TITLE VII: HISTORICAL PERSPECTIVE ON THE FIRST FIFTY YEARS

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I. INTRODUCTION

July 2, 2014 marked the fiftieth anniversary of the enactment of the Civil Rights Act of 1964. This article examines four specific areas of that law and how each has evolved through amendments, regulatory guidelines, and precedent set through case law. Title VII of the Civil Rights Act of 1964 is that part of the Act which governs employment relationships, and specifically makes it an unlawful practice for any employer to discriminate "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin"[1].

During the fifty years since its enactment, Title VII has undergone a gradual process of changing from a statute which attempted to remove barriers to employment to one which, now, regulates most aspects of the employer-employee relationship. To better understand the impetus moving these innovations, we begin with a brief review of the historical background of the Act and a discussion of the two views which are imbedded in the debate as to what is the appropriate nature of equal employment opportunity. This review will be followed by an exploration of the chronological evolution of the four selected areas of the law: affirmative action, disparate treatment versus disparate impact, harassment as actionable discrimination and national origin and immigration. We conclude with a brief summary and a forecast of anticipated innovations in the Act and its enforcement.

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[1] 42 U.S.C. § 2000e-2 (2016).

Table 1. Major Legislative, Executive and Judicial Action Affecting Equal Employment Opportunity from 1964 to 2014.

Year	Issue
1964	**Title VII** – Congress creates disparate treatment
1965	**E.O. 11246** – Federal contractors required to provide Affirmative Action
1971	***Griggs v. Duke Power*** – Supreme Court creates Disparate Impact
1976	***Williams v. Saxbe*** – Federal District Court recognizes quid pro quo sexual harassment
1978	**Uniform Guidelines on Employee Selection Procedures** – EEOC establishes the means for establishing Disparate Impact
1979	***Steelworkers v. Weber*** – Affirmative Action permissible under Title VII
1986	***Meritor Savings Bank v. Vinson*** – Supreme Court recognizes both quid pro quo and hostile environment Sexual Harassment
1989	***Price Waterhouse v. Hopkins*** – Supreme Court recognizes sex stereotyping
1991	**Civil Rights Act of 1991** – Congress recognizes disparate impact
1998	***Oncale v. Sundowner Offshore*** –Supreme Court recognizes same sex sexual harassment
2014	**E.O. 13672** – Federal contractors required to provide LGBT protection
2016	**EEOC Files First Title VII Lawsuits Alleging Sexual Orientation Discrimination**

II. EQUAL EMPLOYMENT OPPORTUNITY IN THE WORKPLACE: THE BEGINNING

In a historical context, the debate on the Civil Rights Act began in Congress when the bill was discharged from the House Rules Committee in January 1964[2]. Once out of committee, the civil rights bill passed the House of Representatives with a 290 to 130 vote on February 10, 1964 and went to the Senate for consideration.[3]

What followed in the Senate was a contentious debate which coalesced into three distinct and separate coalitions. One faction's goal was to prevent the Civil Rights Act from ever becoming law. Though outnumbered, this coalition intended to forestall the bill by filibuster (extended debate). Its efforts ultimately failed at the conclusion of a seventy-five day filibuster, the longest in the history of the Senate, when cloture was voted on June 10, 1964.[4] Cloture is the legislative term meaning to bring a filibuster to an end by a supermajority vote, in the Senate, this is by a two-thirds majority vote.[5] This coalition opposing the civil rights bill saw its efforts come to resounding defeat with the 71 to 29 cloture vote.[6]

As for seventy-one senators who supported a federal mandate for workplace equality, two markedly different views, or perspectives, were to emerge. What distinguished these two factions was their definition as to exactly what *equal employment opportunity* (EEO) should mean. Understanding these two divergent views of *equal employment opportunity* will help the reader better navigate the perplexing nature of the future innovations reported in this article. It will also help explain the sometimes confusing approach that courts and regulatory agencies have taken in their enforcement of Title VII, some of which often appear to be contradictory. Their terminology is identical, but their connotation is dissimilar.

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[2] CONGRESSIONAL QUARTERLY WEEKLY REPORT 2150 (Dec. 13, 1963).
[3] Robert D. Loevy, *A Brief History of the Civil Rights Act of 1964*, *in* THE AMERICAN PRESIDENCY: A POLICY PERSPECTIVE FROM READINGS AND DOCUMENTS 411-19 (David C. Kozark & Kenneth N. Ciboski, eds., 1985).
[4] Timothy N. Thurber, *The Second American Revolution*, *in* THE AMERICAN CONGRESS: THE BUILDING OF DEMOCRACY 529-47 (Julian E. Zelitzer ed., 2004).
[5] Rule XXII: "Senate Cloture Rule: Limitation of Debate in the Congress of the United States and Legislative History" included in *Standing Rules of the Senate* (112th Congress). Available from: Government Printing Office.
[6] FRANK H MACKAMAN, AN IDEA WHOSE TIME HAS COME: THE CIVIL RIGHTS ACT OF 1964 126 (2014).

III. INDIVIDUAL RIGHTS V. GROUP RIGHTS IN A HISTORICAL PERSPECTIVE

The first faction, which the authors will hereafter refer to as the individual rights faction, defined *equal employment opportunity* from an individual rights perspective. This faction understood racial discrimination as adversely affecting *individuals*, who, though qualified for a position, were denied the opportunity to compete because of their race.[7] The initial debate concentrated on racial discrimination in the workplace, but was later expanded to include the individual's color, religion, sex, or national origin when similar adverse employment actions were directed against qualified individuals in these categories.[8] The overall view of the individual rights faction can be characterized as being *prospective* or forward-looking in its nature.[9] The principal concern was that an employer's decision, which was based only on an individual's race, was morally reprehensible. In essence, harm occurred when an otherwise qualified candidate was being excluded from competing for a particular job because of his/her race (also expanded to include color, religion, sex or national origin); not his/her ability to perform the job in question. As morally repugnant as it was, what was done in the past was legal then and could not be undone. Henceforth, such actions would be illegal and would not be tolerated under the Act. Consequently, the force of the Act had to be forward-looking in its commitment and purpose to eliminate a wrong from recurring. On July 1, 1964, denying a job opportunity to a qualified candidate because he is African American, though morally wrong, was not unlawful. However, on July 2, 1964 the same behavior became unlawful and the aggrieved individual could now seek redress under the law.

The other faction tended to define *equal employment opportunity* as a matter that should concentrate on protecting group rights, hereafter the group rights faction. Their philosophical underpinnings may be summed up as viewing discriminatory employer actions as directed against a specific group; hence the new law should include redress for the effects of this past discrimination.[10] This view point can be described as being *retrospective* by its very nature from the perspective that indeed wrongs were committed in the past, and *equal employment opportunity* laws should be designed to

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[7] ROBERT K. ROBINSON & GERALYN M. FRANKLIN, EMPLOYMENT REGULATION IN THE WORKPLACE: BASIC COMPLIANCE FOR MANAGERS (2d ed. 2014).
[8] 42 U.S.C. § 2000e-2(a) (2016).
[9] HERMAN BELZ, EQUALITY TRANSFORMED: A QUARTER-CENTURY OF AFFIRMATIVE ACTION (1991).
[10] MICHEL ROSENFELD, AFFIRMATIVE ACTION AND JUSTICE: A PHILOSOPHICAL AND CONSTITUTIONAL INQUIRY (1993).

correct the injustices of the past. This necessitated going beyond merely prohibiting the offenses of the past, as advocated by the individual rights faction, but also requiring restitution. The new statute, from this group rights perspective, had to be remedial in nature, thus equal outcomes in the workplace would be more important than equal treatment.

These fundamental differences are at the very heart of these two separate perceptions; some might say conflicting views, of *equal employment opportunity*. Both factions use, and continue to use, the phrase *equal employment opportunity,* but it has a very different connotation for each group. For the individual rights faction, EEO is manifested as equal treatment in the workplace.[11] For the group rights faction, the goal of EEO shifts from equal treatment to equal outcomes or equal results.[12] This may be an oversimplification, but it facilitates understanding the discrepancy and confusion in subsequent legislation, court-decisions, and executive orders which were constructed based on this very basic orientation of the initiating entity.

IV. TITLE VII IN ITS ORIGINAL CONTEXT

Which of these factions succeeded in molding the new Civil Rights Act to its interpretation of *equal employment* opportunity? The prevailing faction is revealed in the final language of Title VII.

> It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any *individual*, or otherwise to discriminate against any *individual* with respect to *his* compensation, terms, conditions, or privileges of employment, because of such *individual's* race, color, religion, sex, or national origin.[13]

Note the emphasis on *individual* throughout the language of Title VII. It is specifically mentioned three times in the paragraph, as well as the use of the singular pronoun *his* being used once. This clearly indicates that individual rights faction prevailed, a conclusion further supported by the inclusion of Section §703(j), which states:

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[11] CLAY RISEN, THE BILL OF THE CENTURY: THE EPIC BATTLE FOR THE CIVIL RIGHTS ACT 178 (2014); CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 149-55 (1985).

[12] TERRY H. ANDERSON, THE PURSUIT OF FAIRNESS: A HISTORY OF AFFIRMATIVE ACTION 88 (2004); Allan C. Brownfeld, *Affirmative Action Violates the Civil Rights Act, in* THE CIVIL RIGHTS ACT OF 1964 100-04 (Robert H. Mayer, ed., 2004); ALFRED W. BLUMROSEN, BLACK EMPLOYMENT AND THE LAW (1971).

[13] 42 U.S.C. §2000e-2(a) (2016) (emphasis added).

> Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.[14]

The wording in Section 703(j) is a compelling indication that the individual rights perspective prevailed in the statute. This language was clearly intended to insure that Title VII prohibited mandatory proportional representation, a goal of the group rights faction. And though the language in the Civil Rights Act of 1964 in Section 703(j) seemed to accomplish this, it would only be temporary. In the following year these efforts would appear to be thwarted by an executive action which advanced the group rights view of *equal employment opportunity.* And within fourteen years, the language of Section 703(j) would be completely reinterpreted by the Supreme Court to actually authorize preferences and proportional outcomes when affirmative action was declared permissible in private employment.[15] In less than seven years, affirmative action would also be declared to be conditionally permissible in state and local government employment decisions.[16]

Whatever the underlying factions lobbied for as the Act was debated, the original wording of Title VII was fairly straightforward in its definitions:

- Protected classes were defined by race, color, religion, sex or national origin.[17]
- The law prohibited discrimination (disparate treatment) of an individual in a protected class with regard to:
- Compensation

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[14] 42 U.S.C. § 2000e-2(j) (2016).
[15] United Steelworkers of America v. Weber, 443 U.S. 193 (1979).
[16] Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).
[17] 42 U.S.C. §§ 2000e-2(a) & (b) (2016).

- Terms of employment
- Conditions of employment
- Privileges of employment[18]

"Compensation" is fairly clear and speaks to fair pay. On the other hand, "terms, conditions, and privileges of employment" are not clarified in the Act, leaving these issues open to further interpretation. Title VII of The Civil Rights Act of 1964, like many statutes, is broadly worded, leaving details to be fleshed out through the issuance of *guidelines* by enforcement agencies, in this instance the Equal Employment Opportunity Commission. Additionally, ambiguity or conflicts in what the statute meant to achieve would be resolved through case law as equal employment opportunity cases moved through judicial channels to the Supreme Court. As a result, this lack of precise definition would become the Trojan horse for such future judicial innovations as disparate impact,[19] harassment[20] and stereotyping.[21]

They say that the Devil is in the details,[22] and it will be the details that provide the means for transforming Title VII. Though the individual rights faction won the first round, the group rights faction was by no means down for the count. Though the phrase, equal employment opportunity, is found in many regulations and court decisions, its meaning is dependent upon which faction put it there or which faction interprets it in the future.

V. THE RETURN OF GROUP OUTCOMES: AFFIRMATIVE ACTION

Slightly more than one year following Title VII's enactment, the group rights faction was afforded an opportunity to forward their agenda through executive action when President Lyndon Johnson issued Executive Order 11246.[23] At first this appeared to be only a minor obstruction of the individual rights faction as the executive order was restricted in its scope to only those employers who held federal contracts and subcontracts in excess of $10,000, or were recipients of federal grant and aid monies. Though the term "affirmative action" is usually credited to the aforementioned E.O. 11246, it was used four years earlier in President John F. Kennedy's 1961 Executive Order 10925:

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[18] 42 U.S.C. §§ 2000e-2(a)(1) (2016).
[19] Griggs v. Duke Power Co., 401 U.S. 424 (1971).
[20] Studstill v. Borg Warner Leasing, Div. of Borg Warner Acceptance Corp., 806 F.2d 1005, 1007 (11th Cir. 1986).
[21] Price Waterhouse v. Hopkins, 490 U.S. 288 (1986).
[22] GREGORY TITELMAN, RANDOM HOUSE DICTIONARY OF POPULAR PROVERBS AND SAYINGS 49, 116 (2d ed. 2000).
[23] Charles T. Canady, *The Meaning of American Equality*, *in* THE AFFIRMATIVE ACTION DEBATE 277-87 (George E. Curry, ed., 1996).

> (1) The contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The contractor will take *affirmative action* to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin.[24]

The term appeared again four years later when President Lyndon Johnson's Executive Order 11246 was issued on September 24, 1965:

> The contractor will take *affirmative action* to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin. [25]

Both executive orders only affected employers who held federal contracts and subcontracts in excess of $10,000, or who received any federal grant and aid monies. Johnson's order required these affected employers to submit an annual report to the Office of Federal Contract Compliance Program (OFCCP) in order to maintain contract or federal grant eligibility. Specifically:

> Each contractor having a contract containing the provisions prescribed in Section 202 shall file, and shall cause each of his subcontractors to file, Compliance Reports with the contracting agency or the Secretary of Labor as may be directed. Compliance Reports shall be filed within such times and shall contain such information as to the practices, policies, programs, and employment policies, programs, and employment statistics of the contractor and each subcontractor, and shall be in such form, as the Secretary of Labor may prescribe.[26]

The major difference between the two executive orders? President Kennedy "urged" contractors to employ affirmative action; President Johnson "required" it.

When challenged in federal court in 1971, the U.S. Court of Appeals for the Third Circuit upheld the President's and Secretary of Labor's authority to impose such requirements on the beneficiaries of federal assistance.[27] After all, the employer's compliance was considered to be *voluntary*. If an

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[24] Exec. Order No. 10925, 26 Fed. Reg. 1977 (March 6, 1961) (emphasis added).
[25] Exec. Order No. 11246, 30 Fed. Reg. 12,319 (Sept. 24, 1965) (emphasis added).
[26] *Id.*
[27] Contractors Ass'n of E. Pa. v. Sec'y of Labor, 442 F.2d 159 (3d Cir. 1971).

employer failed to comply with the federal requirements, he/she could choose not apply for the contracts or grants. Compliance was a condition of acceptance; hence the subsequent affirmative action was determined to be volitional.[28]

A. *Different Meanings of "Affirmative Action"*

Subsequently, *affirmative action* has emerged as one of the most contentious, polarizing elements of equal employment regulations. In a very technical sense, the term *affirmative action* means that employers are responsible for taking initiative, on their own, to formulate policies to enhance the representation of women and minorities in the workplace. To add confusion, *equal employment opportunity* may be a confusing concept because of two contrasting definitions, but *affirmative action* may be even more so because it can mean any one of the following three:

(a) Intentionally recruiting members of specific underutilized classes for employment or for training programs.[29]
(b) Identifying practices that promote underutilization.[30]
(c) Providing preferential treatment for underutilized classes.[31]

The last is, perhaps, the most divisive definition of *affirmative action*. The preferential treatment interpretation of affirmative action focuses the attention of both employers and the regulatory agencies on proportional outcomes. It is a means by which the group rights goal of equal outcomes may be achieved, thus correcting past injustices.

In its purest form, *affirmative action* focuses on the racial, ethnic and gender composition of a workforce relative to the available external workforce. This may also lead employers to consciously make employment decisions, in part, on the applicant's race, color, religion, sex or national origin. As a caveat, this protected class conscious employment practice (the EEO definition of equal outcomes) seems to contradict Title VII's prohibition on protected class conscious employment decision (the EEO definition of equal opportunity).

Holding to this group rights perspective, the proponents of affirmative action argue that it corrects past wrongs by providing reparation for

[28] Local 28 of Sheet Metal Worker's Int'l Assoc. v. E.E.O.C., 478 U.S. 421, 456-57 (1986).
[29] 29 C.F.R. §§ 1608.3(c)(1) & (2) (2016).
[30] 41 C.F.R. § 60-2.17(b).
[31] 29 C.F.R. § 1608.4(c).

historically victimized groups.[32] They also contend that affirmative action offers a temporary mechanism to achieve economic and occupational equality and will work toward breaking down stereotypes, providing positive role models in the workplace.[33]

The fundamental argument of the opponents of affirmative action is that preferential treatment is in direct contradiction of Title VII in its purest form – basically, discrimination being used to correct discrimination. Affirmative action – especially preferential treatment of members of a protected class – clearly shifts the focus from the individual member of a protected class to the aggregated protected class group. Some contend that it goes further by re-enforcing stereotypes and punishing the innocent.[34]

The arguments for and against have continued unabated for nearly half a century. It is unlikely to end. However, preferences have never been popular among the general public. Following a 2003 Supreme Court decision allowing preference to be given to minority applicants applying for university admission,[35] Gallup conducted a poll gauging national opinion on affirmative action.[36] Respondents favored affirmative action programs in general though not by a large margin,[37] but overwhelmingly opposed businesses or colleges using race as a factor in hiring or admission decisions. These somewhat contradictory results suggest that national opinion supports affirmative action in the abstract (perhaps definitions (a) through(c)), but specifically does not support preferential treatment (definition (d)).

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[32] Mari Marsuda. *Looking to the Bottom: Critical legal Studies and Reparations*, *in* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 63-79 (Kimberle Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas, eds., 1995).

[33] Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984).

[34] RUSSELL K. NIELI, WOUNDS THAT WILL NOT HEAL: AFFIRMATIVE ACTION AND OUR CONTINUING RACIAL DIVIDE 119-22 (2012).

[35] Grutter v. Bollinger, 539 U.S. 306 (2003).

[36] *USA TODAY/CNN/Gallup Poll results*, USA TODAY (March 20, 2005, 11:56 AM), http://usatoday30.usatoday.com/news/polls/tables/live/0623.htm.

[37] *Id.*

Table 2. Selected Results from a 2003 Gallup Poll as Reported in *USA Today* Asking Adults Their Opinion on Various Elements of Affirmative Action.[38]

2003 Gallup Poll	Favor / Should	Oppose / Should not	No Opinion
Do you generally favor or oppose affirmative action programs for women?	59%	34%	7%
Do you generally favor or oppose affirmative action programs for racial minorities?	49%	43%	8%
Do you think that businesses should or should not be allowed to consider race as a factor in making hiring decisions?	11%	87%	2%
Do you think that colleges should or should not be allowed to consider race as a factor in student admission decisions?	16%	84%	2%

B. *Voluntary Affirmative Action*

Affirmative action is viewed by the EEOC as a valid remedial tool since 1965, when it encouraged employers to adopt such programs as a legitimate approach to correcting imbalances in the workplace. Some employers were inspired by feelings of social or ethical responsibility, a desire to create corporate legitimacy, while some were motivated by a means to avoid future lawsuits. In the case of the latter, v*oluntary* affirmative action plans moved the process from one designed to remedy past discrimination to one proactively aimed at warding off future problems. This practice is sometimes referred to as hiring by the numbers.[39] According to EEOC's own *Uniform Guidelines on Employee Selection Procedures*:

> These guidelines are also intended to encourage the adoption and implementation of voluntary affirmative action programs by users who have no obligation under Federal law to adopt them; but are not intended to impose any new obligations in that regard. [40]

It was only a matter of time before an employee or applicant would challenge an employer's affirmative action plan's racial or gender preferences as violating Title VII. Fifteen years after the enactment of Title

[38] http://usatoday30.usatoday.com/news/polls/tables/live/0623.htm (accessed Feb. 19, 2015).
[39] Johnson v. Transportation Agency, 480 U.S. 616, 636 (1987).
[40] 29 C.F.R. § 1607.13 (2016).

VII, the Supreme Court addressed voluntary affirmative action programs, and again reinforced the group rights view of proportional outcomes, in its decision in *United Steelworkers of America, AFL-CIO-CLC v. Weber.*[41]

> Had Congress meant to prohibit all race-conscious affirmative action, as respondent urges, it easily could have answered both objections by providing that Title VII would not require or permit racially preferential integration efforts. But Congress did not choose such a course. Rather, Congress added § 703(j), which addresses only the first objection. The section provides that nothing contained in Title VII shall be interpreted to *require* any employer . . . to grant preferential treatment . . . to any group because of the race . . . of such . . . group on account of a de facto racial imbalance in the employer's workforce. The section does not state that "nothing in Title VII shall be interpreted to permit" voluntary affirmative efforts to correct racial imbalances. The natural inference is that Congress chose not to forbid all voluntary race-conscious affirmative action.[42]

Under this interpretation of Title VII, the Supreme Court stated that affirmative action, least of all voluntary affirmative action, was not unlawful, however, employers had to be extremely careful in constructing such programs to avoid crossing the line into unlawful discrimination. In order to be permissible under Title VII, the *Weber* Court stated that the affirmative action plan had to satisfactorily meet all four of the following criteria in order to overcome Section §703(j) prohibitions:[43]

(1) The plan must be justified as being remedial in nature, mirroring the purpose of Title VII.
    - This requires a careful self-analysis to determine if an imbalance exists, what level of correction is needed and why an affirmative action plan is appropriate.
(2) The plan does not *unnecessarily* trammel the interests of employees belonging to groups not eligible for preferential treatment.
    - Note “unnecessarily” (emphasis added by author). The courts have held that some trammeling may be required but it must not be overly harsh.

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[41] 443 U.S. 193 (1979).
[42] *Id.* at 206 (emphasis added).
[43] *Id.* at 208.

(3) The plan must not create an absolute bar.
   - The plan must not automatically exclude all members of the non-preferred group from consideration.

(4) The plan must be a temporary measure.
   - The goal is to achieve, not maintain, proportional representation.

One salient point to remember is that merely being a member of a group that has historically suffered discrimination is not sufficient to merit preferential treatment. Only individuals in *underutilized* groups are eligible for preferences.[44] Underutilization is determined by comparing the proportion of a racial, ethnic, or gender group in a particular job category in an employer's workforce with its proportion in the relevant labor market.[45] The relevant labor market is generally defined as the geographic area from which an employer routinely recruits individuals with the requisite skills for a specific job.[46]

The *Steelworkers* decision permitted voluntary affirmative action under Title VII (provided that the four previously mentioned criteria were met), but it did not completely exonerate state and local governments who are also covered under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. Accordingly, these governmental entities are constitutionally banned from denying any person within their jurisdictions the equal protection of the law.[47] In short, states may not favor one class of citizens over another. However, the permissibility of affirmative action programs under the Equal Protection Clause was not established until the 1986 Supreme Court decision, *Wygant v. Jackson Board of Education*.[48] As with Title VII, the Court would allow state and local governments to engage in voluntary affirmative action but only under strict, enumerated conditions. Consequently, a state or local government-sponsored affirmative action program would be governed under regulatory requirements imposed by both Title VII and the Equal Protection Clause. As this article addresses only Title VII innovations, the discussion of Equal Protection Clause restrictions was provided only as a point of information.

Before departing affirmative action, it should be noted that there exists one instance in which an employer could be compelled to initiate an affirmative action plan, that is to say, it becomes involuntary. Affirmative

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[44] 41 C.F.R. § 60-2.
[45] SAMUEL LEITER & WILLIAM M. LEITER, AFFIRMATIVE ACTION IN ANTIDISCRIMINATION LAW AND POLICY: AN OVERVIEW AND SYNTHESIS 1043-44 (2002).
[46] 41 C.F.R § 60-2.14(c)(1); 29 C.F.R. § 1608.4.
[47] U.S. CONST. amend. XIV, § 1.
[48] 476 U.S. 267 (1986).

action can be mandatory when it is imposed by a court as a remedy for unlawful discrimination.[49]

VI. GROUP OUTCOMES ENTRENCHED: DISPARATE IMPACT

The original intent of the Civil Rights Act of 1964 was to ratify the underlying principle of *Brown v. Board of Education*[50] by officially prohibiting racial discrimination in all venues. While *Brown* did prohibit racial segregation in schools, it did not end racial separation driven primarily by racially concentrated neighborhoods. In *Green v. County School Board of New Kent County,*[51] the Supreme Court unanimously moved from prohibiting segregation to requiring desegregation. Judge Brennan, writing the unanimous decision, made the claim that "desegregation" is not the same as "integration."[52] The goal of first identifying segregation in order to remove it would become the impetus for making disparate impact actionable under Title VII.

A. *Disparate Impact*

As already discussed, Title VII envisioned discrimination as *disparate treatment* of an *individual* due solely to that person's membership in a protected class. A critical shift to the group rights view would occur in 1971 when the Supreme Court, in its unanimous decision, *Griggs v. Duke Power Company*.[53] This ruling concluded that Title VII may also be unlawfully violated in circumstances where a facially neutral employment requirement or practice has the effect of substantially disproportionately excluding one group (as identified demographically by race, sex, or national origin) from the selection process.[54] *Griggs* did for Title VII what *Green* did for school segregation.[55]

Underlying the concept of disparate impact (or adverse impact) is the premise that the discrimination is unintentional. Unlike disparate treatment claims which can be defeated by establishing a nondiscriminatory justification (a legitimate nondiscriminatory reason) for a personnel

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[49] Louisiana v. United States, 380 U.S. 145 (1965).
[50] 347 U.S. 483 (1954).
[51] 391 U.S. 430 (1968).
[52] Lino A. Graglia, *The Supreme Court's Perversion of the 1964 Civil Rights Act*, 37 HARV. J. L. & PUB. POL'Y 103 (2013).
[53] 401 U.S. 424 (1971).
[54] 29 C.F.R. § 1607.4 (2016).
[55] Graglia, *supra* note 52, at 107.

decision,[56] a disparate impact allegation can be sustained in the presence of nondiscriminatory justifications provided that the selection criterion is not deemed to be necessary for the job.[57] It does not matter whether the employer intended to discriminate or not – only that the resulting employment statistics show an imbalance. The *Griggs* ruling moved Title VII from intentional discrimination against individuals as members of a protected class to unintended discrimination against protected groups.[58] The premise was simple. An employment requirement which all applicants or employees have to meet had the effect of disqualifying members of one protected group from consideration at a substantially higher rate than it disqualified members of another group. For example, a position advertising an education requirement for a particular job to be a Master's in Business Administration would, by the very nature of this requirement, exclude a higher percentage of Latino applicants from consideration for the position, than it would Asian Americans.[59]

Just how this substantially disproportionate exclusion is determined would not be standardized until the Equal Employment Opportunity Commission (EEOC) promulgated its *Uniform Guidelines on Employee Selection Procedures*.[60] Typically, a complaining party can establish a case of disparate impact by demonstrating that a specific employment selection practice results in candidates in a particular group passing that practice at a rate which is less than 80% of the group with the highest pass rate, the so-called "4/5ths" or "80% rule".

> A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.[61]

The four-fifths standard focused the employer's attention on the proportional representation of their given selection criteria outcomes, which would, over time, result in proportional hiring. And, again over time,

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[56] Ricci v. DeStefano, 557 U.S. 557, 590 (2009).
[57] Watson v. Ft. Worth Bank & Trust, 487 U.S. 977, 998 (1988).
[58] Kenneth L. Marcus, *The war between disparate impact and equal protection*, CATO SUPREME COURT REVIEW 2008-2009 (2009), https://object.cato.org/sites/cato.org/files/serials/files/supreme-court-review/2009/9/ricci-marcus_0.pdf.
[59] Institute of Education Sciences, Digest of Education Statistics 2011 476 (2012).
[60] 29 C.F.R. § 1607 (2016).
[61] *Id.* § 1607.4(D).

proportional hiring will result in proportional representation of an employer's workforce, or at least within 80%, which might preclude exposure to claims of separate impact.

The problem for an employer who does not meet the 80% standard is that once a complaining party establishes that an employment practice excludes a disproportionate number of one group from further consideration, an onerous burden is placed on the employer to justify that practice. Even so-called "simplified record keeping" requires data showing:

- The number of persons hired, promoted, and terminated for each job, by sex, and where appropriate by race and national origin;
- The number of applicants for hire and promotion by sex and where appropriate by race and national origin; and
- The selection procedures utilized (either standardized or not standardized).
- These records should be maintained for each race or national origin group … constituting more than two percent (2%) of the labor force in the relevant labor area.[62]

Congress did increase the burden on complaining parties in the Civil Rights Act of 1991[63] when it endorsed the Supreme Court decision in *Wards Cove Packing Co. v. Atonio*.[64] *Wards Cove* made it more difficult for employees to prove disparate impact by requiring them to demonstrate that a *specific* policy or requirement produced inequalities in the workplace.[65] Reacting to that decision, Congress added this requirement to the Civil Rights Act of 1991.[66] This also gave statutory recognition to disparate impact nearly two decades after the Supreme Court created it.

This amendment to the Act clarified that statistical imbalance alone was no longer sufficient to prove disparate impact. Unless the disparity was linked directly to specific practices or procedures that caused the disparity, an actionable violation did not occur. More specifically, "bottom-line" statistics are not admissible as a defense against a claim of disparate impact though their usage may be allowed by a complaining party, except under rare circumstances.[67] "Bottom-line" statistics refers to selection rates of protected

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[62] *Id.* § 1607.15(A)(1)(c).
[63] 42 U.S.C. § 2000e-2(k) (2014).
[64] 490 U.S. 642 (1989).
[65] *Id.* at 659.
[66] 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2016).
[67] *Id.* § 2000e-2(k)(1)(B).

class members at the conclusion of the selection process.[68] An employment selection process that includes multiple stages must be analyzed separately at each stage in a process termed "applicant flow analysis." If disparity occurs at any stage of the selection process, regardless of the ultimate hiring figures, the process is tainted.

As an aside, since its inception, disparate impact has been applied to other statutes. For example, since 2005 disparate impact has been actionable under the Age Discrimination in Employment Act.[69] Most recently, the Supreme Court has held that the Fair Housing Act prohibits housing decisions that have a disparate impact, hence disparate impact claims are cognizable under the Act.[70]

VII. HARASSMENT AS ACTIONABLE DISCRIMINATION

One of the earliest clarifications of Title VII expanded the prohibition against discrimination in conditions of employment to include harassment. Any workplace situation that creates a hostile work environment against a member of a protected class could be considered a violation of Title VII.

Racial harassment was a case of judicial innovation. Actionable harassment, as originally envisioned, occurred when management personnel tried to intentionally drive off members of unwanted protected classes by making working conditions so unpleasant and deplorable that the employee would self-terminate.[71] This is essentially a constructive discharge, and was seen as an arbitrary barrier to racial equality in the workplace. The connection was made to Title VII as singling out an employee for abusive treatment (in order to affect a constructive discharge) because of his or her race resulted in discriminating against that individual in "the terms and conditions of employment," thus racial harassment is actionable under Title VII.[72]

This presented a problem for employers in that not only can managers be the instigators of the unlawful behavior, but now coworkers can just as easily poison a workplace environment. Up to this point, Title VII violations were only committed by employers and/or their designated representatives (managers). Now employers became liable when co-workers disliked a

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[68] Michael K. Fee, *The Bottom Line Concept under Title VII: Connecticut v. Teal*, 24 B.C. L. REV. 1131 (1983).
[69] Smith v. City of Jackson, 544 U.S, 228 (2005).
[70] Texas Dep't of Hous. & Cmty. Affairs v. The Inclusive Communities Project, Inc., 135 S. Ct. 2507 (2015).
[71] Martha Crumpacker & Jill M. Crumpacker, *The U.S. Supreme Court Clarifies Constructive Discharge under Title VII: Responsibilities and Opportunities for Human Resource Practitioners*, 38 PUB. PERSONNEL MGMT. 1 (2007).
[72] Patterson v. McLean Credit Union, 491 U.S. 164 (1989).

fellow worker of another race.[73] To prevent coworkers from driving individuals out of the workplace because the coworkers objected to the individual's race, an employer has an affirmative duty to maintain a working environment free of harassment whether it is based on race, sex, or national origin.[74] The underlying logic appears to be that if the employer is held liable for the behavior of its employees, the employer will initiate policies to ban harassing behavior in his workplace.[75]

Today actionable racial harassment can be established by demonstrating that the complaining party was subjected to racial slurs, offensive graffiti, derogatory remarks about the person's race or color, or the display of racially-offensive symbols.[76] In fact, courts have held that a single utterance of the N-word is now sufficient to create a hostile work environment.[77] The employer must respond by demonstrating that he/she took immediate and appropriate action to stop the harassing behavior and prevent its recurrence.[78] This prompted many employers to adopt their own written anti-harassment policies and document that they were being enforced. It should be noted that in doing so, employers may be abler to strictly control the behaviors of its employees than the government.

A. *Sexual Harassment*

In *Williams v. Saxbe*,[79] the United States District Court for the District of Columbia created a variant of harassment to specifically deal with sexual behavior in the workplace. The new form was called "sexual harassment," though this first variant would later become known as *quid pro quo* sexual harassment. It was created by the courts to solve a specific workplace problem related to sex: management personnel using their organizational authority to extort sexual favors from employees or applicants. As an historical artifact, this form of sexual harassment was first characterized by male supervisors and female victims.

Gradually, sexual harassment evolved to include hostile environment sexual harassment which more closely resembled its predecessor, racial harassment. Originally, it was intended to prohibit behavior which was intentionally designed to poison the working environment in order to drive

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[73] Meri O. Triades, *Finding a Hostile Environment: The Search for a Reasonable Reasonableness Standard*, 8 WASH. & LEE RACE & ETHNIC ANC. L.J. 35 (2002).
[74] 29 C.F.R. §§ 1606.8 & 1604.11 (2016).
[75] Grace v. Rumsfeld, 614 F.2d 796, 804 (lst Cir. 1980).
[76] Adams v. Austral, U.S.A., L.L.C., 754 F.3d 1240, 1245 (11th Cir. 2014).
[77] Lounds v. Lincare, Inc., 812 F.3d 1208 (10th Cir. 2015).
[78] Katz v. Dole, 709 F.2d 251, 255 (4th Cir. 1983).
[79] 413 F. Supp. 654 (D.D.C. 1976).

the individual out, the situation presented in *Henson v. City of Dundee*.[80] Later, hostile environment sexual harassment was extended to encompass behavior of a sexual nature which is unwelcomed by the individual. This would include overtures for sexual favors from coworkers, graphic pictures of a sexual nature, discussions of an individual's body parts,[81] and other such issues not covered under the *quid pro quo* theory since the coworker cannot directly affect the victim's tangible benefits if that individual refused to acquiesce.[82] In cases such as *Harris v. Forklift Systems*,[83] elements of both *quid pro quo* and hostile environment were charged.

> Sexual harassment is a form of sex discrimination that violates Title VII of the Civil Rights Act of 1964. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when submission to or rejection of this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance or creates an intimidating, hostile or offensive work environment.[84]

According to EEOC guidelines on sexual harassment:

> [S]exual harassment can occur in a variety of circumstances, including but not limited to the following:
>
> - The victim as well as the harasser may be a woman or a man. The victim does not have to be of the opposite sex.
> - The harasser can be the victim's supervisor, an agent of the employer, a supervisor in another area, a co-worker, or a non-employee.
> - The victim does not have to be the person harassed but could be anyone affected by the offensive conduct.
> - Unlawful sexual harassment may occur without economic injury to or discharge of the victim.
> - The victim should directly inform the harasser that the conduct is unwelcome and must stop. The victim should also use any

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[80] 682 F2d 897 (11th Cir. 1982).
[81] BUSINESS & LEGAL REPORTS SEXUAL HARASSMENT: ESSENTIALS OF PREVENTION & RESPONSE 49 (2005).
[82] Joel Israel, *Quid pro quo: Harassment Law Changes Its Terminology without Changing Its Meaning*, 10 DUKE J. OF GENDER L & POL'Y 247 (2003).
[83] 510 U.S. 17, 23 (1993).
[84] 29 C.F.R. § 1604.11(a) (2016).

> employer complaint mechanism or grievance system available.[85]

There are several key differences between *quid pro quo* sexual harassment and hostile environment sexual harassment: Under hostile environment, 1) the harasser does not have to have a supervisory relationship with the victim; 2) the victim need not be the person harassed but may be someone simply offended by the behavior; 3) hostile environment sexual harassment does not require economic injury to the victim. Under the *quid pro quo* interpretation, acquiescence as a condition of continued employment or future economic benefits is a key element in the charge.

In its 1986 decision, *Meritor Savings Bank v. Vinson,*[86] the Supreme Court established that, consistent with EEOC published guidelines, "hostile environment" by non-managers was clearly an actionable form of sexual harassment under Title VII. This line of reasoning would later expand to include the actions of vendors, customers, and even supervisors when no tangible job benefits were involved.[87] As with racial harassment, an employer is charged by the EEOC with maintaining a workplace free of harassment.[88]

VIII. THE NEXT ITERATION: TITLE VII PROTECTION AND LBGT

Originally sexual harassment meant opposite-sex harassment, particularly a female victim and male harasser. In the 1998 case of *Oncale v. Sundowner Offshore Services*,[89] the Supreme Court ruled that same-sex sexual harassment was also unlawful under Title VII. It is the perpetrator's sexual preference that determines the sex of his/her victim. A heterosexual female perpetrator would prefer and harass only a member of the opposite sex (a male), where a lesbian perpetrator would harass only a member of the same sex (a female). Thus, subjecting members of one particular sex to harassment, while members of the other sex are not, makes sexual harassment actionable under Title VII. The members of the harassed sex are being subjected to different conditions of employment because of their sex.

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[85] EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FACTS ABOUT SEXUAL HARASSMENT, http://www.eeoc.gov/facts/fs-sex.html (last visited January 22, 2016).
[86] 477 U.S. 57 (1986).
[87] ROBINSON & FRANKLIN, *supra* note 8.
[88] 29 C.F.R. § 1604.11(d) (2016).
[89] 523 U.S. 75 (1998).

A. *Same-Sex (LBGT) Discrimination, Harassment and Sex-Stereotyping*

Same-sex harassment would eventually create a path way by which LGBT (lesbian, gay, bisexual and transgender) could receive partial protection under Title VII, though at the time of this writing, not full. According to the Transgender Law Center, federal courts have "historically not been very sympathetic to transgender people, having traditionally held that they were excluded from coverage under Title VII."[90] Federal courts had contended that "sex" with relation to Title VII claims, refers to a biological condition, not sexual preference/orientation.[91]

However, though not addressed by the Supreme Court, several lower federal court cases created some LGBT workplace protection by applying Title VII's prohibition on sex-stereotyping, another judicial innovation on sex discrimination.[92] Sex-stereotyping is a product of the 1989 Supreme Court decision, *Price Waterhouse v. Hopkins*, in which that Court held that employment decisions based on an individual's failure to conform to traditional gender stereotypes violated Title VII when it results in different treatment of men and women.[93] In the *Price Waterhouse* case, a female manager with an "aggressive" personality sued the accounting firm for passing her over for partnership. The Supreme Court saw "clear signs . . . that some of the partners reacted negatively to [the plaintiff's] personality because she was a woman."[94] The Court concluded that an "aggressive" male would have been treated differently. Prior to the Supreme Court's decision in Price Waterhouse, several courts concluded that Title VII afforded no protection to transgender victims of sex discrimination.[95]

Price Waterhouse was the basis for a Sixth Circuit Court of Appeals ruling that a police officer who was male-to-female transsexual was demoted because of his failure to conform to sex stereotypes concerning how a man should look and behave.[96] This was also at the heart of another case involving male-to-female transsexual Utah Transit Authority worker who successfully stated a claim of sex discrimination actionable under Title VII under the *Price Waterhouse* theory of gender stereotyping.[97]

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[90] DANA BEYER, JILLIAN T. WEISS & RIKI WILCHINS, KNOW YOUR RIGHTS: TITLE VII AND EEOC RULINGS PROTECT TRANSGENDER EMPLOYEES. TRANSGENDER LAW CENTER 1 (2014).
[91] King v. Super Serv. Inc., 1968 F. App'x 659 (6th Cir. 2003).
[92] Schroer v. Billington, 577 F. Supp. 2d 293 (D.D.C. 2008).
[93] 490 U.S. 228, 251 (1989).
[94] *Id.* at 235.
[95] Glenn v. Sewell, 663 F.3d 1312, 1318, n.5 (11th Cir. 2011).
[96] Barnes v. City of Cincinnati, 401 F.3d 729, 737 (6th Cir. 2005).
[97] Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1224 (10th Cir. 2007).

B. *Executive Acknowledgment of LBGT Protections*

The EEOC now recognizes claims by lesbian, gay, bisexual and transsexual individuals under Title VII by applying sex-stereotyping to such instances as valid sex discrimination claims.[98] On April 20, 2012, the EEOC issued its own decision declaring that "discrimination against an individual because that person is transgender (also known as gender identity discrimination) is discrimination because of sex and therefore is covered under Title VII of the Civil Rights Act of 1964.[99] The rationale is that a man who acts like a woman and suffers adverse employment consequences for his behavior is being subjected to male stereotypes of acceptable behavior. This follows the same logic was previously applied by the Ninth Circuit Court of Appeals in its 2000 decision, *Schwenck v. Harford*, when it permitted a male-to-woman transgender individual to state a Title VII claim on the grounds the complaining party was a man who failed to act like one.[100]

In December 2014, Attorney General Eric Holder reaffirmed that the Department of Justice supports protection from sex discrimination for lesbian, gay, bisexual and transgender citizens under Title VII of the Civil Rights Act of 1964.[101] Sex stereotyping appears to be the chosen means for accomplishing this end.

IX. THE FUTURE

Though anticipated by some members of Congress,[102] the power of the EEOC over the private sector has greatly expanded over the past half century. With the focus on the individual having given way to the focus on the group, the desired outcome, "the concept of proportional representation is becoming increasingly institutionalized as an accepted business practice."[103] Which leads us to the next anticipated innovation in the future of Title VII, to the inclusion of LGBT as a new protected class. Even though Congress has yet to give statutory recognition to LBGT, this has already happened in a de

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[98] Veretto, EEOC DOC 0120110873 2011 WL 2663401 (July 1, 2011); Castello, EEOC DOC 0520110649, 2011 WL 6960810 (Dec. 20, 2011).
[99] Mia Macy, EEOC DOC 0120120821 2012 WL 1435995 (Apr. 20, 2012).
[100] 204 F.3d 1187, 1201-02 (9th Cir. 2000).
[101] Press Release, U.S. Dep't of Justice, Attorney General Holder Directs Department to Include Gender Identity Under Sex Discrimination Employment Claims. (December 18, 2014), http://www.justice.gov/opa/pr/attorney-general-holder-directs-department-include-gender-identity-under-sex-discrimination.
[102] Risen, *supra* note 12, at 149.
[103] FREDERICK R. LYNCH, THE DIVERSITY MACHINE: THE DRIVE TO CHANGE THE "WHITE MALE WORKPLACE" 177 (1997).

facto sense as evidenced by the EEOC's policy forbidding any employment discrimination based on gender identity or sexual orientation.[104]

Employers must not only closely monitor their employment practices and employees' behavior, but also contend with overreaction by the regulators and the courts. One result, arising out of the fear of noncompliance and its resulting penalties, has been the adoption of zero tolerance policies by many employers, especially related to sexual harassment. Though encouraged by the government and advocacy groups, some studies indicate that zero tolerance policies may not be an effective deterrent.[105] These strict policies limit management involvement by eliminating managerial discretion when non-routine problems are reduced to programmed decisions, regardless of the magnitude of the individual offense. In order to avoid a compliance problem, employers may inadvertently create an organizational commitment problem as employee perceptions of fairness may conflict with policy enforcement.[106]

X. CONCLUSION

Looking back a half century, it is amazing to witness how Title VII has been transformed. Title VII was enacted as seemingly straightforward legislation to require equal employment opportunity for individual members of specified classes who were viewed as having been historically subject to discrimination based on race, color, religion, sex or national origin. More succinctly, it was originally intended to protect one particular class of citizens[107] by preventing employers from excluding qualified Black candidates from the right to compete for jobs and benefits. As witnessed, over time, the current state of Equal Employment Opportunity law under

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[104] *What You Should Know About EEOC and the Enforcement Protections for LGBT Workers*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (last visited March 17, 2016), http://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm.

[105] Mary Rowe & Corinne Bendersky, *Workplace Justice, Zero Tolerance and Zero Barriers*, *in* NEGOTIATIONS AND CHANGE: FROM THE WORKPLACE TO SOCIETY, 117-39 (Thomas A. Kochan & David B. Lipsky, eds., 2003).

[106] Jason A Colquitt, Donald E. Conlon, Michael J. Wesson, Porter, O. L. H. Christopher, K. Yee Ng,
Justice at the millennium: A meta-analytic review of 25 years of organizational justice research,
86 J. OF APPLIED PSYCHOL. 425 (2001); Gary R. Weaver & Linda K. Trevino, *The role of human resources in ethics/compliance management: A fairness perspective*, 11 HUM. RESOURCE MGMT. REV. 113 (2001); Gail A. Ball, Linda K. Trevino & Henry P. Sims, *Just and unjust punishment: Influences on subordinate performance and citizenship*, 37 ACAD. OF MGMT. J. 299 (1994).

[107] Jo Freeman, How *"Sex" Got Into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 L. & INEQ.: A J. OF THEORY & PRAC. 163 (1991).

Title VII has expanded in its coverage of workplace behaviors and classes of employees as it was actively altered through regulatory guidelines, congressional amendments, executive orders and court decisions.

The complexity of issues now being addressed by EEO regulations and case law can easily be summarized as there are now two separate forms of discrimination that are unlawful under Title VII. One occurs when the employer fails to provide equal opportunity, the other when he/she fails to produce equal outcomes. The two different views of equal employment opportunity continue to coexist in the legal and regulatory environment, and with them, these two contrasting philosophies, as well as the emergence of a third, inclusion rights for sexual orientation.

In 2016, the Solicitor General's office of thee EEOC initiated litigation against Scott Medical Health Center, and, in a separate suit, IFCO Systems for respectively creating a hostile work environment by subjecting a gay male and lesbian employee because of their sexual orientation. In doing so, EEOC General Counsel David Lope stated, "With the filing of these two suits, EEOC is continuing to solidify its commitment to ensuring that individuals are not discriminated against in workplaces because of their sexual orientation. While some federal courts have begun to recognize this right under Title VII, it is critical that all courts do so."[108]

The authors make no judgment on the philosophical merits of these viewpoints or the resulting innovations. Like the rest of the nation, there are divergent opinions among the authors on many of these revisions. However, one point remains tantamount: Title VII's authority over workplace activities has clearly increased in the previous 50 years, for good or bad, and in this process employers' prerogatives have diminished.

Neither can the authors not notice that by the twenty-first century, there appears to be a tectonic shift in the focus of Title VII enforcement from individual members of protected classes to protected groups; from intentional discrimination against individuals in the form of disparate treatment to the subtler and difficult to discern "hostile work environment". It is also becoming more apparent, from statistics, that individuals and groups in protected classes are increasingly availing themselves these new protections provided by Title VII as it is currently being interpreted.

The overall increase in the number of charges filed with the EEOC may likely reflect the results of the broadening definitions of covered classes to be more inclusive, as well as the expansion of the definitions of what may constitute actionable discrimination in the workplace. If one were to look only at the number of charge receipts, one might conclude that instead of achieving its intended goal of eliminating unlawful discrimination based on

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[108] Press Release, EEOC Files First Suits Challenging Sexual Orientation Discrimination as Sex Discrimination (Mar. 1, 2016), http://www.eeoc.gov/eeoc/newsroom/release/3-1-16.cfm.

race, color, religion, sex or national origin, the Act appears to have increased it. In fiscal year 1989, the EEOC and state Fair Employment Practice Agencies (FEPA) received 55,952 charges to process.[109] Twenty-five years later in fiscal year 2014, the Commission received 63,589 charges under Title VII,[110] an increase of 14 percent. Raw statistics alone would seem to indicate that unlawful discrimination would appear to be worsening, however, this paradox can be easily explained as the result of a lowering of the threshold for what constitutes unlawful discrimination. The innovations reviewed in this article merely increased the number of workplace behaviors which can now be actionable under Title VII. Simply stated there are just currently more ways to violate the Act than in previous times.

The changing legal environment will continue to confound covered employers as to exactly what is permitted (and what is proscribed) under Title VII. This would suggest a need for continuing education for human resource managers, legal professionals and small business owners to ensure that all remain abreast of the continually evolving status of Title VII in order to avoid expensive and disruptive litigation.

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[109] U.S. EQUAL EMP. OPPORTUNITY COMM'N, FISCAL YEAR 1989 ANNUAL REPORT 8 (1989).
[110] *Enforcement and Litigation Statistics: Charge Statistics FY 1997 Through FY 2015*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited March 10, 2015).