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## The Obama Administration's Civil Rights Record: The Difference an Administration Makes

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## The Obama Administration's Civil Rights Record: The Difference an Administration Makes

Michael Selmi\*

### INTRODUCTION

When one thinks about the civil rights record of President Barack Obama after his first term in office, one is likely to focus on issues that arose outside of the traditional civil rights areas. During his first term, the race-related issues that received the most public attention were the President's comments regarding his friend and esteemed Harvard Professor Henry Louis Gates, Jr. and the Secretary of Agriculture's firing and then rehiring of employee Shirley Sherrod.<sup>1</sup> Both of those incidents received widespread and mixed attention, but both quickly faded from the scene and neither involved any matter of civil rights enforcement.<sup>2</sup>

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\* Samuel Tyler Research Professor, George Washington University Law School. An earlier version of this paper was presented at the *Indiana Journal of Law and Social Equality's* Symposium, and I am grateful for the hospitality and comments I received at that time. Greg Matherne, Sonia Weil, and Mary Cameron provided excellent research assistance.

1. The two incidents came early in his administration. Henry Louis Gates, Jr. was arrested for attempting to break into his own home near Harvard University and set off a brief debate regarding the persistence of discrimination. See Helene Cooper & Abby Goodnough, *Over Beers, No Apologies, but Plans to Have Lunch*, N.Y. TIMES, July 30, 2009, [http://www.nytimes.com/2009/07/31/us/politics/31obama.html?\\_r=0](http://www.nytimes.com/2009/07/31/us/politics/31obama.html?_r=0). The incident is chronicled in CHARLES OGLE-TREE, *THE PRESUMPTION OF GUILT: THE ARREST OF HENRY LOUIS GATES, JR. AND RACE, CLASS AND CRIME IN AMERICA* (2012). Shirley Sherrod was an African American employee of the Department of Agriculture who was fired after a misleading videotape was provided to media outlets that suggested she discriminated against white farmers. See Sheryl Gay Stolberg, Shaila Dewan & Brian Stelter, *With Apology, Fired Official is Offered a New Job*, N.Y. TIMES, July 21, 2010, <http://www.nytimes.com/2010/07/22/us/politics/22sherrod.html>. When the misleading nature of the tape was revealed she was offered her job back and later received higher-level positions. See *id.*

2. As I was completing work on this Article, the President also commented on the acquittal of George Zimmerman who had been charged with killing African American teenager Trayvon Martin. See Mark Landler & Michael D. Shear, *President Offers a Personal Take on Race in U.S.*, N.Y. TIMES, July 19, 2013, <http://www.nytimes.com/2013/07/20/us/in-wake-of->

Two other areas are likely to gain attention, one for positive developments and the other for negative. On the positive side, there is President Obama's conversion to a supporter of same-sex marriage, support that was translated into two important positions in cases before the Supreme Court.<sup>3</sup> President Obama also repealed the military's "don't ask, don't tell" policy and stopped enforcing the Defense of Marriage Act (DOMA), a federal anti-gay marriage law.<sup>4</sup> Indeed, his record on issues of importance to the LGBT community has been consistent and impressive, and certainly qualifies as a major civil rights initiative. However, the negative aspect has been equally consistent, if less impressive, at least as measured against the goals of progressive civil rights communities; there has been widespread concern that the Obama administration has aggressively fought the war on terror at the expense of civil liberties.<sup>5</sup>

Beyond these areas, the Obama administration's civil rights record has been remarkably thin. In the first four years, the administration did not file a single major employment discrimination, housing, or education case, which are three traditional areas of civil rights enforcement. Additionally, in all of these areas, the number of cases filed appears to be either at the same level as the George W. Bush administration or down significantly from the prior administration.<sup>6</sup> In the other area of traditional

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[zimmerman-verdict-obama-makes-extensive-statement-on-race-in-america.html](#). As was true with the Gates and Sherrod incidents, the United States was not directly involved with the prosecution of George Zimmerman.

3. The administration sided with gay and lesbian plaintiffs in two recent Supreme Court cases. See John Schwartz & Adam Liptak, *U.S. Asks Justices to Reject California's Ban on Gay Marriage*, N.Y. TIMES, Feb. 28, 2013, <http://www.nytimes.com/2013/03/01/us/politics/administration-to-urge-justices-to-overturn-a-gay-marriage-ban.html>. Those cases were *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (challenge to California law), and *United States v. Windsor*, 133 S. Ct. 2675 (2013) (challenge to DOMA). The President's views evolved significantly from those he held as a candidate for president when he supported civil unions. See Peter Wallsten & Scott Wilson, *For Obama, Gay Marriage Stance Born of a Long Evolution*, WASH. POST, May 10, 2012, [http://articles.washingtonpost.com/2012-05-10/politics/35456048\\_1\\_gay-marriage-stance-gay-donors-marriage-rights](http://articles.washingtonpost.com/2012-05-10/politics/35456048_1_gay-marriage-stance-gay-donors-marriage-rights).

4. See Elisabeth Bumiller, *Obama Ends 'Don't Ask, Don't Tell' Policy*, N.Y. TIMES, July 22, 2011, [http://www.nytimes.com/2011/07/23/us/23military.html?\\_r=0](http://www.nytimes.com/2011/07/23/us/23military.html?_r=0); Letter from Eric H. Holder, Jr., Att'y Gen., to John A. Boehner, Speaker of the House (Feb. 23, 2011), <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

5. The President has been widely criticized for his policies on civil liberties. See, e.g., AM. CIVIL LIBERTIES UNION, *A CALL TO COURAGE: RECLAIMING OUR LIBERTIES TEN YEARS AFTER 9/11* (2011), <https://www.aclu.org/files/assets/acalltocourage.pdf>; Steven Rosenfeld, *Obama's Dismal Civil Liberties Record*, SALON (Apr. 20, 2012), [http://www.salon.com/2012/4/20/Obamas\\_dismal\\_civil\\_liberties\\_record/](http://www.salon.com/2012/4/20/Obamas_dismal_civil_liberties_record/).

6. This issue is discussed in more detail below. One possible exception would be two lending discrimination cases the Department of Justice brought, both of which were never litigated because the parties reached agreements prior to the filing of the suit, settling for sizable amounts.

civil rights enforcement, namely voting rights, the administration has been active, particularly on the divisive issue of voter identification. However, this activity all arose during the 2012 presidential campaign and seems quite likely to have been related to, or motivated by, that campaign. The Obama administration has, in fact, largely been absent on issues relating to redistricting, a traditional activity that often implicates the preclearance mandate of the Department of Justice.<sup>7</sup>

As will be discussed in more detail below, the Obama administration's record on civil rights has been modest at best, at least when the focus is on agency enforcement actions. At the same time, the administration's rhetoric and the positions it has staked out in the Supreme Court, either through amicus participation or as a party, have generally been consistent with a progressive civil rights agenda. There have also been a number of important issues presented, including affirmative action, the constitutionality of the Voting Rights Act, and the legality or constitutionality of same-sex marriage.<sup>8</sup> This Article will proceed in four parts: Part I provides a brief overview of the way civil rights enforcement is handled or divided among agencies. Thereafter, Part II will discuss the enforcement activity of the Civil Rights Division of the Department of Justice, which is traditionally thought to be the premier civil rights group within the government. Part III will analyze the work of the Equal Employment Opportunity Commission (EEOC), which has been the most active agency within the Obama administration, even though the level of some of its enforcement activity has declined dramatically. Finally, Part IV will provide an assessment of the administration's civil rights enforcement efforts, concluding that, while civil rights has certainly not been a priority, the path it has carved out has largely been aligned with the principles of the Democratic Party.

## I. A BRIEF PRIMER ON THE STRUCTURE OF CIVIL RIGHTS ENFORCEMENT

When one thinks about civil rights enforcement, the initial focus is on the Civil Rights Division of the Department of Justice, a division that was initially created in the 1950s and '60s to address voting rights violations and that later expanded to include other areas.<sup>9</sup> The Civil Rights Division has historically focused

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7. Recently, the Supreme Court invalidated the Department of Justice's oversight role under the Voting Rights Act, but the Department retained its traditional role throughout the first term of its administration. *See Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013).

8. The 2012 term featured four important civil rights cases, and the United States was on the side of progressive groups in all four of them: *Shelby Cnty.*, 133 S. Ct. at 2612 (supporting ruling on continuation of section 5 of the Voting Rights Act); *Windsor*, 133 S. Ct. at 2675 (supporting ruling on invalidation of DOMA); *Hollingsworth*, 133 S. Ct. at 2652 (supporting ruling on invalidation of California initiative prohibiting same-sex marriage); *Fisher v. University of Texas*, 133 S. Ct. 2411 (2013) (supporting the University's affirmative action efforts).

9. For a history of the Civil Rights Division, see BRIAN K. LANDSBERG, *ENFORCING CIVIL RIGHTS: RACE DISCRIMINATION AND THE DEPARTMENT OF JUSTICE* (1997).

on education, employment, housing, and voting, and its jurisdiction has expanded to include criminal civil rights violations, disabilities, rights of institutionalized persons, and national origin discrimination in the form of overzealous immigration enforcement.<sup>10</sup> The Civil Rights Division is divided into various sections that concentrate on specific areas of the law. It also files suits and negotiates agreements, most of which involve public entities—though in some areas, such as housing, the Department of Justice can pursue claims against private parties.<sup>11</sup>

Although the Civil Rights Division has added sections in response to legislative changes, much of its work remains the same as it has been for decades, and some areas have become increasingly irrelevant as a result. This is particularly true of the Educational Opportunities Section, which continues to monitor desegregation decrees, many of which have been in place for decades.<sup>12</sup> The Housing and Civil Enforcement Section now handles only a very small number of cases that arise under the primary housing law—the Fair Housing Act of 1968 (FHA).<sup>13</sup> Outside of voting rights and occasional high profile criminal prosecutions, the Civil Rights Division has become strikingly less relevant over time.

Other federal agencies have primary enforcement authority in discreet areas. Perhaps the most important of these is the EEOC, which processes charges of employment discrimination under various federal statutes and pursues litigation against private companies.<sup>14</sup> The EEOC also plays an important advisory role in that it provides guidance to employers on how to comply with the various federal laws it enforces.<sup>15</sup> The other major civil rights agency is found in the Department of Education, where its Office of Civil Rights (OCR) receives complaints pursuant

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10. The scope of the Civil Rights Division's work can be found on its website. *See generally Civil Rights Division*, <http://www.justice.gov/crt/> (Dec. 13, 2013).

11. The Department of Justice now has limited authority over housing matters, and most of the enforcement activity arises from the U.S. Department of Housing and Urban Development (HUD) and the state equivalents. *See infra* Part II.D for further discussion of housing enforcement.

12. To give but one example, the Division recently entered into a consent decree on a case it has been monitoring since 1969. *See* Press Release, U.S. Dep't of Justice, Court Approves Comprehensive Assignment Plan in Longstanding Tennessee Desegregation Case (July 12, 2013), <http://www.justice.gov/opa/pr/2013/July/13-crt-784.html>.

13. Although HUD has primary authority under the FHA, which prohibits discrimination in housing and is part of the series of civil rights acts passed in the 1960s, the Department of Justice has assumed primary authority for cases involving fair lending, some of which involve the FHA and others which involve the Equal Credit Opportunity Act, 15 U.S.C. § 1691(a)(1) (2006). The fair lending cases are discussed further in Part II.D. *See infra* text accompanying notes 72–84.

14. *See generally Overview*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <http://www.eeoc.gov/eeoc/index.cfm> (Dec. 13, 2013). I have previously discussed the EEOC and its work in Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1 (1996).

15. The record of the EEOC is discussed *infra* Part III.

to various statutes, including Title VI and Title IX of the Civil Rights Act of 1964. The OCR primarily processes the 10,000 complaints it receives each year, but it has also helped fashion policies for the nation's educational institutions, some of which have suggested that it has pursued an aggressive course during the first Obama administration.<sup>16</sup> The U.S. Department of Housing and Urban Development (HUD) likewise processes a similar number of complaints under the FHA, although responsibility for such claims has been taken up increasingly by state agencies.<sup>17</sup>

In addition to processing complaints, HUD's civil rights office has also issued important guidance recognizing the disparate impact theory under the FHA.<sup>18</sup> This guidance, while something prior administrations had failed to implement, seems far less significant given that most courts long ago determined the disparate impact theory was viable under the housing law.<sup>19</sup> At the same time, there is at least symbolic significance attached to the administration's regulation, and it is conceivable that it would be relevant if the Supreme Court rules on the issue.<sup>20</sup>

In this Article, I will concentrate my analysis on the Civil Rights Division of the Department of Justice and the EEOC, in part because these are the two sections

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16. The OCR has played an important role in ensuring that educational institutions have effective policies to address sexual harassment and bullying. *See* OFFICE OF CIVIL RIGHTS, U.S. DEP'T OF EDUC., HELPING TO ENSURE EQUAL ACCESS TO EDUCATION: REPORT TO THE PRESIDENT AND SECRETARY OF EDUCATION FY 2009–12 (2012), <http://www2.ed.gov/about/reports/annual/ocr/report-to-president-2009-12.pdf>. It has also engaged in several high profile investigations, most recently targeting the University of Montana and its handling of allegations of sexual assault and harassment. *See* Letter from Thomas E. Perez, Assistant Att'y Gen., Civil Rights Div. & Michael W. Cotter, U.S. Attorney, Dist. of Mont., to Royce C. Engstrom, President of the Univ. of Mont. (May 9, 2013), [http://www.justice.gov/crt/about/spl/documents/missoulafind\\_5-9-13.pdf](http://www.justice.gov/crt/about/spl/documents/missoulafind_5-9-13.pdf).

17. In fiscal year 2010, HUD and its state affiliates closed 10,017 complaints, with the state agencies responsible for 8,161 of those. U.S. DEP'T OF HOUS. & URB. DEV., LIVE FREE: ANNUAL REPORT ON FAIR HOUSING FY 2010, at 29, <http://portal.hud.gov/hudportal/documents/huddoc?id=ANNUALREPORT2010.PDF> (Dec. 13, 2013).

18. This issue is discussed in detail *infra* notes 76–77 and accompanying text.

19. The question of whether the FHA encompasses a disparate impact claim has long been a contested issue, though every appellate court to address the issue has defined the statute to include such a claim. *See, e.g.,* Langlois v. Abington Hous. Auth., 207 F.3d 43, 49–51 (1st Cir. 2000) (discussing disparate impact cases).

20. The Supreme Court granted certiorari on a case from New Jersey, which the parties wisely settled to deprive the Court of jurisdiction. *See* Mount Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly, 658 F.3d 375 (3d Cir. 2011), *cert. granted*, 133 S. Ct. 2824 (2013), *and cert. dismissed*, 134 S. Ct. 636 (2013). For a discussion of the settlement, see Adam Liptak, *Fair-Housing Case is Settled Before it Reaches Supreme Court*, N.Y. TIMES, Nov. 13, 2013, [http://www.nytimes.com/2013/11/14/us/fair-housing-case-is-settled-before-it-reaches-supreme-court.html?\\_r=0](http://www.nytimes.com/2013/11/14/us/fair-housing-case-is-settled-before-it-reaches-supreme-court.html?_r=0). In my opinion, the *Mount Holly* case presented an extremely poor vehicle for the Court to consider the viability of a disparate impact claim since the disparate impact arose simply because the city sought to revitalize an area where many African Americans lived.

or agencies I am most familiar with, but also because these are the primary centers for civil rights enforcement. The OCR within the Department of Education may likewise merit analysis, but its work has been more limited and, beyond what was noted above, there would not be much to report. The same is true with HUD; its activity beyond processing complaints has been quite minimal and the agency has been far less visible than the OCR or the EEOC.

## II. THE DEPARTMENT OF JUSTICE

As noted, the Civil Rights Division of the Department of Justice has traditionally been the central agency associated with civil rights enforcement.<sup>21</sup> The Civil Rights Division serves various functions, including prosecuting claims, serving as amicus in various cases and disputes, and providing policy advice, including issuing regulations on occasion.<sup>22</sup> There is little question that the focus of the Civil Rights Division has varied over time, whether that is as a result of the political orientation of the administration or a simple changing of the times. For example, in the 1970s, education desegregation was a central part of the civil rights mission, whereas today, the Educational Opportunities Section, which still exists as a separate entity, has largely become irrelevant to civil rights enforcement, monitoring old decrees and only occasionally filing new claims.<sup>23</sup>

Before proceeding to evaluate the Civil Rights Division's performance under the Obama administration, it is worth noting that assessing its performance has become particularly difficult in light of the Division's reporting efforts. Although its practice has varied over time, the Civil Rights Division no longer issues annual reports chronicling its activity, and instead one can only piece together the highlights by looking at congressional oversight hearings. The reports provided to Congress are typically very short and do not provide any numerical information—the equivalent of a sports highlight reel that makes it difficult to assess the

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21. See Goodwin Liu, *The Bush Administration and Civil Rights: Lessons Learned*, 4 DUKE J. CONST. L. & PUB. POL'Y 77, 78 (2009) (“The Civil Rights Division of the Department of Justice is the nation’s foremost civil rights enforcement agency.”).

22. The Department of Justice has limited rulemaking authority, though it has issued regulations regarding the Americans with Disabilities Act. See, e.g., U.S. DEP’T OF JUSTICE, AMERICANS WITH DISABILITIES ACT TITLE III REGULATIONS: NONDISCRIMINATION ON THE BASIS OF DISABILITY BY PUBLIC ACCOMMODATIONS AND IN COMMERCIAL FACILITIES (2010), [http://www.ada.gov/regs2010/titleIII\\_2010/titleIII\\_2010\\_regulations.pdf](http://www.ada.gov/regs2010/titleIII_2010/titleIII_2010_regulations.pdf).

23. To offer one example from its website, the Department of Justice notes that it filed a lawsuit in March 2012 regarding the continued segregation of a school district in Cleveland, Mississippi, where the district had been under a consent decree for forty-two years. See *Cowan v. Bolivar Cnty. Bd. of Educ.*, 914 F. Supp. 2d 801 (N.D. Miss. 2012). See Chinh Q. Le, *Racially Integrated Education and the Role of the Federal Government*, 88 N.C. L. REV. 725, 764–65 (2010), for a recent scholarly overview discussing the Department of Justice’s desegregation actions.

efficiency of the Civil Rights Division or even the quantity of its activity. Curiously, the only comprehensive report the Civil Rights Division has issued in the last five years came out after its head Thomas Perez was nominated to be the new secretary of labor.<sup>24</sup> It is certainly possible that the timing was coincidental, but it also seems beyond question that the Department should be providing annual reports detailing its activity. In any event, the analysis that follows is based on all publicly available reports.<sup>25</sup>

### A. *Employment Litigation*

Historically, the area within the Civil Rights Division that has drawn the most scrutiny has been employment litigation, principally because of the direct connection with affirmative action in the employment setting. Over the last decade, the Department's activity has become more muted, at least in part because of the surge in private litigation that was prompted by statutory changes included as part of the Civil Rights Act of 1991,<sup>26</sup> which provided damages as an available remedy for claims of intentional discrimination<sup>27</sup> and spawned a rise in private litigation

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24. Thomas Perez was nominated for the position of secretary of labor on March 18, 2013. Colleen Curtis, *President Obama Nominates Thomas Perez for Secretary of Labor*, WHITE HOUSE BLOG (Mar. 18, 2013, 1:11 PM), [www.whitehouse.gov/blog/2013/03/18/president-obama-nominates-thomas-perez-secretary-labor](http://www.whitehouse.gov/blog/2013/03/18/president-obama-nominates-thomas-perez-secretary-labor).

25. See CIVIL RIGHTS DIV., ACCOMPLISHMENTS 2009–2012, [http://www.justice.gov/crt/publications/accomplishments/crtaccomplishment09\\_12.pdf](http://www.justice.gov/crt/publications/accomplishments/crtaccomplishment09_12.pdf) (Dec. 13, 2013) [hereinafter ACCOMPLISHMENTS]. I should note that it is not clear what date the report was first posted on the Department of Justice website, but it appeared sometime near when Secretary Perez was nominated. The other reports are congressional testimony. See *Oversight Hearing on the U.S. Department of Justice Civil Rights Division: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 112th Cong. (2012) (statement of Thomas E. Perez, Assistant Att'y Gen. Civil Rights Div.); *Examining Lending Discrimination Practices and Foreclosure Abuses: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. (2012) (statement of Thomas E. Perez, Assistant Att'y Gen. Civil Rights Div.); *Civil Rights Division Oversight Hearing: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. (2011) (statement of Thomas E. Perez, Assistant Att'y Gen. Civil Rights Div.); *Oversight Hearing on the U.S. Department of Justice Civil Rights Division: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 112th Cong. (2011) (statement of Thomas E. Perez, Assistant Att'y Gen. Civil Rights Div.); *Oversight of the Civil Rights Division of the Department of Justice: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (2010) (statement of Thomas E. Perez, Assistant Att'y Gen. Dep't of Justice).

26. See Sean Farhang, *Congressional Mobilization of Private Litigants: Evidence from the Civil Rights Act of 1991*, 6 J. EMPIRICAL LEGAL STUD. 1 (2009) (documenting rise in private litigation after Civil Rights Act of 1991).

27. Cornell Univ. Law Sch., *Equal Employment Opportunity Commission*, LEGAL INFO. INST., [http://www.law.cornell.edu/wex/equal\\_employment\\_opportunity\\_commission](http://www.law.cornell.edu/wex/equal_employment_opportunity_commission) (Dec. 13, 2013).



that has only recently slowed down.<sup>28</sup> As a result, the Department of Justice has become a relatively small player in employment litigation, and has been eclipsed by the more active EEOC—an issue that will be explored shortly.

From the reports, it appears that the Department's filings have been quite modest and have not varied much from its past patterns. Based on the sample complaints listed on its website, the vast majority of the complaints filed involved individual plaintiffs; only three of the complaints filed during the Obama administration arose under section 707, the pattern and practice provision of Title VII.<sup>29</sup> Those three cases all involved traditional claims of discrimination in the hiring of women in male prisons or the use of discriminatory written tests—the very same kind of cases the Department has been bringing for more than forty years.<sup>30</sup> Although the listed complaints are designated as “samples,” the mix of individual and class action cases is likely to be representative of the broader landscape of cases, and it is also highly unlikely that high profile cases, which are likely to be class actions, would not be listed among the sample complaints or appear within the various reports issued by the Department. The description of cases contained within congressional testimony also suggests limited activity by the employment litigation section, particularly among pattern or practice cases.

Ironically, one of the cases the Department routinely trumpets as a major accomplishment is a case it originally brought under the George W. Bush administration, though the Obama administration has continued the litigation, which includes both routine and innovative aspects.<sup>31</sup> Originally filed in 2007, the case challenged the New York City Fire Department's use of a written examination in its hiring process,

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28. Based on statistics compiled by the Administrative Office of the United States Courts, the number of employment discrimination filings in federal court peaked in 1997 at 23,796. *Table C-2A, U.S. District Courts – Civil Cases Commenced, by Nature of Suit*, U.S. COURTS 132 (1997), <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/1997/appendices/c2asep97.pdf>. A substantial decline occurred in the following decade leveling out at 13,219 in 2008. *Table C-2A, U.S. District Courts – Civil Cases Commenced, by Nature of Suit*, U.S. COURTS 147 (2008), <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2008/appendices/C02ASep08.pdf>. Since then, the number of complaints has stabilized around 15,000 cases, with another nearly 2,000 employment cases filed under the Americans with Disabilities Act. *Table C-2A, U.S. District Courts – Civil Cases Commenced, by Nature of Suit*, U.S. COURTS 2 (2012), <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/appendices/C02ASep12.pdf>.

29. For a list of the complaints filed, see *Employment Litigation Section Cases*, <http://www.justice.gov/crt/about/emp/papers.php> (Dec. 13, 2013).

30. See, e.g., Complaint, *United States v. Consolidated City of Jacksonville*, No. 3:12-CV-451 (M.D. Fla. Apr. 23, 2012) (suit against fire department); Complaint, *United States v. State*, No. 2:33-AV-00001 (D.N.J. Jan. 7, 2010) (suit challenging written tests used for promotion to sergeant); Complaint, *United States v. Commonwealth*, No. 1:09-CV-11623 (D. Mass. Sept. 28, 2009) (sex discrimination challenge to physical agility tests for correctional officers).

31. See, e.g., ACCOMPLISHMENTS, *supra* note 25, at 35–36 (discussing the New York Fire Department case).

an issue that again harkens back to the very early era cases. However, the case went further and sought to transform a traditional disparate impact claim into an intentional discrimination case by alleging that the Fire Department knew, or should have known, that the test it was using would have a disparate impact because of the city's long history of adverse results from such examinations.<sup>32</sup> This has been a rarely pursued litigation strategy, and the Department deserves credit for including an intentional discrimination claim as part of the case. However, the credit cannot go entirely to the Obama administration. Further, it seems odd that the Department never mentions in its materials that the case was originally brought by the Bush administration, particularly since the Obama administration is quick to compare itself to that earlier administration when the comparison is favorable.<sup>33</sup> It should be noted that the litigation was initially successful, though the Second Circuit recently reversed and remanded the intentional discrimination finding for further review, assigning that aspect of the case to a new judge in the process.<sup>34</sup> It is also worth emphasizing that the case against the New York City Fire Department is undoubtedly the largest case the Obama administration has litigated in the employment area.<sup>35</sup>

On the whole, in the area of employment discrimination, the Obama administration's enforcement efforts have been limited, and for the most part have continued a downward trajectory that has been in place for many years. The vast majority of the cases the Department brings are individual cases, either under the Uniformed Services Employment and Reemployment Rights Act (USERRA) or Title VII. Of the fifteen cases filed in 2013, six were filed under USERRA, and in 2012, seven of the twenty cases were filed under that statute.<sup>36</sup> These are not necessarily trivial cases, and one might argue that the Department is simply pursuing its statutory mandate. However, they are cases that involve individuals and rarely provide much impact beyond the particular case. It has never made much sense to

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32. See *United States v. City of New York*, 637 F. Supp. 2d 77 (E.D.N.Y. 2009) (original disparate impact claim); *United States v. City of New York*, 683 F. Supp. 2d 225 (E.D.N.Y. 2010) (disparate treatment claim).

33. To take a random example: "Under the current Administration, 43 cases have been filed under the Uniformed Services Employment and Reemployment Rights Act (USERRA), already exceeding the 32 USERRA cases filed in the entire four years during the previous Administration . . ." *Oversight Hearing on the U.S. Department of Justice Civil Rights Division*, 112th Cong. (2012), *supra* note 25, at 3.

34. See *United States v. City of New York*, 717 F.3d 72, 77 (2d Cir. 2013).

35. The case settled shortly after Mayor Bill de Blasio took office. See Marc Santora & Michael Schwartz, *New York City Settles Lawsuit Accusing Fire Dept. of Racial Bias*, N.Y. TIMES, Mar. 18, 2014, [http://www.nytimes.com/2014/03/19/nyregion/new-york-settles-bias-lawsuit-against-fire-department.html?\\_r=0](http://www.nytimes.com/2014/03/19/nyregion/new-york-settles-bias-lawsuit-against-fire-department.html?_r=0).

36. *Employment Litigation Section Cases*, , [www.justice.gov/crt/about/emp/papers.php](http://www.justice.gov/crt/about/emp/papers.php) (Dec. 13, 2013). It is worth noting that only one of the cases filed during 2012–2013 was filed under section 707 of Title VII, which is the section under which pattern or practice cases are filed. *Id.*

me that a relatively small section of attorneys would devote its primary resources to individual claims, given that there should be no shortage of private attorneys available to bring meritorious individual claims.<sup>37</sup> Indeed, the emphasis on individual claims recalls Justice Thomas's position at the EEOC many years ago where he pushed the Agency to concentrate on individual claims and was reluctant to settle for less than full relief.<sup>38</sup>

### *B. Education*

Civil rights litigation involving educational equality has dramatically declined over the last two decades, as the emphasis on desegregation—the traditional focus of civil rights litigation in this area—has become less of a concern, and for a variety of reasons. Those reasons include the limited success that past desegregation cases have achieved, ambivalence towards making desegregation a priority, and housing patterns that make desegregation all the more difficult.<sup>39</sup> To be sure, there are many desegregation cases still pending and the Department of Justice monitors many of them. Occasionally it will pursue some enforcement actions on the older cases, but there are few, if any, new cases in the area.<sup>40</sup>

In terms of new cases or issues, there has been decidedly little action, and this again is largely consistent with the limited focus education receives as a civil rights issue these days. For example, it appears that the Department of Justice has not brought any cases involving a charter school or a school district that oversees charter schools, despite evidence indicating widespread segregation among charter schools.<sup>41</sup> The administration has, however, influenced the development of the No

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37. I have addressed this issue in the past. See Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401 (1998).

38. See Douglas Frantz, *Thomas Seems Sure to Face Criticism on EEOC Policies*, L.A. TIMES, July 3, 1991, [http://articles.latimes.com/1991-07-03/news/mn-1550\\_1\\_clarence-thomas](http://articles.latimes.com/1991-07-03/news/mn-1550_1_clarence-thomas) (discussing controversial policies implemented at the EEOC, including his decision to “abandon[] the agency’s traditional reliance on class-action lawsuits in favor of individual cases”).

39. Over time, the Supreme Court’s jurisprudence has also made it increasingly more difficult for school districts to maintain desegregation efforts. See, e.g., *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (invalidating desegregation plans in Seattle and Louisville).

40. For a discussion of the continuing role played by both consent decrees and the Department of Justice’s monitoring, see Wendy Parker, *The Decline of Judicial Decision Making: School Desegregation and District Court Judges*, 81 N.C. L. REV. 1623 (2003).

41. Segregation among charter schools has been a concern since the advent of the choice movement. See, e.g., Wendy Parker, *The Color of Choice: Race and Charter Schools*, 75 TUL. L. REV. 563 (2001) (discussing the problem of how charter schools perpetuate segregation). A number of research reports have documented the segregation of charter schools when compared to public schools. For a recent report, see, for example, Erica Frankenberg, Genevieve Siegel-Hawley & Jia Wang, *Choice Without Equity: Charter School Segregation and the Need for Civil Rights Standards*, THE CIVIL RIGHTS PROJECT AT UCLA (2010), [117](http://www.civilright-</a></p></div><div data-bbox=)

Child Left Behind Act by granting many state waivers, and has likewise moved to modify the law.<sup>42</sup> This influence is consistent with the administration's broader actions—while it brings relatively few enforcement actions, it has moved for policy change and has also, as discussed more below, issued many policy statements that have proved influential.

One area where the administration has set out into new territory has to do with differential treatment of African American students in school discipline. This has been a well-documented issue for many years, and the OCR within the Department of Education has processed many complaints.<sup>43</sup> More recently, the Department of Justice has brought several complaints against school districts for applying their disciplinary policies in a discriminatory fashion.<sup>44</sup> Settlements were obtained in both of the cases the Department filed and these claims likely had substantial reverberations in the education community, particularly since under Title VI of the Civil Rights Act of 1964 the school districts could have been at risk of losing their federal funding if they were found to have discriminated in their educational facilities.<sup>45</sup>

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sproject.ucla.edu. Others have expressed skepticism that charter schools are responsible for increasing levels of segregation given that segregation is so prevalent in urban school districts where most charter schools are found. *See, e.g.*, Matthew M. Chingos, *Does Expanding School Choice Increase Segregation?*, BROOKINGS BROWN CTR. CHALKBOARD (May 15, 2013), <http://www.brookings.edu/blogs/brown-center-chalkboard/posts/2013/05/15-school-choice-segregation-chingos>.

42. The administration has put its own stamp on the law by granting a large number of waivers to states and has also sought to change the law. *See, e.g.*, Robert Hanna, *5 Ways No Child Left Behind Waivers Help State Education Reform*, CTR. FOR AM. PROGRESS (Apr. 8, 2013), <http://www.americanprogress.org/issues/education/news/2013/04/08/59542/5-ways-no-child-left-behind-waivers-help-state-education-reform/>; Michele McNeil & Alyson Klein, *Obama Outlines NCLB Flexibility: Plan Waives Cornerstone Provisions of Law*, EDUC. WK., Sept. 28, 2011, at 20.

43. *See* OFFICE OF CIVIL RIGHTS, *supra* note 16. By its own data, the OCR found that African Americans were subjected to twice as many out of school suspensions, expulsions, and arrests than their presence in the school population would support. *Id.* at 29. The OCR also noted that between 2009 and 2012, it opened twenty investigations and fielded 1,250 complaints regarding school discipline. *Id.*

44. *See, e.g.*, Press Release, U.S. Dep't of Justice, Court Approves Consent Decree to Prevent and Address Racial Discrimination in Student Discipline in Meridian, Mississippi (May 30, 2013), <http://www.justice.gov/opa/pr/2013/May/13-crt-634.html>; Press Release, U.S. Dep't of Justice, Justice Department Reaches Settlement with School District of Palm Beach County, Florida, to Prevent and Address Discrimination in School Enrollment and Student Discipline (Feb. 26, 2013), <http://www.justice.gov/opa/pr/2013/February/13-crt-238.html>.

45. *See* 42 U.S.C. § 2000d (2006). Title VI prohibits racial discrimination among the recipients of federal funds, and violations can—though rarely do—lead to a loss of those funds. ROY L. BROOKS, GILBERT PAUL CARRASCO & MICHAEL SELMI, *THE LAW OF DISCRIMINATION: CASES AND PERSPECTIVES* 215–16 (2011).

### C. Voting

At one time, employment discrimination was the most controversial subject matter within the Civil Rights Division since it was the location of the heated affirmative action debate that erupted in the 1980s.<sup>46</sup> Today, the Employment Section is quiet and uncontroversial and the Voting Section has become the political hotbed. This may seem rather obvious given that voting rights are most directly related to an administration's political interests, but it has been strategic enforcement decisions—typically pursued with the administration's interests in mind—that have sparked controversy.

During the first George W. Bush administration, the Voting Section took an aggressive position regarding racial redistricting, generally supporting such districts under the theory that packing African Americans into a single district might enable Republicans to win surrounding districts by making them more competitive or more Republican.<sup>47</sup> Within the scholarly literature, there has been a lively debate regarding whether the strategy was successful,<sup>48</sup> but in the late 1980s and 1990s racial redistricting became a deeply contested issue, including within the Supreme Court.<sup>49</sup> Today, racial redistricting draws far less interest, in part because over time it has become increasingly difficult to draw new majority-minority districts, particularly in light of Supreme Court cases that limited the use of race in drawing district lines.<sup>50</sup>

The second Bush administration took a different and more confrontational approach—substantially decreasing its enforcement efforts. When it did bring cases, it often focused on the rights of white voters,<sup>51</sup> which led to substantial political

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46. See, e.g., RAYMOND WOLTERS, *RIGHT TURN: WILLIAM BRADFORD REYNOLDS, THE REAGAN ADMINISTRATION, AND BLACK CIVIL RIGHTS* (1996).

47. For a discussion of the Bush Administration's support for redistricting, see Grant M. Hayden, *Resolving the Dilemma of Minority Representation*, 92 CALIF. L. REV. 1589, 1591–93 (2004).

48. See, e.g., DAVID LUBLIN, *THE PARADOX OF REPRESENTATION: RACIAL GERRYMANDERING AND MINORITY INTERESTS IN CONGRESS* (1997) (making the claim that racial redistricting benefited southern Republicans); *REDISTRICTING AND MINORITY REPRESENTATION* (David A. Bositis ed., 1998) (exploring the various issues). For a skeptical evaluation, see Adam B. Cox & Richard T. Holden, *Reconsidering Racial and Partisan Gerrymandering*, 78 U. CHI. L. REV. 553 (2011).

49. In the 1990s, the Supreme Court issued a series of decisions aimed at limiting the possibility of racial redistricting. See *Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Reno*, 509 U.S. 630 (1993).

50. As it became more difficult to draw new districts, some legislatures began to create what were defined as “influence districts,” districts in which African American voters could influence an election. The Supreme Court upheld one such effort against a section 5 challenge. See *Georgia v. Ashcroft*, 539 U.S. 461 (2003). That decision was subsequently invalidated by a provision of the Voting Rights Act extension in 2006. See *Voting Rights Act*, 42 U.S.C. § 1973c–d (2006).

51. One such case, which garnered much media attention, involved alleged intimidation by

attention and ultimately caught the Obama administration in its web when it sought to rid the Department of some of the Bush administration's political hires. A lengthy report was issued on the controversial employment practices within the section that makes for interesting reading, as it determines that there was plenty of blame to go around for what appeared clearly to be impermissible political hiring and not so tactful efforts to remove some of the individuals who had been impermissibly hired.<sup>52</sup>

With respect to its enforcement efforts, the Voting Section has pursued a modest amount of cases; indeed, according to the report issued by the Office of the Inspector General, the number of cases filed by the Obama administration has been roughly the same as was filed by the second Bush administration and far below the activity of Bush's first administration.<sup>53</sup> In its reply to the report, the Voting Section proclaimed a far higher level of activity, noting specifically that it had begun participation in "43 new cases in fiscal year 2012—the largest number of new litigation matters in any fiscal year ever, to the best of our knowledge."<sup>54</sup> It is hard to reconcile the numbers (the Office of the Inspector General report noted four cases the Department of Justice had filed), but the sudden surge of cases in 2012 may have been related to the ongoing election campaign and certainly included amicus participation rather than just the filing of lawsuits. If nothing else, the discrepancy in the numbers demonstrates the need for readily accessible and frequent reports. Ironically, the reports that the Department has issued support the numbers listed by the Office of the Inspector General rather than its own response to that report.<sup>55</sup> To the extent the Department has focused its efforts, it has been on the rights of non-English speakers to obtain bilingual ballots and other access issues.<sup>56</sup> The Department also quickly challenged, and ultimately prevailed over, an Alabama law that required proof of citizenship as a prerequisite to vote.<sup>57</sup>

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the New Black Panther Party in Philadelphia during President Obama's first election campaign and was filed just before the administration changed over. *See* Krissah Thompson, *2008 Voter-Intimidation Case Against the New Black Panthers Riles the Right*, WASH. POST, July 15, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/14/AR2010071405880.html>.

52. *See* OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, A REVIEW OF THE OPERATIONS OF THE VOTING SECTION OF THE CIVIL RIGHTS DIVISION (2013), <http://www.justice.gov/oig/reports/2013/s1303.pdf>.

53. *Id.* at 24.

54. *Id.* at app. A at 2 (memorandum from Thomas E. Perez, Assistant Att'y Gen., Civil Rights Div., to Michael E. Horowitz, Inspector Gen.).

55. In its report touting its accomplishments, the Department of Justice indicates that it had filed "21 new lawsuits seeking judicial review of redistricting plans and other complex voting changes under Section 5" during the period between 2009–2012. ACCOMPLISHMENTS, *supra* note 25, at 54. The report mentions another seven cases to enforce minority language rights and two lawsuits to enforce the requirements under the National Voter Registration Act. *Id.* at 54, 56.

56. *See Civil Rights Division Oversight Hearing*, 112th Cong. (2011), *supra* note 25, at 13–14.

57. *See United States v. Alabama*, 813 F. Supp. 2d 1282 (N.D. Ala. 2011), *aff'd in part*, 691 F.3d 1269 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 2022 (2013) (issuing preliminary in-

More recently, voter identification has become the most controversial voting rights topic. Voter identification laws have arisen in many states, often prompted by Republican legislators who have expressed a concern with voter fraud. These laws typically require voters to produce government-issued identification in order to vote.<sup>58</sup> By design, the laws would likely decrease voter turnout since some portion of the population is likely not to possess or be able to obtain the requisite voter identification.<sup>59</sup> Moreover, it appears these laws would have their greatest effect on Latinos and particularly among elderly African Americans, and Democrats have challenged the laws as interfering with the voting rights of these minority populations.<sup>60</sup>

During the Obama administration, the Department actively challenged several of the voter identification laws under the authority it previously held pursuant to section 5 of the Voting Rights Act. Section 5 required certain jurisdictions to submit voting changes to the Department of Justice for preclearance, and the Department refused to clear two voter identification laws prior to the 2012 election.<sup>61</sup> The states, Texas and South Carolina, both appealed the Department's decision, and

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junction on part of Alabama law).

58. For a comprehensive discussion of the issues, see Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631 (2007).

59. See *id.* at 659 (discussing adverse impact of driver's license requirement); see also Janai S. Nelson, *The Causal Context of Disparate Vote Denial*, 54 B.C. L. REV. 579, 603–05 (2013) (discussing adverse impact of voter identification laws).

60. I have found this debate quite interesting with a twilight zone quality to it. The concerns of both sides seem to be grossly exaggerated—the Republican concern with voter fraud is misfounded, as there have been very few documented cases of voter fraud. For a journalistic account, see Jane Mayer, *The Voter-Fraud Myth*, THE NEW YORKER, Oct. 29 2012, [http://www.newyorker.com/reporting/2012/10/29/121029fa\\_fact\\_mayer?currentPage=all](http://www.newyorker.com/reporting/2012/10/29/121029fa_fact_mayer?currentPage=all). The Republican supporters of the legislation are well aware of the limited incidents of voter fraud and have barely mustered a sufficient defense. On the other side, the number of individuals without proper identification, or who are unable to obtain the identification and who are likely to vote, seems significantly less than Democratic opponents of the legislation suggest. Just prior to the 2012 election, statistical guru Nate Silver sought to calculate the effect of voter identification laws and found they would have a relatively small effect, noting specifically that “[i]n Pennsylvania . . . [the law would have] reduced Mr. Obama’s chances of winning the state to 82.6 percent from 84.2 percent.” Nate Silver, *Measuring the Effects of Voter Identification Laws*, N.Y. TIMES FIFTYEIGHT BLOG (July 15, 2012, 9:28 AM), [http://fivethirtyeight.blogs.nytimes.com/2012/07/15/measuring-the-effects-of-voter-identification-laws/?\\_r=0](http://fivethirtyeight.blogs.nytimes.com/2012/07/15/measuring-the-effects-of-voter-identification-laws/?_r=0). Academic studies performed prior to the 2012 elections also documented minimal effects from the ID laws. See, e.g., Robert S. Erickson & Lorraine C. Minnite, *Modeling Problems in the Voter Identification—Voter Turnout Debate*, 8 ELECTION L.J. 85 (2009). This is not to say the challenges are ill-considered; arguably, denying anyone the right to vote without some clear and permissible rationale demands redress, but at the same time the controversy is fueled by unsubstantiated claims on both sides, an issue both sides are well aware of.

61. See BROOKS ET AL., *supra* note 45, at 667–68.

after trials the decisions were upheld as applied to the 2012 elections.<sup>62</sup>

These cases were undoubtedly among the most important the Department litigated during President Obama's first term, and had important consequences for the national trend towards voter identification. On the surface, the cases may appear to be politically inspired since, building on the broader debate over voter identification laws, blocking the legislation should have led to higher voter turnout. Yet, the two challenges came in decidedly Republican states: Texas and South Carolina have voted for Republican presidential candidates since 1976, and President Obama lost both states by wide margins during both of his campaigns.<sup>63</sup> In fact, the most crucial voter identification challenge in terms of its political importance involved Pennsylvania's law, which was challenged by private plaintiffs, but without the assistance of the Department of Justice.<sup>64</sup> More recently, in response to the Supreme Court decision invalidating section 5 of the Voting Rights Act, the Department of Justice has sought to invalidate the voter identification laws in North Carolina and Texas under a different provision of the Voting Rights Act, signaling a continued commitment to protect minority voters despite the judicial setback.<sup>65</sup>

Based on the various reports, the Voting Section was the section most affected by the George W. Bush administration's efforts to shift enforcement away from traditional claims towards protecting the rights of whites, or in some instances, religious minorities. It seems that the Voting Section's legitimacy has now been restored even if there remain some political concerns in how that was accomplished.

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62. See *South Carolina v. United States*, 898 F. Supp. 2d 30 (D.D.C. 2012) (upholding the Department of Justice's objection for 2012 election); *Texas v. Holder*, 888 F. Supp. 2d 113 (D.D.C. 2012) (upholding the Department of Justice's denial of preclearance), *vacated*, 133 S. Ct. 2886 (2013) (remanded to District Court for the District of Columbia for further consideration in light of *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013)).

63. President Obama lost Texas and South Carolina by obtaining 41.37% and 44.09% of the states' votes respectively. See *2012 Presidential General Election Results*, U.S. ELECTION ATLAS, <http://uselectionatlas.org/RESULTS/index.html> (scroll over respective states to view results). The vote totals were nearly identical during the 2008 election in South Carolina and slightly more favorable in Texas. See *2008 Presidential General Election Results*, U.S. ELECTION ATLAS, <http://uselectionatlas.org/RESULTS/index.html> (under Menu option "General by Year," select 2008 and scroll over respective states to view results). Neither state has voted for a Democratic candidate since 1976. See *1976 Presidential General Election Results*, U.S. ELECTION ATLAS, <http://uselectionatlas.org/RESULTS/index.html> (under Menu option "General by Year," select 1976 and scroll over respective states to view results).

64. See Ethan Bronner, *Voter ID Rules Fail Court Tests Across Country*, N.Y. TIMES, Oct. 2, 2012, <http://www.nytimes.com/2012/10/03/us/pennsylvania-judge-delays-implementation-of-voter-id-law.html> (discussing Pennsylvania voter identification law and challenge).

65. See Michael Muskal, *U.S. Alleges Discrimination, Sues North Carolina Over Voter Laws*, L.A. TIMES, Sept. 30, 2013, <http://articles.latimes.com/2013/sep/30/nation/la-na-nn-justice-sues-north-carolina-voter-rights-20130930>; Charlie Savage, *U.S. Is Suing in Texas Cases Over Voting By Minorities*, N.Y. TIMES, Aug. 22, 2013, [http://www.nytimes.com/2013/08/23/us/politics/justice-dept-moves-to-protect-minority-voters-in-texas.html?hp&\\_r=0](http://www.nytimes.com/2013/08/23/us/politics/justice-dept-moves-to-protect-minority-voters-in-texas.html?hp&_r=0).



Given the direct link to political results, the Voting Section will always have a political overlay, and there is no evidence to suggest the current political environment of the Voting Section differs from what has traditionally prevailed. However, it also seems clear that the former big three within the civil rights pantheon—employment, education, and voting—are no longer the big three at all, but have instead fallen to incidental enforcement efforts, with a few pesky voting rights cases cropping up from time to time.

#### *D. Housing*

In contrast to the big three, housing has always been a bit of a civil rights stepchild. The FHA was the last of the major civil rights statutes to be passed in the 1960s and has never generated significant amounts of complaints or litigation, particularly compared to something like employment discrimination. To give but one example, in 2010 there were nearly 100,000 complaints filed with the EEOC but only 10,000 filed with HUD, or its affiliates.<sup>66</sup>

**Table 1.**<sup>67</sup>

Complaints Filed	10,155
HUD	1,943
State FHAP	8,212
Complaints Closed	10,017
HUD	1,856
State FHAP	8,161
Percent Reas. Cause	7%
Percent No Reas. Cause	46%
DOJ Case Resolutions	28

The primary responsibility for enforcing the FHA lies with HUD, with a small number of cases referred to the Department of Justice. The vast majority of the cases are brought on behalf of individuals, and state or local agencies handle most of them. As indicated in Table 1, HUD now processes approximately 2,000 claims a year, and it sends a handful to the Department of Justice in any given year.<sup>68</sup> The state fair housing agencies handle more than four times as many complaints as HUD.<sup>69</sup> In terms of basic enforcement, the Obama administration has followed the prior administration with very little variation. This includes the percentage

66. In fiscal year 2010, HUD received 8,212 complaints. U.S. DEP'T OF HOUS. & URB. DEV., *supra* note 17, at 23, tbl.3.

67. U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 17.

68. *Id.* at 30–31.

69. *Id.* at 29.

of claims HUD finds meritorious, which has ranged from 5-7% of complaint outcomes going back to 2005.<sup>70</sup> The amount of money recovered in the cases is also relatively small—most of the reported cases settled for \$10,000 or less.<sup>71</sup> This is, it should be noted, the nature of housing claims, which tend to yield relatively low monetary awards.

There were, however, two significant developments during the Obama administration. The first runs counter to the individual nature of the cases—the Department of Justice settled two massive cases involving lending discrimination. One case involved Countrywide Financial Corporation, which was later purchased by Bank of America, and involved allegations that the company shifted African American and Latino applicants into high-rate mortgages even when they qualified for better rates.<sup>72</sup> The case settled for \$335 million and provided relief to more than 230,000 victims.<sup>73</sup> The other case involved Wells Fargo & Company, the largest residential lender in the country, with similar allegations and a settlement amount of \$184 million with an additional \$50 million to be invested in a homebuyer assistance program.<sup>74</sup> Even though these cases arose out of the banking crisis that erupted at the time, the Obama administration surely deserves credit for recovering substantial sums for the injured communities. The Department has also brought a number of smaller claims for lending discrimination, and though the cases remain relatively few in number, this might qualify as an area that has been targeted for redress.<sup>75</sup>

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70. In addition to Reasonable Cause or No Reasonable Cause Findings, HUD closures from 2005–2011 include Conciliation/Settlements, which accounted for a range of 28–33% of the closures, and Administrative Closures, which accounted for a range of 11–17% of the closures. U.S. DEP'T OF HOUS. & URB. DEV., ANNUAL REPORT ON FAIR HOUSING: FISCAL Year 2011, at 29, chart 3 (detailing complaint outcomes from 2008–2011), [http://portal.hud.gov/hudportal/documents/huddoc?id=FY2011\\_annual\\_rpt\\_final.pdf](http://portal.hud.gov/hudportal/documents/huddoc?id=FY2011_annual_rpt_final.pdf) (Dec. 13, 2013); U.S. DEP'T OF HOUS. & URB. DEV., STATE OF FAIR HOUSING: FY 2008 ANNUAL REPORT ON FAIR HOUSING 35, chart 7 (detailing complaint resolutions from 2005–2008), <http://www.hud.gov/content/releases/fy-2008annual-rpt.pdf> (Dec. 13, 2013).

71. During fiscal year 2010, the Agency reported thirteen Post-Charge Consent Orders, with three of the cases involving no monetary amounts and one case settling for \$40,000. *See* U.S. DEP'T OF HOUS. & URB. DEV., *supra* note 17, at 35, tbl.9. Only one other case settled for more than \$10,500, and that was a consent order for \$12,250. *See id.*

72. ACCOMPLISHMENTS, *supra* note 25, at 22–23.

73. *Id.* at 23.

74. *Id.*

75. In addition to the two large cases, the Division entered into a \$700,000 consent order with Texas Champion Bank, obtained more than \$1 million in financing from Luther Burbank Savings, and has sued SunTrust for discriminatory lending practices involving Latinos. *See* Consent Order at ¶ 17, *United States v. Tex. Champion Bank*, No. 2:13-CV-00044 (S.D. Tex. Mar. 5, 2013); Agreed Order at ¶ 13, *United States v. Luther Burbank Sav.*, No. 2:12-CV-07809 (C.D. Cal. Oct. 12, 2012); Consent Order, *United States v. SunTrust Mortg., Inc.*, No. 3:12-CV-00397 (E.D. Va. Sept. 14, 2012).

The other significant development concerned a long contested issue, namely whether the FHA encompasses disparate impact claims. Without going into too much detail, there has never been a definitive ruling from the Supreme Court regarding the scope of the FHA, although all of the appellate courts that have addressed the issue have concluded that the Act permits disparate impact claims.<sup>76</sup> This means that plaintiffs do not need to prove an intent to discriminate, but rather can focus on the effect of the housing policy at issue. Many advocates contend that disparate impact claims can be easier to prove and see the theory as a valuable weapon in the civil rights arsenal, and whether the FHA includes a disparate impact component has been a hot button political issue for many years.<sup>77</sup>

The Department's efforts on the disparate impact front were not without controversy. During the Obama administration, HUD had been working on a regulation that would have acknowledged the availability of disparate impact claims under the FHA, and at the same time a case was working its way up the review ladder to the Supreme Court.<sup>78</sup> The particular case involved the city of St. Paul, Minnesota, which was pursuing a writ of certiorari in the Supreme Court after having lost its case in the Eighth Circuit Court of Appeals.<sup>79</sup> The Department of Justice was also considering intervening in a False Claims Act case filed against the City of St. Paul for allegedly falsely claiming compliance with a provision of the FHA designed to ensure that federal housing development funds went to employ low-income individuals.<sup>80</sup> With these two cases on the horizon, the Department of Justice made a deal with St. Paul to forego intervention if the city agreed to withdraw its case from the Supreme Court.<sup>81</sup>

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76. See *Mount Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly*, 658 F.3d 375, 384 (3d Cir. 2011) ("All of the courts of appeals that have considered the matter . . . have concluded that plaintiffs can show the FHA has been violated through policies that have a disparate impact."), *cert. granted*, 133 S. Ct. 2824 (2013), and *cert. dismissed*, 134 S. Ct. 636 (2013).

77. I have been more skeptical about the importance and power of the disparate impact theory outside of the area of written employment examinations. See Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701 (2006).

78. HUD's proposed rule was published in the *Federal Register* on November 16, 2011. See *Implementation of the Fair Housing Act's Discriminatory Effects Standard*, 76 Fed. Reg. 70,921 (Nov. 16, 2011) (to be codified at 24 C.F.R. pt. 100).

79. *Gallagher v. Magner*, 619 F.3d 823 (8th Cir. 2010), *cert. granted*, 132 S. Ct. 548 (2011), and *cert. dismissed*, 132 S. Ct. 1306 (2012).

80. The case is described at length in the report provided by Republican Congressional staff. See H. COMM. ON OVERSIGHT & GOV'T REFORM, SENATE COMM. ON THE JUDICIARY & HOUSE COMM. ON THE JUDICIARY, 113TH CONG., DOJ'S QUID PRO QUO WITH ST. PAUL: HOW ASSISTANT ATTORNEY GENERAL THOMAS PEREZ MANIPULATED JUSTICE AND IGNORED THE RULE OF LAW 12-14 (Joint Staff Report 2013) [hereinafter Joint Staff Report], <http://oversight.house.gov/wp-content/uploads/2013/04/DOJ-St-Paul.pdf> (Dec. 13, 2013).

81. *Id.* at 18.

This was a highly unusual deal—trading one case for another—and sparked congressional attention after Thomas Perez was nominated to be the secretary of labor.<sup>82</sup> The Department justified its action by noting that it was able to avoid a potentially adverse Supreme Court decision with little cost since in its opinion the case in which it declined to intervene was weak, and the City of St. Paul had a voluntary agreement in place that encompassed the issues that were present in the False Claims Act case.<sup>83</sup> It appears that the arrangement was permissible in that it did not run afoul of any ethics regulations, but even if justified, there was certainly an appearance of political calculation that created another political furor. Unnoticed in the melee, HUD's disparate impact rule became final and marked a significant achievement for the agency.<sup>84</sup>

### *E. Other Areas*

The Civil Rights Division has other areas of responsibility, including disability and criminal violations. With respect to disability rights, the Department has pursued a modest enforcement agenda, concentrating on access to public facilities and integrating the disabled into the broader community.<sup>85</sup> These cases are undeniably important, but there is nothing distinctive regarding the Department's efforts—the claims largely mirror past administrations and the cases are few in number.<sup>86</sup> On the criminal side, the Civil Rights Division has initiated several investigations of police departments, including one against Joe Arpaio, the well-known Arizona sheriff, for discriminatory treatment of Latinos.<sup>87</sup> At the request of the City of New Orleans, the Department also fashioned an unusual oversight deal that the city later sought to free itself from due to perceived exorbitant costs.<sup>88</sup>

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82. *See id.*

83. The Democratic Committee Staff issued its own memorandum that is supportive of the position taken by the Department of Justice. *See* Memorandum from the Democratic Staff to the Democratic Members of the Comms. on Oversight & Gov't Reform & Judiciary (Apr. 14, 2013), [http://democrats.oversight.house.gov/images/user\\_images/gt/stories/2013-04-14-Dem-Memo-DOJ-Magner.pdf](http://democrats.oversight.house.gov/images/user_images/gt/stories/2013-04-14-Dem-Memo-DOJ-Magner.pdf).

84. *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013) (to be codified at 24 C.F.R. pt. 100).

85. *See* ACCOMPLISHMENTS, *supra* note 25, at 43–48.

86. *Id.*

87. *See* Press Release, U.S. Dep't of Justice, Assistant Attorney General for the Civil Rights Division Thomas E. Perez Speaks at the Maricopa County Press Conference (May 10, 2012), <http://www.justice.gov/crt/opa/pr/speeches/2012/crt-speech-120510.html>. The case against the County was dismissed while the claims against the Sheriff were permitted to go forward. *See* United States v. Maricopa Cnty., 915 F. Supp. 2d 1073 (D. Ariz. 2012).

88. *See* Campbell Robertson, *Louisiana: New Orleans Rethinks Deal on Police*, N.Y. TIMES, Jan. 12, 2013, <http://www.nytimes.com/2013/01/12/us/louisiana-new-orleans-rethinks-deal-on-police.html>.

Where the Obama administration has distinguished itself from the George W. Bush administration is on policy matters where the Department has followed a fairly strict liberal line. I have already mentioned some of those decisions—pursuing disparate impact cases under the FHA and filing several cases relating to school discipline. Perhaps most significantly, the Department has also actively pursued a liberal agenda in the Supreme Court, both as a party and more commonly as an amicus. Moreover, it has been an active few years. In the most recent Supreme Court Term, the Department supported gay rights, the Voting Rights Act, and affirmative action, and sought to prevent anti-immigrant legislation from taking effect.<sup>89</sup> It also supported plaintiffs in all of the employment discrimination cases in the Supreme Court over the last few years.<sup>90</sup>

In all of these cases, there was nothing particularly path breaking in the Department's positions. For example, the brief filed in the affirmative action case was quite similar to the brief filed by the Clinton administration a few years earlier.<sup>91</sup> Yet, the positions were also refreshingly clear of internal conflict—there was never any real doubt in any of the cases how the Obama administration would come out, and it seemed unconcerned that it might acquire a reputation as supportive of the various civil rights claims. In contrast, during the George W. Bush administration, it was not uncommon for the Department to align itself with the interests of employers or those opposing diversity efforts within schools, and the Clinton administration had initially and publicly waffled on its position in the affirmative action cases.<sup>92</sup> Matters of policy that arise out of active cases are undoubtedly the area in which an administration makes the most substantial difference.

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89. See generally *United States v. Windsor*, 133 S. Ct. 2675 (2013) (supporting unconstitutionality of federal Defense of Marriage Act); *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (supporting challenge to California law prohibiting recognition of same-sex marriage); *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013) (defending constitutionality of Voting Rights Act pre-clearance provision); *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013) (supporting the University's affirmative action plan); *Arizona v. United States*, 132 S. Ct. 2492 (2012) (challenging Arizona immigration provision as preempted under federal law).

90. See, e.g., *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013) (advocating mixed-motives approach to retaliation claims); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (supporting, as amicus, plaintiffs' class action sex discrimination claim).

91. For a discussion of the Clinton position, see Wendy Parker, *The Story of Grutter v. Bollinger: Affirmative Action Wins*, in *EDUCATION LAW STORIES* 83 (Michael A. Olivas & Ronna Greff Schneider eds., 2007).

92. Indeed, the George W. Bush administration supported employers or defendants in most of the high-profile civil rights cases that made their way to the Supreme Court. See generally *Ricci v. DeStefano*, 557 U.S. 557 (2009) (supporting white plaintiffs' challenge to City's decision not to use test results because of their adverse impact); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (supporting parents' challenge to use of race in school assignment plans); *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007) (supporting Goodyear's approach to filing deadline in sex discrimination case), *super-seded by statute*, *Lilly Ledbetter Fair Pay Act of 2009*, 42 U.S.C. § 2000e-5(e) (2009).

### III. THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

The EEOC has had a checkered history. From its inception, the agency accumulated a substantial backlog of complaints from which it has never fully recovered.<sup>93</sup> Investigations can take a year, even for relatively simple claims, and that comes after waiting up to a year just to get to the front of the queue. Supreme Court Justice Clarence Thomas is surely the best known of the many chairs the EEOC has had, but he was also known at the time for politicizing the agency by disclaiming disparate impact and class action claims in favor of individual claims, on which he was determined to obtain full relief.<sup>94</sup>

By the Clinton administration, the agency had acquired a reputation of mild competence, but was largely seen as a claims processing agency.<sup>95</sup> Its importance paled in comparison to the Civil Rights Division, as perhaps evident by the fact that President Clinton's first choice to head that Division was Lani Guinier, a distinguished civil rights scholar, whereas the nominee for the EEOC was Gilbert F. Casellas, a Latino with minimal experience in the area of employment discrimination.<sup>96</sup> All the while, the agency continued to process more complaints than any other agency, and likely more complaints than all of the other agencies combined.

Today, matters have completely changed. The EEOC is now the premier civil rights agency, one that has established priorities and is willing to pursue difficult claims that are designed to create law rather than just obtain relief. There is little question that the EEOC is now far more important to the development of employment discrimination law than the Civil Rights Division; indeed, the Civil Rights Division has largely become irrelevant outside of its amicus role before the Supreme Court.

The EEOC has become an aggressive and effective enforcement agency; one that still underperforms in terms of the volume of work it produces, but has remarkably turned around its image. During the Obama administration, the agency has increased its emphasis on systemic discrimination cases and has brought a substantial number of cases that seek to protect the rights of some of our most

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93. See Selmi, *supra* note 14, at 5–8.

94. See *supra* note 38 and accompanying text.

95. See, e.g., Reed Abelson, *Anti-Bias Agency Is Short of Will and Cash*, N.Y. TIMES, July 1, 2001, <http://www.nytimes.com/2001/07/01/business/anti-bias-agency-is-short-of-will-and-cash.html?pagewanted=all&src=pm>.

96. Professor Guinier ultimately withdrew her nomination after she became embroiled in nasty allegations regarding her views on quotas. See LANI GUINIER, *LIFT EVERY VOICE: TURNING A CIVIL RIGHTS SETBACK INTO A NEW VISION OF SOCIAL JUSTICE* (1998). In contrast, after a lengthy delay, President Clinton selected Gilbert Casellas to be the head of the EEOC. At the time of his nomination, Mr. Casellas was serving as general counsel to the U.S. Air Force, and his prior work indicated a limited connection to employment issues. See Press Release, The White House, President Clinton Names Gilbert F. Casellas to Chair EEOC (June 14, 1994), <http://clinton6.nara.gov/1994/06/1994-06-14-casellas-named-chair-of-eoec.html>.

aggrieved individuals: the unemployed, those with arrest and conviction records, and those with poor credit histories.<sup>97</sup> To be fair, the George W. Bush administration surprisingly began a systemic litigation initiative, and it did, in fact, pursue some important systemic cases.<sup>98</sup>

I will begin with an overview of these initiatives and then move to focus on the sharp decline in cases the agency has pursued. In the weak economy that has plagued the country through much of the last decade, many employers have instituted new practices that can sharply limit the employment opportunities of minority workers. The EEOC has singled out three of those practices for concern: the refusal by some employers to hire unemployed workers, the refusal to hire applicants with arrest or conviction records, and the use of credit histories as part of the hiring process. The EEOC has held hearings on these issues and has filed important court cases challenging the practices as well.

For example, in 2010 the EEOC brought several challenges regarding the use of credit histories in the hiring process, with the case against Kaplan Higher Learning Education Corporation receiving the most attention.<sup>99</sup> The claim in all of the cases was that the use of credit histories could have an adverse impact against African Americans and Latinos because of their generally lower credit histories. The cases also emphasized the prevalence of errors in such histories. These cases are complicated. Although one might assert that African Americans and Latinos generally have lower credit histories, the focus in a particular case has to be on the group of applicants, and there is no reason to believe that errors in the reports would be skewed against any particular group. The case against Kaplan was recently dismissed by the district court mostly because of data problems that occurred in trying to identify the race of the applicants, and in another case brought by the EEOC the defendants were awarded summary judgment primarily because of the lack of compelling data.<sup>100</sup> The EEOC was also able to obtain a \$3.13 million settlement against

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97. See *infra* text accompanying notes 99–109 (discussing several examples of these cases); see also Margo Schlanger & Pauline Kim, *The Equal Employment Opportunity Commission and Structural Reform of the American Workplace* (Univ. of Mich. Law Sch., Pub. Law & Legal Theory Research Paper Series, Paper No. 340, Law & Econ. Research Paper Series, Paper No. 13-013, 2013), available at [papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2309514](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2309514) (discussing an interesting and recent example of the EEOC's systemic litigation efforts).

98. See EEOC, SYSTEMIC TASK FORCE REPORT 30 (2006), [http://www.eeoc.gov/eeoc/task\\_reports/upload/systemic.pdf](http://www.eeoc.gov/eeoc/task_reports/upload/systemic.pdf).

99. See, e.g., Steven Greenhouse, *EEOC Sues Kaplan Over Hiring*, N.Y. TIMES, Dec. 21, 2010, <http://www.nytimes.com/2010/12/22/business/22kaplan.html>.

100. See *EEOC v. Kaplan Higher Learning Educ. Corp.*, No. 1:10-CV-2882, 2013 WL 322116 (N.D. Ohio Jan. 28, 2013) (discussing the first case mentioned in the text); *EEOC v. Freeman*, No. 09-CV-2573, 2013 WL 4464553 (D. Md. Aug. 9, 2013) (discussing the second case mentioned in the text). In *Kaplan*, Kaplan did not keep track of the race of its applicants and the EEOC sought to determine the race of the applicants in a manner the court found unacceptable. See *Kaplan Higher Learning Educ. Corp.*, 2013 WL 322116. A motion for

Pepsi Beverages in a similar case.<sup>101</sup>

Most recently, the agency has initiated two high-profile cases challenging the use of criminal background checks. The first case involves a BMW plant in South Carolina, and the second case involves a nationwide lawsuit against one of the many dollar stores, Dollar General.<sup>102</sup> These cases are a variant on an older set of cases that sought to restrict the use of arrest or conviction records because of their discriminatory impact.<sup>103</sup> Conviction records are more difficult to challenge, but their undifferentiated use, including relying on convictions from long ago, may be difficult for some employers to justify under the business necessity defense applicable to disparate impact claims.<sup>104</sup> In any event, like the credit history challenges, these cases seek to protect some of the most vulnerable workers, which is precisely the kind of action a liberal democratic government should be taking.<sup>105</sup> Lest I be accused of oversight, I should note that the agency's initial foray into this area resulted in a substantial defeat that included the highly unusual award of

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reconsideration of this case was likewise recently denied. *See* EEOC v. Kaplan Higher Learning Educ. Corp., No. 1:10-CV-2882, 2103 WL 1891365 (N.D. Ohio May 6, 2013). In *Freeman*, the district court labeled the case “a theory in search of facts to support it.” *Freeman*, 2013 WL 4464553, at \*16.

101. Press Release, EEOC, Pepsi to Pay 3.13 Million and Make Major Changes to Resolve EEOC Findings of Nationwide Hiring Discrimination Against African Americans (Jan. 11, 2012), [www.eeoc.gov/eeoc/newsroom/release/1-11-12a.cfm](http://www.eeoc.gov/eeoc/newsroom/release/1-11-12a.cfm).

102. *See* Press Release, EEOC, EEOC Files Suit Against Two Employers for Use of Criminal Background Checks (June 11, 2013), <http://www.eeoc.gov/eeoc/newsroom/release/6-11-13.cfm>.

103. The leading case among the older cases is *Green v. Mo. Pac. R.R.*, 523 F.2d 1290 (8th Cir. 1975), which invalidated a policy that prohibited hiring anyone with a conviction other than a traffic offense. Earlier cases had also successfully challenged restrictions on hiring individuals with arrest records. *See* *Gregory v. Litton Sys., Inc.*, 316 F. Supp. 401 (C.D. Cal. 1970), *aff'd*, 472 F.2d 631 (9th Cir. 1972).

104. Under a disparate impact theory, if a plaintiff is able to demonstrate that an identified practice has a statistically significant adverse impact upon a protected group, the employer is then afforded an opportunity to justify its practice under what is loosely known as a “business necessity” test. Put simply, the employer has an opportunity to explain the reason for its practice though the legal standard is a bit more complicated. *See* MARIO G. CRAIN, PAULINE T. KIM & MICHAEL L. SELMI, *WORK LAW: CASES AND MATERIALS* 614–17 (2d. ed. 2010) (discussing the theory).

105. The government's initiative is all the more impressive in that some of the more recent cases have upheld conviction policies when the employer is able to establish a connection between the job and the particular policy. *See* *El v. Se. Pa. Transp. Auth.*, 479 F.3d 232 (3d Cir. 2007) (upholding policy prohibiting the hiring of individuals with felony convictions of violent crimes as applied to paratransit bus driver); *see also* *Waldon v. Cincinnati Pub. Sch.*, 941 F. Supp. 2d 884 (S.D. Ohio 2013) (denying summary judgment on Ohio background check policy as applied to school employees with convictions that were decades old). For a recent discussion of the cases, *see* Alexandra Harwin, *Title VII Challenges to Employment Discrimination Against Minority Men with Criminal Records*, 14 *BERKELEY J. AFR.-AM. L. & POL'Y* 2 (2012).



attorneys' fees to the defendant of just over \$750,000.<sup>106</sup>

In addition to these initiatives, the agency has also held a hearing on employers who refuse to hire those who are currently unemployed.<sup>107</sup> Although it is not clear how widespread the practice is, there is little question that such a policy targets a disadvantaged population and is likely to have a disparate impact given the perpetually higher unemployment rates of African Americans.<sup>108</sup> The agency has also expressed interest in one of the emerging areas of litigation, namely, what is often referred to as "discrimination against caregivers."<sup>109</sup>

These various initiatives provide a picture of an engaged agency seeking to push the boundaries of the law forward; however, its enforcement activity provides an altogether different portrait. Over the last several years, and by virtually every measure, the agency's enforcement activity has sharply declined and is well below levels obtained during the second Bush administration. Before looking at the data more carefully, the EEOC should be commended for the information it makes available to the public, particularly when compared to the limited information the Department of Justice provides. This has not always been true, as the EEOC has gone through periods when it was quite difficult to determine the scope of its work. Currently, however, the EEOC provides a model for how to disseminate information, even though that information may not place the agency in a positive light. It should be incumbent upon all agencies to provide a similar level of disclosure, and it has long been inexcusable that the Civil Rights Division refuses to do so, even though the information is readily available.

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106. See *EEOC v. Peplemark, Inc.*, No. 1:08-CV-907, 2011 WL 1707281 (W.D. Mich. 2011) (awarding \$751,942 in attorneys' fees). This case actually began under the George W. Bush administration and alleged that Peplemark categorically refused to hire those with felony convictions. *Id.* at \*1. The attorneys' fees were awarded largely because the EEOC continued to litigate the case after it became clear that there was no categorical prohibition. *Id.* at \*3.

107. See Meeting Transcript, EEOC, EEOC to Examine Treatment of Unemployed Job Seekers (Feb. 16, 2011), <http://www.eeoc.gov/eeoc/meetings/2-16-11/transcript.cfm>.

108. African American men traditionally have an unemployment rate that is twice as high as the rate for white men. See, e.g., U.S. DEP'T OF LABOR, THE AFRICAN-AMERICAN LABOR FORCE IN THE RECOVERY (2012), [http://www.dol.gov/\\_sec/media/reports/BlackLaborForce/BlackLaborForce.pdf](http://www.dol.gov/_sec/media/reports/BlackLaborForce/BlackLaborForce.pdf).

109. The agency held a meeting on the topic in 2012. See Meeting Transcript, EEOC, Unlawful Discrimination Against Pregnant Workers and Workers With Caregiving Responsibilities (Feb. 15, 2012), [www.eeoc.gov/eeoc/meetings/2-15-12/transcript.cfm](http://www.eeoc.gov/eeoc/meetings/2-15-12/transcript.cfm). This is not a new initiative as the George W. Bush administration issued policy guidance on the subject. See EEOC, ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES (May 23, 2007), <http://www.eeoc.gov/policy/docs/caregiving.pdf>.

**Table 2.**<sup>110</sup>

Category	2003	2005	2009	2011
Charges Received	81,293	75,428	93,277	99,947
Suits Filed	366	381	281	261
Suits Resolved	351	338	321	276
Monetary Benefits (in millions)	\$146.6	\$104.8	\$82.1	\$91.0

Table 2 provides comparative information over four years, two from the Bush administration (FY 2003 and 2005) and two from the Obama administration (FY 2009 and 2011). These years were not chosen based on the data, but were instead selected as representative of the work of the administrations. The EEOC provides annual data going back to 1997 on its website, and the years selected turn out to be representative of the activity of the administrations. In FY 2009, the EEOC filed 281 merits lawsuits, and that number declined to 261 in 2011. In contrast, the Bush administration filed 366 in 2003 and 381 in 2005, or nearly a third more. The EEOC's filings in 2011 were the lowest level since 1997. This was true even though the agency had experienced a substantial increase in charges, receiving 99,947 in 2011 compared to 75,428 in 2005. Although I have not set forth the data, the EEOC provides a breakdown of the statutes it has filed suit under, and the only meaningful difference between the two administrations is that the Obama EEOC devoted significantly more of its resources to Americans with Disabilities Act cases, filing eighty such cases in 2011 compared to the Bush EEOC's filing forty-nine in 2005. The agency's merit filings plummeted to 155 in 2012, though it is too early to know whether this is anything other than an aberration.

On a comparative basis, the EEOC fared better in terms of resolving cases: the agency resolved 276 merits cases in 2011 and 321 in 2009, compared to 338 in 2005 and 351 in 2003. Yet, the monetary recoveries were significantly lower. In 2009, the agency recovered \$82.1 million, with the amount increasing to \$91 million in 2011. In contrast, the Bush administration recovered \$146.6 million in 2003 and \$104.8 million in 2005. These numbers are more difficult to compare, as a single large case or several can skew the results, and it would certainly be better if we had average figures to evaluate. There were, in fact, several years during the Bush administration when the amount recovered fell well below what the Obama administration recovered, hitting a low of \$49 million in 2001.

It may be that the lower volume of cases is the result of a greater emphasis on complex actions that involve multiple parties. There is some evidence consistent with this theory, but it does not seem to provide a full explanation of the decrease in

110. *Enforcement and Litigation Statistics*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <http://eeoc.gov/eeoc/statistics/enforcement/> (Dec. 13, 2013).

volume. This is one area where the agency can be criticized for its data—the agency does not typically report in its tables the number of cases that involve multiple parties. For that, one has to look at their annual performance reports. In 2011, of the 261 merit suits that were filed, sixty-one involved multiple victims, and twenty-three were classified as systemic violations.<sup>111</sup> The agency noted that at the end of 2011, 14% of its caseload involved systemic claims, which included a steady increase since 2006.<sup>112</sup>

#### IV. ASSESSING THE WORK OF THE OBAMA ADMINISTRATION

Civil rights have not been a cornerstone of the Obama administration's interests. Indeed, the President's own involvement with matters of civil rights has occurred as a result of external events—most recently the acquittal of George Zimmerman for the murder of Trayvon Martin and the arrest of Henry Louis Gates, Jr.<sup>113</sup> Attorney General Eric Holder recently spoke critically of the Supreme Court decision invalidating a part of the historic Voting Rights Act, which the Obama administration followed up by filing a lawsuit against Texas outside the scope of section 5.<sup>114</sup> However, there has been no civil rights agenda to speak of. In fact, it seems safe to conclude that the policies pursued by the Obama administration have largely followed closely on the heels of the Clinton administration—the modest prosecution of complaints and the general support of liberal democratic policies in the Supreme Court. This is not intended as a criticism, but it is meant to suggest that there has been nothing distinctive involving the Obama administration on traditional matters of civil rights.

I wanted to frame the prior sentence in this way—focusing on traditional matters of civil rights—because the area where the Obama administration has set out on a more aggressive course has to do with the rights of gays and lesbians. The administration's refusal to support DOMA and its support of same-sex marriage should be seen as distinctive and important developments in civil rights. Unlike the

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111. See *Performance Results*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, [http://www.eeoc.gov/eeoc/plan/2011par\\_performance.cfm](http://www.eeoc.gov/eeoc/plan/2011par_performance.cfm) (Dec. 13, 2013).

112. See *id.*

113. See *supra* notes 1–2 and accompanying text.

114. See Press Release, U.S. Dep't of Justice, Attorney General Eric Holder Delivers Remarks on the Supreme Court Decision in *Shelby County v. Holder* (June 25, 2013), <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130625.html>. The Department of Justice has since filed lawsuits against both Texas and North Carolina challenging their voter identification laws as intentionally discriminatory. See Charlie Savage, *U.S. Is Suing in Texas Cases over Voting by Minorities*, N.Y. TIMES, Aug. 22, 2013, [http://www.nytimes.com/2013/08/23/us/politics/justice-dept-moves-to-protect-minority-voters-in-texas.html?\\_r=0](http://www.nytimes.com/2013/08/23/us/politics/justice-dept-moves-to-protect-minority-voters-in-texas.html?_r=0); Holly Yeager, *Justice Department to Sue North Carolina over Voting Law*, WASH. POST, Sep. 29, 2013, [http://www.washingtonpost.com/politics/justice-department-to-sue-north-carolina-over-voting-law/2013/09/29/123cbbce-292d-11e3-8ade-a1f23cda135e\\_story.html](http://www.washingtonpost.com/politics/justice-department-to-sue-north-carolina-over-voting-law/2013/09/29/123cbbce-292d-11e3-8ade-a1f23cda135e_story.html).

Clinton administration, the Obama administration successfully repealed the “don’t ask, don’t tell” policy, and has undoubtedly been the most progressive administration when it comes to issues involving the rights of the LGBT community. However, it could have done better. One inexcusable legislative mystery is why Title VII has not been amended to include sexual orientation as a protected class, or even more mysterious, why the administration has not sought to issue an executive order relating to the rights of gays, lesbians, and transgender individuals that would apply to federal contractors.<sup>115</sup>

Outside of the issues relating to the LGBT community, the Obama administration’s general reticence on civil rights reflects not just its own priorities, but also the moment in time. The civil rights era is fading and increasingly less attention is being devoted to the prevalence and persistence of discrimination, and the Obama administration has largely avoided touching on controversial civil rights issues. Although it has supported affirmative action efforts within schools, it has not challenged the discriminatory results of standardized tests, sought to address the segregation fostered by the charter school movement, or engaged the school-to-prison pipeline debate, other than through the filing of several cases relating to the disparate school discipline afflicted on African American boys.<sup>116</sup> To be sure, the rhetoric arising from the administration has been sound, and that is not an issue that should be lightly dismissed. Indeed, the Obama administration has largely avoided waffling on issues relating to affirmative action in a way that plagued the Clinton administration, and there is little question that the Obama administration is on the side of justice; it just seeks to do so quietly.

This is one area where Republican administrations have clearly bested the Democrats—Republican administrations have been far more aggressive in pushing their agenda on civil rights than Democratic administrations have been willing to do. This was certainly true of the Reagan administration, which aggressively fought affirmative action and pursued an agenda that sought to protect the rights of whites, particularly white men.<sup>117</sup> The first Bush administration was softer in its rhetoric and better on many of its policies, but it seized on the Voting Rights Act for its own political purposes.<sup>118</sup> The second Bush administration returned to the aggressive approach of the Reagan administration, consciously bringing in individuals to the Civil Rights Division with an ideological agenda that was consistent with

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115. See Jackie Calmes, *Obama Won't Order Ban on Gay Bias by Employers*, N.Y. TIMES, Apr. 11, 2012, [http://www.nytimes.com/2012/04/12/us/politics/obama-wont-order-ban-on-gay-bias-by-employers.html?\\_r=0](http://www.nytimes.com/2012/04/12/us/politics/obama-wont-order-ban-on-gay-bias-by-employers.html?_r=0).

116. See *supra* notes 41–45 and accompanying text.

117. See THE EROSION OF RIGHTS: DECLINING CIVIL RIGHTS ENFORCEMENT UNDER THE BUSH ADMINISTRATION 5 (William L. Taylor, Dianne M. Piché, Crystal Rosario & Joseph D. Rich eds., 2007) (discussing President Reagan’s efforts to transform the Civil Rights Division).

118. See *supra* text accompanying note 47.

Republican Party priorities.<sup>119</sup> Many of these individuals had no prior civil rights experience; they sought to protect the rights of white individuals and also seemed oblivious to the perpetuation of discrimination. In other words, Republican administrations pursued conscious policies through the enforcement efforts of the Civil Rights Division, and to a lesser extent, the EEOC.

In contrast, the last two Democratic administrations have lacked civil rights priorities. I mentioned the foregone opportunities with respect to education, but in all areas other than voting rights, there has been no clear policy initiative, particularly within the Civil Rights Division. For example, there has been no effort over time to discuss and address the entrenched nature of discrimination or the way in which discrimination has become more subtle and difficult to prove. The Clinton administration did appoint a panel to study race in the United States, headed by esteemed historian John Hope Franklin, but nothing ever came from that effort other than some unfortunate public fighting among commission members regarding whether issues of race should have remained a priority.<sup>120</sup> President Obama recently mentioned the possibility of a similar conversation on race, but it is unlikely such a conversation would lead very far.<sup>121</sup>

It may be that expecting more out of the administrations, particularly the current administration, would be expecting too much. Aggressive civil rights enforcement, or strong rhetoric regarding the persistence of discrimination, would come with significant political costs, and President Obama's status as the first African American president gives him considerable cover on civil rights issues. Indeed, one of the interesting aspects of his first term is just how reticent public interest groups have been to criticize the administration's tepid approach to civil rights. Only the American Civil Liberties Union (ACLU) has been actively critical of the President, and its focus has been almost entirely on civil liberties concerns. This is likely in part because the Obama administration has been perceived to be far superior on civil rights enforcement than the George W. Bush administration, and most of that perception is accurate. However, there likely is also a desire to avoid criticizing one's friends, with some political calculation in mind, as many of those who work for public interest groups likely desire political appointments.

This is indeed one of the areas where the administration has succeeded—appointing individuals who are committed to civil rights and pursuing justice. One need only look at President Obama's two Supreme Court appointments—Justices Sonia Sotomayor and Elena Kagan—to see two Justices with an eye on justice and who hold the promise of being the most progressive justices on issues of civil rights

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119. See generally THE EROSION OF RIGHTS: DECLINING CIVIL RIGHTS ENFORCEMENT UNDER THE BUSH ADMINISTRATION, *supra* note 117.

120. See Michael A. Fletcher, *President Accepts Report on Race*, WASH. POST, Sept. 19, 1998, <http://www.washingtonpost.com/wp-srv/national/longterm/race/race.htm>.

121. See, e.g., Derrick Z. Jackson, Editorial, *Soul Searing on Race? Hardly*, BOSTON GLOBE, July 24, 2013, at A15.

since the loss of Justices William Brennan and Thurgood Marshall. The head of the EEOC, Jaqueline Berrien, was a career civil rights advocate, and Commissioner Chai Feldblum has long been an important advocate for the rights of the disabled, a mission she has carried forward while at the EEOC.<sup>122</sup> Having just written about those four leaders, it must be noted that all are women, an issue that has largely been underappreciated in our post-gender era. The former head of the Civil Rights Division, Thomas Perez, likewise had a distinguished career as an advocate for civil rights and labor issues, though his focus was mostly on labor, which is why he is now serving as the secretary of labor. Secretary Perez left a modest imprint in the Civil Rights Division, but there is little question that the commissioners at the EEOC have transformed that agency into an aggressive enforcement entity with intent to shape the law. Although the administration itself seems generally disinterested in the day-to-day civil rights issues, one way this or any administration makes a difference is by appointing committed individuals and allowing them to set out on their own course.

#### CONCLUSION

It has been many years since civil rights enforcement has been a priority, and that tradition has continued under the Obama administration. As a general matter, the Civil Rights Division now performs primarily like a local United States Attorney's Office, reacting to crimes that are committed or cases that come its way without any obvious priorities or initiatives. The one surprising exception to this general trend has been the EEOC, which has established important initiatives and pursued difficult claims that have the possibility of truly shaping the law. However, even there the developments have not been all positive as the sharp decline in enforcement activity should be a concern to anyone interested in the rights of employees.

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122. See Christine Caulfield, *Obama Picks Civil Rights Lawyer For EEOC Chair*, LAW360 (July 16, 2009, 6:36 PM), [www.law360.com/articles/111791/obama-picks-civil-rights-lawyer-for-eeoc-chair](http://www.law360.com/articles/111791/obama-picks-civil-rights-lawyer-for-eeoc-chair) (describing selection of Jacqueline Berrien as Chair of EEOC); Garance Franke-Ruta, *Disability, Gay Rights Expert Picked for EEOC*, WASH. POST, Sept. 14, 2009, [voices.washingtonpost.com/44/2009/09/14/disability\\_gay\\_rights\\_expert\\_p.html](http://voices.washingtonpost.com/44/2009/09/14/disability_gay_rights_expert_p.html) (discussing selection of Chai Feldblum). I should note that many years ago, I worked with Jacqueline Berrien at the Lawyers' Committee for Civil Rights.