Has the Roberts court placed landmark 1964 civil rights law on a hit list?

By John Blake, CNN
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(CNN) -- It took the assassination of a president, a ferocious legislative battle and a bloodied army of protesters filling the streets of America to get the Civil Rights Act of 1964 passed.

A half-century later, defenders of the landmark law say it faces a new threat: Five votes on the U.S. Supreme Court and an indifferent public.

As the nation celebrates the 50th anniversary of the Civil Rights Act, it's tempting to believe the battle over the law is over. But people are still clashing over it -- what it means, how long should it last and whether it discriminates against whites.

Now some supporters of the law fear the battle has shifted to new terrain. They warn that the conservative majority on the court, headed by Chief Justice John Roberts Jr., will do to the law what it did last year to the Voting Rights Act -- gut the parts that make it work while leaving its façade still standing.

"I think Roberts is very smart and takes the long view," says Kent Greenfield, a columnist and professor at Boston College Law School. "The Roberts court won't say this law cannot stand."

Instead, Greenfield says, the Roberts court is already chipping away at the legal architecture of the act, making it more difficult for an individual or a group to sue for racial discrimination. "It's getting harder and harder for plaintiffs in discrimination suits to get to the court, much less win their cases," Greenfield says.

Yet there are conservative and libertarian groups that say the 1964 act has been perverted and that it has spawned all sorts of dubious legal theories.

The act should be celebrated for ending Jim Crow laws, but some parts of it have been twisted by "clever lawyering and political activism" to justify discrimination against whites, says Ilya Shapiro, a constitutional studies expert with the Cato Institute, a libertarian think tank in Washington.

"It has been invoked to justify racial preferences in public education, employment and contracting," Shapiro says.

The act has also been used to violate the rights of private business owners to serve the customers they prefer, Shapiro says. If businesses decided not to serve customers because of their race or sexual orientation, the market and social norms -- not the federal government -- should punish them, he says.

"That's what freedom means," Shapiro says. "Freedom means allowing people to do things you might not agree with. I think it's ugly to have tattoos cover your body, but it doesn't mean I want to ban these things. Freedom allows people to do things that are stupid or morally wrong."

How it changed America

While the Civil Rights Act evokes strong emotions today, it provoked even rawer emotions when it was passed. The law demolished an America version of apartheid. It struck down segregation in public

accommodations and the workplace, and it banned discrimination on the basis of gender, religion and national origin.

The act was first introduced by President John F. Kennedy in 1963 amid bloody civil rights campaigns in places such as Birmingham, Alabama. After Kennedy's assassination, President Lyndon Johnson marshaled the sympathy generated by Kennedy's death and the suffering of civil rights protesters to pass the bill after a bruising, yearlong legislative battle.

The Rev. Martin Luther King Jr. called the law "the child of a storm, the product of the most turbulent motion the nation has ever known in peacetime."

The law, though, didn't just help blacks**.** It explicitly banned discrimination against women, religious minorities, Latinos and even whites. It also served as a model for other anti-discrimination measures passed by Congress: the Americans with Disabilities Act and the Pregnancy Discrimination Act.

"The Civil Rights Act was significant not just for what it did but for what it meant symbolically," says Allison Orr Larsen, a law professor at the College of William & Mary in Virginia. "The national government was no longer going to sit and be idle while individual liberties were trampled."

Before the law's passage, the United States was trapped in a Mad Men era where employers brazenly advertised for white workers and forced women to fetch coffee. The law banning sex discrimination helped lead to millions of women entering and advancing in the workplace.

"The largest beneficiaries of affirmative action are white women," says Charles Gallagher, a sociologist at La Salle University in Philadelphia.

The law shifted the balance of power and gave ordinary people a legal tool to fight back.

"To bring a racial discrimination lawsuit or to claim gender discrimination was unheard of before 1964," says Kevin R. Johnson, dean of the University of California, Davis, School of Law.

The most divisive section of the law

But did the act exchange one group of victims -- racial minorities, religious groups and women -- for another group: white people?

Some critics say it has.

There was a time, for example, when the act was used to justify racial preferences in college admission for blacks who had grown up under segregation.

Yet that was 40 years ago, and racial preferences in college admissions remain. Why should black college applicants to universities get the nod over financially poorer white applicants, some critics ask. Do Sasha and Malia Obama really need special treatment to get in college, something that even President Barack Obama conceded would not be fair in interviews about affirmative action.

Racial preferences that penalize white and Asian students because of their skin color are morally repugnant, says Hans von Spakovsky, a civil and voting rights expert with the Heritage Foundation, a conservative think tank in Washington.

"The students who are applying to colleges today were born in the 1990s when that kind of systematic discrimination disappeared decades ago," von Spakovsky says. "They come from families whose parents

are doctors or lawyers, and they haven't suffered the kind of discrimination that was occurring in the 1950s and '60s."

The act's impact on the workplace has also caused fierce disagreement in the courts and among the public.

Title VII of the act bans discrimination in employment. What it means often depends on your political beliefs.

The courts and Congress expanded Title VII's reach in the 1960s and '70s so that it would not only ban actual discrimination but "disparate impact" -- any hiring policy judged to adversely impact a minority group.

Disparate impact has become one of the most powerful tools for civil rights lawyers and officials.

'I was an affirmative action imposter'

After the passage of the 1964 law, few business owners or employers were dumb enough to publicly admit that they would not hire or serve anyone because of their race or gender. A lawyer, though, could point at a "disparate impact" to prevail in court -- a police force serves a city that's 60% Latino, for example, but there are no Latino officers.

In 1971, a unanimous Supreme Court invoked the Civil Rights Act and the disparate impact approach in Griggs v. Duke Power. A Southern power company had confined all of its black workers to menial work while even the lowest paid white workers made more than any black worker.

"It was no longer necessary to prove that employers had actively, purposely discriminated," writes Clay Risen, author of "The Bill of the Century." "It was enough to prove that minorities were adversely affected by company decisions, regardless of intention."

The Obama administration has embraced disparate impact as a way to address some racial discrimination. Its Justice Department recently won a $335 million settlement against Countrywide Corporation after it discovered that the now defunct-lender had charged black and Latino customers higher rates and fees than white applicants with similar credit histories.

Conservative legal scholars have generally scorned disparate impact court decisions. They say the approach infringes upon the rights of business owners and can lead to discrimination against qualified white and Asian people.

"That's a made-up legal theory," von Spakovsky says of disparate impact. "Under that theory, medical schools would have to start barring Jewish Americans from applying to medical schools because the percentage of Jews as doctors is higher than the general population."

Will the Roberts court save or savage the law?

Roberts and four other Republican-appointed justices on the Supreme Court have also been suspicious of disparate impact claims and racial preferences. These five reliably conservative votes have shifted the court to the right on decisions involving race.

Justice Anthony Kennedy, who is seen as the swing vote on the court, has never voted to uphold an affirmative action plan, says Marcia Coyle, author of "The Roberts Court." He has written forcefully against the use of racial classifications in cases involving affirmative action, voting rights and reverse discrimination.

Roberts worked as a lawyer for the Reagan administration and clerked for Justice William Rehnquist, who led the court's withdrawal from school desegregation efforts as well as its retreat from affirmative action, Coyle writes in her book.

Roberts promised to be a nonpartisan justice during his confirmation hearings, one who would not easily overrule precedent. Coyle, however, writes that "he is unafraid to deliver a major jolt to the system if he disagrees with the law's direction."

One such jolt to the 1964 act came in in 2009.

In the Ricci v. DeStefano case, a conservative majority on the court ruled white firefighters in New Haven, Connecticut, were victims of racial discrimination because they weren't promoted after passing a test for lieutenant and captain. The city was about 60% black and Latino at the time, and city officials tossed the results of the test because the only firefighters who passed it were white.

The decision was seen by some legal observers as an erosion of the Civil Rights Act. Justice Ruth Bader Ginsburg, who dissented in the New Haven case, says the court's decision did "untold" damage to the 1964 act.

Kennedy, who wrote the majority decision, invoked the same act when he said:

"No individual should face workplace discrimination based on race."

And then there's the link between affirmative action and the law.

The Civil Rights Act did not initially use the phrase "affirmative action," but it spawned the use of such policies. The law has been interpreted by the Supreme Court since the 1970s to allow employers to, for example, favor women and minorities in hiring, says Larsen, the William & Mary law professor.

Roberts, though, says it is unconstitutional to take race into account, whether it is intending to benefit or burden racial minorities, Larsen says.

Roberts distilled his approach to race in one of the court's most controversial cases in 2007. The court ruled 5-4 along ideological lines that a public school district in Seattle couldn't consider race when assigning students to schools, even for the purposes of integration.

"The way to stop discrimination on the basis of race is to stop discriminating on the basis of race," Roberts said in what is arguably his most famous quote.

Critics say the decision undermined the landmark Brown v. Board of Education decision, which maintained that the separate but equal doctrine was unconstitutional in education.

Former Supreme Court Justice Harry Blackmun once said about affirmative action:

"In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently."

No matter where you stand on the Seattle decision, Larsen says, it showed that the Roberts court has taken a very different view on school desegregation than the one adopted by Supreme Court decisions rendered in the past half-century.

"I do not think the justices have a 'hit list' so to speak. But I do think the colorblind view of the Constitution could spell a significant change in the treatment of laws that target racial justice," Larsen says.

Will the courts wash their hands of race?

Gallagher, the sociologist at La Salle, has no trouble saying the 1964 law is on a hit list. He says the Roberts court has already weakened the law through decisions such as the Seattle case.

He thinks the court will continue to chip away at the 1964 act by arguing some of the law's major enforcement provisions are obsolete because America has changed and Jim Crow-like racism no longer exists.

But racism and sexism have changed as well, Gallagher argues, and it persists in more subtle ways in hiring, housing and promotions. He alluded to one recent famous experiment where nearly 5,000 fictitious resumes were sent in response to 1,300 job ads in newspapers. Each resume was assigned a very white-sounding name (Emily, Brendan) or a very black name (Lakisha, Jamal). All applicants had similar qualifications.

The authors of the experiment, a professor at the University of Chicago and another at the Massachusetts Institute of Technology, found that applicants with white-sounding names were 50% more likely to get call-backs for interviews than their black counterparts.

The Roberts court ignores this kind of racial reality by saying that the government should no longer be in the business of divvying up America by race, Gallagher says.

"You can say the government is no longer engaged in discriminatory treatment," Gallagher says, "then basically the courts can wash their hands of race."

Making it tough for the little guy?

The Roberts court is also eroding another potent tool from the 1964 law -- provisions that enable women and racial minorities to join class-action lawsuits against companies for employment discrimination, says Johnson, dean of the University of California, Davis, School of Law.

In the court's 2011 Wal-Mart v. Dukes, a conservative majority on the court turned aside a group of women who brought a class-action lawsuit against the company for discriminating against them in pay and promotional policies.

The Roberts court ruled in favor of Wal-Mart, saying that the lawsuit had been improperly certified by a lower court.

The Wal-Mart decision might limit the effectiveness of resolving class-wide claims of discrimination under the Civil Rights Act by making it more difficult for ordinary employees to ban together, Johnson says.

People join forces in class-action lawsuits because it's the only way they can compete with the deep pockets of corporation lawyers.

"I worry that the courthouse doors will be closed to the little guys trying to vindicate their rights," Johnson says.

A new challenge to the Civil Rights Act

The Roberts court may also be poised to open another door that had been closed by the Civil Rights Act, others say.

When the act was passed, some business owners claimed it was unconstitutional because it violated the rights of small, private businesses to serve the customers they preferred. The U.S. Supreme Court rejected that argument in the 1964 case involving an Alabama motel owner who said serving black customers violated his rights.

Another family-owned business is making a claim about how they should run their business that could cripple the anti-discrimination laws in the 1964 act, says Greenfield, the Boston Law School professor.

In the recent Hobby Lobby case, the Christian owners of a chain of arts and crafts stores said that the Affordable Care Act violated their religious beliefs because it forced them to provide birth control methods to employees.

The court hasn't ruled on Hobby Lobby yet, but court watchers say some conservative members of the Roberts court appeared sympathetic to Hobby Lobby's claims during oral arguments. Roberts suggested in those arguments that the court could limit claims to companies owned by only a few shareholders or a family.

But Greenfield says accepting Hobby Lobby's argument could endanger provisions of the 1964 law that ban businesses from discriminating against all customers and employees.

The Christian owner of a fast-food company such as Chick-fil-A, for example, could claim that religious beliefs prevent them from providing benefits to same-sex partners, says Greenfield, author of "The Myth of Choice: Personal Responsibility in a World of Limits."

"There are also plenty of people in America who hold sincere religious beliefs, deeply held, that women belong in the home," Greenfield says. "A company believing that could say we think it's immoral to hire women away from their families."

The Civil Rights Act of 1964 may seem unassailable, but so did another landmark civil rights bill, the 1965 Voting Rights Act, Greenfield says. The court gutted it last year when it invalidated federal enforcement over all or parts of 15 states with a history of discrimination against minority voters.

"The attacks on the Voting Rights Act started small," Greenfield says. "Roberts planted small seeds here and there that grew into these more robust attacks."

The same could happen to the 1964 Civil Rights Act, he says. "We take these laws for granted. But little by little, we are going to see them erode if we don't take care of them."

Von Spakovsky, the Heritage Foundation constitutional expert, dismisses the notion the Roberts court is gunning to dismantle the 1964 law. He also says that the Roberts court did not gut the Voting Rights Act but preserved the most powerful parts of it, including a nationwide provision banning racial discrimination in voting.

"There's no question that the Civil Rights Act of 1964 is probably one of the most important pieces of legislation ever passed by Congress," he says. "It was a key piece of legislation in getting rid of systematic and widespread discrimination across America. The Roberts court hasn't done anything but uphold that statute."

Perhaps King was not just being descriptive when he called the Civil Rights Act a "child of the storm." Americans celebrate how far the nation has come since 1964, but something invariably happens -- a racially polarizing court verdict, a case over racial preferences in college admissions, a racially insensitive remark by a celebrity -- and those old wounds reopen.

Some of those racial tensions inevitably make it to the Supreme Court. The Roberts court may seem as divided as America at times, but its members have already shown that on issues such as campaign finance reform, they are not shy about making divisive decisions that break precedent.

Is the 1964 law safe or is it on a judicial hit list?

Stay tuned. Another storm may be on the way.