause as a source of congressional power, the Supreme Court applied the logic of *Wickard v. Filburn* to a small

important, focusing on the Commerce Clause rescued the bill from a slow but certain death in the Senate Judiciary Committee, known as the “graveyard of civil rights legislation” because of the tight control exercised by its entrenched chairman, Mississippi’s Democratic Senator James Eastland.¹²⁴ Senate rules called for a bill based on the Commerce Clause to be referred to the Senate Commerce Committee, which was chaired by Warren Magnuson, a liberal Democrat from Washington.¹²⁵ Congressional power to enact Part III was, arguably, only available under Section 5 of the Fourteenth Amendment, and the end run around Senator Eastland would not be possible if the bill rested on Equal Protection.

Unfortunately, because of a drafting error, the bill that was reported out of Subcommittee No. 5 of the House Judiciary Committee conferred far broader powers on the Attorney General than even the Leadership Conference had called for.¹²⁶ The draft of Part III that was considered by the subcommittee limited the Attorney General’s authority to bring suits to enforce minority rights under the Equal Protection Clause, but the bill reported out of the subcommittee gave the Attorney General power to sue over *any* constitutional right, including freedom of religion, searches and seizures, and seizures of private property.¹²⁷ Robert Kennedy vigorously objected, claiming that the provision would overwhelm the Department of Justice.¹²⁸ But because this error could easily have been remedied by restoring the narrower language initially proposed, it is likely that Kennedy’s objections were more fundamental. Mindful of the need for a bill that could attract significant Republican support in the Senate, he urged cutbacks including total excision of

barbeque joint in Birmingham. *See Katzenbach v. McClung*, 379 U.S. 294, 300-01 (1964) (finding that Congress could regulate discrimination in public accommodations under the Commerce Clause because such discrimination meant that “established restaurants in such areas sold less interstate goods . . . that interstate travel was obstructed directly by it, that business in general suffered and that many new businesses refrained from establishing there as a result of it”).

¹²⁴ *See* WHALEN & WHALEN, *supra* note 101, at 4.

¹²⁵ *See* CHARLES STEWART III, *ANALYZING CONGRESS* 343 (2001). In the case of the 1964 Civil Rights Act, the House bill presented the opposite strategic situation. *See id.* (“The House provided exactly the opposite situation [of the Senate]: The chairman of the House Commerce Committee, Rep. Oren Harris (Dem., Ark.), was an opponent while the chairman of the House Judiciary Committee, Rep. Emanuel Celler (Dem., N.Y.), was a supporter.”).

¹²⁶ *See* Rauh, *supra* note 110, at 59 (“The . . . tragic, if understandable, mistake by the over-worked and conscientious committee counsel, William Foley [was to rewrite] . . . the amendment to cross-reference to other statutes, and in doing so made it far broader than the situation warranted and vulnerable to later attack.”).

¹²⁷ *See id.* at 59.

¹²⁸ *See id.* (describing the Attorney General’s objection that a robust Part III “would bring the attorney general into disputes involving censorship, church-state relations, confiscatory rate-making, searches and seizures, and other matters totally unrelated to minority rights”).

Part III.¹²⁹ A compromise bipartisan bill emerged, and, on October 29, 1963, it passed the House Judiciary Committee.¹³⁰ Far stronger than the administration measure, the bill authorized the Justice Department to intervene in pending public accommodations lawsuits in federal court and allowed for appellate review of a federal court's decision to remand a civil rights action to a state court.¹³¹ It did not, however, grant the Attorney General broad authority to initiate legal action in civil rights matters. Initially, the Leadership Conference strenuously objected to the elimination of a Part III to permit the Attorney General to initiate civil rights suits.¹³² But at a meeting with President Johnson on January 21, 1964, the Leadership Conference changed its position and agreed to oppose any weakening amendments on the House Floor and in the Senate, while reserving its right to attempt to strengthen the bill.¹³³

Part III never received a hearing in the Senate. In light of the compromises necessary to win Senate approval, however, it seems unlikely the measure would have won a sufficient number of supporters. Senator Hubert Humphrey, the Democratic whip whose strategies were key to obtaining cloture, was keenly focused on getting a reasonable law adopted.¹³⁴ He skillfully constructed a narrow path between conservative Republicans, many of whom, although loathe to cede to the Democrats their party's reputation as the Nation's leader on civil rights matters, were discomfited by the specter of increased federal regulation of local transactions, and Southern Democrats, who remained intransigently opposed to any bill.¹³⁵ On the other side of the aisle, Illinois Republican Senator Everett Dirksen sought a bill that would not unduly threaten Northern interests.¹³⁶ To that end, he proposed a series of amendments that weakened the power of the Attorney General to take independent corrective action, excluded de facto school segregation from regulation, and severely reduced the regulatory and prosecutorial powers of the

¹²⁹ See WHALEN & WHALEN, *supra* note 101, at 47.

¹³⁰ See 109 CONG. REC. 20,613 (1963) (Statement of Rep. Watkins Abbitt).

¹³¹ See Rauh, *supra* note 110, at 60; WHALEN & WHALEN, *supra* note 101, at 64-68 (explaining the complicated strategy employed in adding this new language and the negative reactions to the House's version of the proposed legislation).

¹³² See Rauh, *supra* note 110, at 62.

¹³³ See *id.*

¹³⁴ See Stewart, *supra* note 103, at 221-23 (describing Humphrey's strategy to postpone a cloture motion until it was near certain because "[t]o attempt cloture and to fail would seriously cripple the civil rights forces in their campaign to generate confidence and momentum behind the legislation").

¹³⁵ On Senator Humphrey's role, see generally Stewart, *supra* note 103, and John G. Stewart, *The Civil Rights Act of 1964: Tactics II*, in THE CIVIL RIGHTS ACT OF 1964, *supra* note 106.

¹³⁶ Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and its Interpretation*, 151 U. PA. L. REV. 1417, 1490-94 (2003).

EEOC.¹³⁷ This was ultimately the demise of Part III until Congress returned to the enforcement tool in the wake of events surrounding the police assault on Rodney King in 1992.¹³⁸

D. *Part III's Partial Revival: The Violent Crime Control and Law Enforcement Act of 1994*

In September 1994, President Clinton signed into law the Violent Crime Control and Law Enforcement Act of 1994.¹³⁹ Included in the measure was § 14141, a provision giving the Attorney General the power to initiate litigation seeking structural reforms of local police departments upon a showing of a pattern or practice of unconstitutional behavior.¹⁴⁰ Congress initially considered the use of litigation, initiated by the Justice Department, to address systemic problems of police abuse in the wake of the March 1991 beating of Rodney King by members of the Los Angeles department.¹⁴¹ A nearly identical provision to § 14141 was a part of an omnibus crime control bill introduced in 1991.¹⁴² While the history on § 14141 of the 1994 Act is sparse, the House Judiciary Committee's Report on the 1991 proposal offers

¹³⁷ See *id.* at 1490-96.

¹³⁸ See *id.* at 1495.

¹³⁹ Pub. L. No. 103-322, § 210401, 108 Stat. 1796, 2071 (codified at 42 U.S.C. § 14141 (1994)).

¹⁴⁰ 42 U.S.C. § 14141 (2012). Section 14141(a) provides, “[i]t shall be unlawful for any governmental authority . . . to engage in a pattern or practice of conduct by law enforcement officers . . . that deprives persons of rights, privileges, or immunities secured or protected by the Constitution.” *Id.* § 14141(a). Section 14141(b) provides that “[w]hensoever the Attorney General has reasonable cause to believe [that there is a pattern or practice of misconduct] . . . the Attorney General . . . may in a civil action obtain appropriate equitable and declaratory relief to eliminate the pattern or practice.” *Id.* § 14141(b).

¹⁴¹ See Eugene Kim, Note, *Vindicating Civil Rights Under 42 U.S.C. § 14141: Guidance from Procedures in Complex Litigation*, 29 HASTINGS CONST. L.Q. 767, 769-72 (2002) (recognizing in light of the Rodney King beating that the Justice Department had limited “authority to seek civil injunctive relief from systemic patterns or practices of police misconduct” and that the Attorney General should therefore be authorized to “sue for injunctive relief”).

¹⁴² See The Violent Crime Control and Law Enforcement Act of 1991, H.R. 3371, 102d Cong. § 1202 (1st Sess. 1991) (making it “unlawful for any governmental authority . . . to engage in a pattern or practice of conduct by law enforcement officers that deprives persons of rights, privileges, or immunities, secured or protected by the Constitution or laws of the United States” and enabling the Attorney General to bring “a civil action [to] obtain appropriate equitable and declaratory relief”); H.R. REP. NO. 102-1085, at 21-22 (1992) (detailing that although the House approved the conference report for H.R. 3371, the Violent Crime Control and Law Enforcement Act of 1991, the Senate failed to invoke cloture and “[n]o further action was taken on the conference report on H.R. 3371 during the 102d Congress”).

insight on the legislators' understanding of their power to redress systemic violations of justice rights.¹⁴³ The Report noted that

[t]he Attorney General has pattern or practice authority under eight civil rights statutes, including those governing voting, housing, employment, education, public accommodations and access to public facilities. The Justice Department can sue a city or a county over its voter registration practices or its educational policies. It can sue private and public employers, including police departments, over patterns of employment discrimination. The Justice Department can seek injunctive relief under the Civil Rights of Institutionalized Persons Act against a jail or prison that tolerates guards beating inmates. But it cannot sue to change the policy of a police department that tolerates officers beating citizens on the street.¹⁴⁴

Congress has yet to pass legislation expanding the powers of the Justice Department with regard to other justice rights, although the dismal state of our criminal justice systems suggest the time has come to revisit John Lewis' Part III.

CONCLUSION

For all of its transformative effect, the Civil Rights Act of 1964 fell short on a central issue in that it failed to address the citizenship rights that had been recognized by the Thirty-Ninth Congress in 1866: the right to be free from racial violence and to equal access to the public instrumentalities of justice. With no adequate federal protection for these critical rights, by the time the Civil Rights Act of 1964 was passed, African Americans had for eighty-nine years been excluded from the law's vital protections while reduced to economic slavery and penal death by its punishments. Although the tools to do so were readily at hand, the Congresses that deliberated on the Long Civil Rights Act were not willing or able to change this reality.¹⁴⁵ It would not be until 1994 that Congress granted the federal government the power to initiate civil actions to redress wide scale police abuse. This civil rights history is markedly distinct from legislative successes on employment, housing, voting, education, and public facilities, and the House Judiciary Committee recognized as much when, in 1991, it studied a bill to expand civil rights remedies to cover systemic police misconduct.¹⁴⁶ One can only imagine how different civil rights

¹⁴³ In *United States v. City of Columbus*, the district court relied on the legislative history of the 1991 bill in considering the constitutionality of § 14141. No. CIV.A.2;99CV1097, 2000 WL 1133166, at *3-4, *7 (S.D. Ohio Aug. 3, 2000).

¹⁴⁴ H.R. REP. NO. 102-242, pt. 1, at 137 (1991).

¹⁴⁵ See *supra* note 1 and accompanying text (discussing Congress's failure to protect "justice rights" in the course of the "Long Civil Rights Movement").

¹⁴⁶ See H.R. REP. NO. 102-242, pt. 1, at 137 (1991) (explaining that the Attorney General's lack of "pattern or practice authority" to address police brutality is a "serious and outdated gap in the federal scheme for protecting constitutional rights" because this

law would look today had the Justice Department been empowered to enforce justice rights, and had the courts been tasked with interpreting statutes, regulations, and claims based on legislative recognition of such rights.

authority already exists “under eight civil rights statutes, including those governing voting, housing, employment, education, public accommodations and access to public facilities”).