Fall October, 2011

How Myth-Busting about the Historical Goals of Civil Rights Activism Can Illuminate Paths for the Future

Susan D. Carle

ARTICLE

HOW MYTH-BUSTING ABOUT THE HISTORICAL GOALS OF CIVIL RIGHTS ACTIVISM CAN ILLUMINATE FUTURE PATHS

Susan D. Carle†

This Article considers four myths about the history of civil rights activism that have tended to cloud assessments about current civil rights law and its potential future directions. I argue that correcting those myths can help illuminate promising paths for the future. In each instance, alternative historical narratives reveal a rich record of experimentation with diverse ideas. This history suggests many alternative routes for further development of core principles of civil rights law, including further theoretical and practical work to pursue long-standing concepts of structural discrimination, the promise of experimentalist approaches to regulation and enforcement, increased interdisciplinary collaboration between law and other social science fields, and more focus on matters of economic inequality and other forms of inequitable resource distribution that have both class and race components. All of these reflect central but unfinished goals of the civil rights movement throughout its long history stretching back into the nineteenth century.

---

† Professor of Law, American University Washington College of Law. Special thanks are owed to Kevin Stein for able and speedy research assistance over winter break and to Susannah Karlsson for inviting me to take part in this Symposium.

My task here is to lay out some perhaps forgotten or overlooked aspects of civil rights history in order to help frame the presentations that will follow. I do so by "busting" four myths about the history of civil rights activism. Because I recently researched the historical origins of employment discrimination law, and disparate impact doctrine in particular, I will draw some examples from that area, but many of the points I will make can be generalized to other areas of civil rights law as well.

The four myths I will refute are as follows:

1) The core of civil rights concern was intentional discrimination; structural or effects-based concepts were peripheral ideas added only much later;

2) Lawyers developed federal civil rights law primarily through high-profile test case litigation in federal courts;

3) The civil rights movement unduly focused on a legal liberalist agenda;

4) Efforts to address social resource inequalities through civil rights law have largely failed and are doomed to fail due to the limits of law in reaching private social orderings.

I. MYTH NUMBER ONE: THE CORE OF CIVIL RIGHTS CONCERN WAS INTENTIONAL DISCRIMINATION; STRUCTURAL OR EFFECTS-BASED CONCEPTS WERE PERIPHERAL IDEAS ADDED MUCH LATER

The United States Supreme Court's recent civil rights jurisprudence[1] and some recent civil rights scholarship[2] emphasize intentional discrimination as the core of civil rights law. This trend corresponds with a call for the return to so-called core principles of antidiscrimination law, especially a focus on the prohibition of invidious discrimination, defined as specific, triable acts of dignitary affront inflicted with discriminatory motive. A further assumption posits that in our current uncertain times, characterized by rapid social, demographic and political change, a return to the core values of antidiscrimination law would be a positive move.

---

1. *See, e.g.*, Ricci v. DeStefano, 129 S. Ct. 2658, 2072-82 (2009) (upholding a disparate treatment claim filed against a city fire department that had decided not to validate the results of a promotion test where it had a severe disparate impact on the basis of race).

2. Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 732-45 (2006) (arguing that the core of employment antidiscrimination law is intentional discrimination and that disparate impact theory may have been a mistake).

Several analytic problems mar the argument just summarized. In the first place, no particular logic commends the idea that a return to core principles is the most prudent course in times of change or uncertainty. Exactly the opposite tack may be needed: new ideas may be necessary to respond to new challenges. But even more basically, the argument fails because its factual premise simply is not accurate, especially as viewed from the perspective of the activists who fought to bring about our current system of civil rights protections. To be sure, civil rights activists were always concerned about the problem of racial prejudice, but they were most concerned with how this prejudice manifested itself in institutions offering or denying paths to opportunity for persons of color. They did not believe they could change institutions simply by prosecuting persons based on the particular feelings they harbored in their hearts; instead, what civil rights activists wanted from as far back as the days of abolitionism was the broad-scale removal of structural barriers to advancement.

To abolitionists such as Frederick Douglass, the treatment of African Americans in employment, as a society-wide phenomenon, was a key measure of the country's progress away from slavery. Douglass viewed the systemic relegation of African Americans to menial employment in service positions in the North as akin to slavery in the South; he argued that such structural subordination was an indication that both regions of the country were deeply implicated in an economic system built on racial injustice. As Douglass explained in one speech, "shaving, boot-blacking, and carrying parcels, are nothing better than being slaves to the community; and [we] ought never to relax [our] agitation until this species of slavery is abolished as firmly as that which exists in the South."[3] In other words, Douglass blamed employment subordination on systematic exclusion, not on the acts of particular prejudiced employers that should be individually rooted out.

One might expect that Emancipation would ease the problem of racial employment subordination but, of course, precisely the opposite phenomenon occurred. The end of Reconstruction and the rise of Jim Crow produced the historical period known as "the nadir,"[4] characterized by lynchings and other forms of terror directed against African Americans, mass political disfranchisement throughout the South, and society-wide segregation and subordination in a vast array of goods and services including education, housing, employment, health and access to medical care, transportation, municipal services, accommodations, and entertainment. In the employment arena, the pushing of racially disfavored minorities into the least desirable employment sectors became even more pronounced and severe over time, as

3. *See Great Abolition Movement—Manifesto of the Negros*, BENNETT'S N.Y. HERALD, *reprinted in* THE NORTH STAR (Rochester), Nov. 10, 1848.

4. *See* RAYFORD W. LOGAN, THE NEGRO IN AMERICAN LIFE AND THOUGHT: THE NADIR, 1877-1901 (1954) (discussing the concept of the nadir); *see also* RAYFORD W. LOGAN, THE BETRAYAL OF THE NEGRO FROM RUTHERFORD B. HAYES TO WOODROW WILSON 11-12 (1965) (noting the debate about dating the nadir and suggesting it extended into the 1920s).

large literature documents.[5] Again, this society-wide phenomenon occurred not only because of the racial prejudice lying in the hearts of individual employers, but also because of a socio-structural web of institutions and practices. Even when it was in the interests of rational, economically self-maximizing employers to hire persons of color because they could be hired for much lower wages,[6] third-party agency enforced a pervasive color bar against racial minorities moving into more favored occupational sectors as white workers used both law and violence to maintain a racial monopoly over job sectors that provided paths to relative economic prosperity.[7]

Discriminatory labor statutes helped enforce the systemic and structural exclusion of racial minorities from desirable occupations.[8] Informal strategies

---

5. *See generally* DAVID ROEDIGER, THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS (2007) (covering both antebellum and postbellum periods); JAMES W. LOEWEN, SUNDOWN TOWNS 35 (2005) ("Before the Nadir, African Americans worked as carpenters, masons, foundry and factory workers, postal carriers, and so on. After 1890, in both the North and the South, whites expelled them from these occupations."); ALLAN H. SPEAR, BLACK CHICAGO, 1890-1920, at 29-35 (1967) (describing the decline in job prospects for working-class African Americans in Chicago at turn of the twentieth century); JOHN DITTMER, BLACK GEORGIA IN THE PROGRESSIVE ERA: 1900-1920, at 1-71 (1977) (describing late nineteenth century exclusion of African Americans from railroad and textile industries in Georgia); ALMA HERBST, THE NEGRO IN THE SLAUGHTERING AND MEAT-PACKING INDUSTRY IN CHICAGO 17 (Arno ed. 1971) (1932) (describing change in white workers' attitudes towards African American meatpacking workers in the 1890s). Chicanos had similar experiences. *See* Juan Gómez-Quiñones, *The First Steps: Chicano Labor Conflict and Organizing, 1900-1920*, 3 AZATLAN J. CHICANO STUD. 13, 22-23 (1972).

6. *See, e.g.*, PAUL ORTIZ, EMANCIPATION BETRAYED: THE HIDDEN HISTORY OF BLACK ORGANIZING AND WHITE VIOLENCE IN FLORIDA FROM RECONSTRUCTION TO THE BLOODY ELECTION OF 1920, at 11 (2005) (quoting one white southern politician's observation that "[c]olored labor is the cheapest, and therefore just the kind suited to the South in its present condition. This fact must have weight also with capitalists, for other things being equal, the returns from an investment must increase in proportion to the cheapness of the labor employed.").

7. *See* 1 ENCYCLOPEDIA OF AMERICAN RACE RIOTS 361, 460, 999 (Walter Rucker & James N. Upton eds., 2007) [*hereinafter* RACE RIOTS] (describing various labor-related incidents of racial violence); WILLIAM H HARRIS, THE HARDER WE RUN: BLACK WORKERS SINCE THE CIVIL WAR 35, 99 (1982); RICHARD CORTNER, A MOB INTENT ON DEATH 5-23 (1988) (describing whites' attack against African American sharecroppers who were meeting in an attempt to improve their employment conditions); James Gilbert Ryan, *The Memphis Riots of 1866: Terror in a Black Community During Reconstruction*, 62 J. NEGRO HIST. 243, 244 (1977) (locating as a cause of the 1886 Memphis race riot the fact that black civilians often had to compete with the city's Irish immigrants for low-skilled jobs); PATRICIA A. SCHECHTER, IDA B. WELLS-BARNETT AND AMERICAN REFORM, 1880-1930, at 75-77 (2001) (describing an 1892 Memphis lynching precipitated by conflict between an African American storekeeper and white competitors).

8. *See* DAVID E. BERNSTEIN, ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS, AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL 6, 28, 37–38, 50, 51–52, 58, 66, 75, 86 (2001) (compiling many examples of state and federal labor legislation that directly or indirectly discriminated against African Americans); STATES' LAWS ON RACE AND COLOR (Pauli Murray ed., 1951) (important civil rights lawyer's compilation of racially discriminatory state laws).

played a part as well. These included pressure tactics white workers used against employers who hired persons of color. These tactics took place during the labor conflicts that were a regular feature of industrial life in the North, in which employers sometimes cynically manipulated race by transporting African American workers from the South to take the place of striking workers as scab laborers.[9] But job actions aimed at keeping racial minorities out of jobs white workers viewed as their entitlement took place in the absence of scab labor as well, and frequently involved brutal violence including outright murder.[10]

Thus when the NAACP and the National Urban League were founded in 1910, their leaders confronted an economic and social system predicated on systemic racial subordination in a host of arenas, including employment. This system was deeply entrenched and a product of social structure and practice beyond particular individuals' prejudice. The founding leaders of these organizations experimented with strategies that would change society at the structural and institutional level, because their analysis showed that the problem of racial subordination needed to be attacked at those levels.[11]

I have elsewhere written about the role of the early leaders of the National Urban League in experimenting with strategies for loosening the pervasive structural bar against the advancement of racial minorities into more favored employment sectors.[12] National Urban League leaders—none of whom were lawyers, a point to which I will return below—did not in the early decades of the twentieth century view private-sector employment discrimination as a matter reachable through legal regulation. Instead, they relied on appeals to progressive employers to increase their hiring and advancement of minorities

9. *See* HERBST, *supra* note 5, at 17 (describing use of violence against African American strikebreakers in the Pullman Strike of 1894); MICHAEL KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 106 (2004) ("Unions secured legislation that required that plumbers and electricians be licensed—measures that proved effective at excluding blacks. On the railroads, black firemen lost jobs through a terrorist campaign that killed dozens."); *id.* at 64 ("Massive outbreaks of white-on-black violence erupted in East St. Louis in 1917 . . . killing an estimated forty-eight . . . people . . . most of them black"); RACE RIOTS, *supra* note 7, at 552-53 (describing the 1919 national steel industry strike that led to white mob attacks on African American workers in many parts of the country); WILLIAM M. TUTTLE, JR., RACE RIOT: CHICAGO IN THE RED SUMMER OF 1919, at 109 (1970) (noting that the race riot of 1919 was "a violent outcrop of the long-standing discord between white and black job competitors in the Chicago Labor market. In fact, several contemporaries claimed that labor was perhaps the most significant cause of the riot.").

10. *See, e.g.*, KLARMAN, *supra* note 9, at 65 ("Around 1910, unionized white railway workers struck employers in an effort to have black firemen dismissed. When the strike failed, they simply murdered many of the black workers").

11. On the ideas underlying the founding of the NAACP, see Susan D. Carle, *Debunking the Myth of Civil Rights Liberalism: Visions of Racial Justice in the Thought of T. Thomas Fortune*, 77 FORDHAM L. REV. 1479, 1530-32 (2009).

12. Susan D. Carle, *A Social Movement History of Title VII Disparate Impact Analysis*, 63 FLA. L. REV. 251, 262 (2011).

(as a kind of voluntary affirmative action plan, to translate their ideas into presentist concepts). At the same time, the National Urban League emphasized job training and job placement services in order to match qualified minority applicants to willing employers.[13] The speeches of even the most dedicated and visionary of these early leaders, such as William L. Bulkley, a founder of both the National Urban League and the NAACP[14] and the first African American principal of New York City's newly consolidated unitary school system,[15] are remarkable both for the clarity of their perspective on the structural nature of racial employment subordination and their desire to use broad-scale voluntarist, or non-legal, appeals to achieve social change.[16]

Law's entry into the field of private employment discrimination took place gradually. The earliest statutory fixes addressed public-sector employment, prohibiting government entities from engaging in discrimination. The New Deal, and then the World Wars, especially World War II, began to break open the realm of private-sector employment as an area for civil rights regulation. Government contracting during the War, the valor of African American troops who fought abroad for a country that denied them equal citizenship rights at home, and the ugly face of fascism in Europe, all brought home to white Americans the depths of racial injustice in their own country. The migration of African Americans out of the South where they were politically disfranchised and into the North where they could vote increased their aggregate political power. In 1940, President Roosevelt capitulated to A. Philip Randolph's threat to lead a march on Washington to protest race discrimination in wartime industries with the issuance of Executive Order 8802, which for the first time banned employment discrimination on the basis of race by private employers engaged in government contracting. This Executive Order created a Fair Employment Practices Commission (FEPC) to oversee compliance with its mandate.[17]

Executive Order 8802 and its successors were limited in their power and short in duration, but nevertheless heralded employment antidiscrimination law as we know it today.[18] As scholars who have studied the FEPCs from a variety

---

13. *See generally* GUICHARD PARRIS & LESTER BROOKS, BLACKS IN THE CITY: A HISTORY OF THE NATIONAL URBAN LEAGUE 57, 64, 110-12 (1971).

14. *See* Carle, *supra* note 12, at 271.

15. *See Colored School Principal: William L. Bulkley To Be Nominated to Public School No. 80*, N.Y. TIMES, Feb. 18, 1901, at 2.

16. William L. Bulkley, *The Industrial Condition of the Negro in New York City*, 27 ANNALS AM. ACAD. POL. & SOC. SCI. 128, 129–31 (1906) (arguing that the existence of a "caste" system explained employment discrimination against African Americans but endorsing voluntarist strategies to improve these conditions).

17. *See* ANDREW KERSTEN, RACE, JOBS AND THE WAR: THE FEPC IN THE MIDWEST 14-18 (2000).

18. *See* ANTHONY S. CHEN, THE FIFTH FREEDOM: JOBS, POLITICS, AND CIVIL RIGHTS IN THE UNITED STATES, 1941-1972, at 32-87 (2009) (tracing the origins of federal employment antidiscrimination law to these early FEPCs).

of perspectives agree, those charged with enforcement of these executive orders measured compliance by monitoring broad trends, pushing employers to set hiring goals and time tables, and assessing the bottom line in terms of overall statistics reflecting employer progress in increasing minority hiring.[19]

The intentional employment discrimination paradigm, focused on proving acts motivated by discriminatory animus, was by no means the focus of this early experimental work at the federal level for several reasons. For one, the orders lacked enforcement mechanisms through which charges of individual discrimination could be pursued. For another, the goals regulators sought to achieve as expeditiously as possible depended on many employers making broad-scale changes to improve their hiring and promotion statistics. Thus historians who are expert in this area, regardless of their views about the desirability about this early statistically focused approach, agree: early federal executive order experiments sought to achieve systemic, structural change. Motive, individual animus, case-by-case processing—these were all matters that would become important at a later time when courts became more involved in adjudicating employment discrimination claims. At the federal level, such court-based jurisprudence would arise only after enactment of Title VII, a statute organized around the concept of an individual's right to file a lawsuit in court.

At the same time that these early, non-judicially supervised legal experiments were taking place at the federal level through FEPCs, some states began to push forward with state employment antidiscrimination legislation. The Ives Quinn Act of 1945 in New York became the first state statute to ban employment discrimination by private-sector employers.[20] Enforcement of that act fell to moderate, pro-business Republican regulators, and they, too, eschewed the individualist, case-by-case prosecutions characteristic of the basic intentional discrimination paradigm.[21] Indeed, regulators in New York state hoped to avoid litigation as often as possible in order to escape the potential limits courts might place on their work.[22] Some key regulators, such as New York State Commission Against Discrimination (SCAD) Chairman Elmer Anderson Carter, hailed from the National Urban League and clearly borrowed from that organization's voluntarist philosophy.[23] Carter argued for a regulatory focus aimed at inducing broad-based change by encouraging employers to

19. *See, e.g., id.; see also* Eileen Boris, *Fair Employment and the Origins of Affirmative Action in the 1940s*, 10 NAT'L WOMEN'S STUD. ASS'N J. 142, 142-43 (1998) (locating the roots of broad-scale, results-focused affirmative action in these first federal executive orders banning discrimination by government contractors).

20. *See generally* Anthony S. Chen, *"The Hitlerian Rule of Quotas": Racial Conservatism and the Politics of Fair Employment Legislation in New York State, 1941–1945*, 92 J. AM. HIST. 1238, 1246 (2006) (summarizing activists' intensive coalition-based campaign to achieve this statute's passage).

21. *See* Carle, *supra* note 12, at 279-83.

22. *Id.* at 282-83.

23. *Id.* at 279.

voluntarily assess and reform their employment practices. SCAD also brought the first disparate impact case as an administrative charge, well before the Court's endorsement of that theory in *Griggs v. Duke Power Co.*,[24] as I will discuss further below.

In short, at the time of the passage of the Civil Rights Act of 1964, intentional discrimination was by no means the established core doctrine. The picture was much messier. In the minds of regulators and civil rights activists alike, there was not yet a clear distinction to be drawn between intent- and effects-based antidiscrimination paradigms. Instead, in the words of one key litigator of the era, Robert Belton, then of the NAACP and now a professor of employment discrimination law: "[i]t was all discrimination [to us]."[25]

The account I have just given is based not only on my own work but also that of expert employment antidiscrimination law historians writing from a variety of political perspectives, including Anthony Chen,[26] Eileen Boris,[27] Martha Biondi[28] and Paul Moreno.[29] If accurate, it raises the question as to why scholars and members of the Court should now assume that intentional discrimination represents the core of employment antidiscrimination law and structural or effects-based tests only the periphery or supplement. The answer, I believe, lies in the common tendency to adopt "presentist" lenses—in other words, to understand the past through the preoccupations of the present. Current doctrine emphasizes the difference between effects and intent tests for discrimination because the Court's 1972 opinion in *Washington v. Davis* did so in rejecting a constitutional equal protection claim for employment discrimination that civil rights litigators filed against a municipal police department solely on a disparate impact theory.[30] After *Washington v. Davis*, litigators ignored the conceptual difference between intent and effects theories of discrimination at their clients' peril. But it was not always so. The salience of the line between intent-versus effects-based theories of discrimination is relatively recent from an historical perspective, especially as viewed from the perspective of civil rights activists who were long focused on experimenting

24. 401 U.S. 424 (1970).

25. *See* Selmi, *supra* note 2, at 723 & n.89. My special thanks to Professor Selmi for drawing my attention to this quote and discussing its implications with me despite my somewhat critical response to the article just cited.

26. *See* CHEN, *supra* note 18.

27. *See* Boris, *supra* note 19.

28. *See* MARTHA BIONDI, TO STAND AND FIGHT: THE STRUGGLE FOR CIVIL RIGHTS IN POSTWAR NEW YORK CITY 100-03 (2003) (describing tension between SCAD and civil rights activists as to enforcement methods and progress).

29. *See* PAUL D. MORENO, FROM DIRECT ACTION TO AFFIRMATIVE ACTION: FAIR EMPLOYMENT LAW AND POLICY IN AMERICA, 1933–1972, at 2 (1997) (tracing origins of group rights approaches to employment antidiscrimination law, which he disfavors, to the period between the 1930s and 1950s).

30. *See* Washington v. Davis, 426 U.S. 229, 232-33, 239, 241-42 (1972).

with structural solutions to problems they perceived as systemic and institutional.

Similar fallacies underlie the related myth that the Equal Employment Opportunity Commission (EEOC) invented disparate impact doctrine after passage of Title VII and then improvidently convinced the Court to adopt this concept in *Griggs,* a claim Hugh Davis makes in his highly respected book on the history of Title VII.[31] As already discussed, no one needed to invent the concept of disparate impact because it predated the 1964 Act. According to two NAACP cooperating attorneys and law professors, George Cooper and Richard Sobol, who together wrote an important article outlining the early history of civil rights lawyers' efforts to litigate employment antidiscrimination principles, the first disparate impact case clearly recognized as such was *Johnson v. Ritz Hotels*, pursued under New York's Ives Quinn Act in 1966.[32] In that case, the Ritz-Carlton denied a job to Mr. Johnson, an African American applicant with considerable hotel experience, because the hotel had a hiring policy requiring at least five years of experience in another "East Side" hotel. Since East Side hotels had traditionally discriminated against African Americans, the hearing examiner ruled that the Ritz-Carlton's policy was unenforceable against Mr. Johnson regardless of intent.[33] In other words, because the policy served to block applicants like Mr. Johnson from consideration despite their qualifications, it could not be invoked as grounds against hiring an applicant of Mr. Johnson's acknowledged level of experience.

Thus *Shellman Johnson* is at least one early administrative case predating the Court's opinion in *Griggs* by more than half a decade. The research of historians of the Ives Quinn Act such as Paul Moreno, a foe of effects-based doctrine, shows that SCAD was using disparate impact concepts even well before this, just not in litigated cases.[34] As Neal Devins has pointed out in seeking to refute Davis's thesis, notions of effects-based approaches to solving structural inequality were a key aspect of popular discourse in the optimistic, social reformist heyday of the early 1960s.[35] Many government programs from

31. *See* HUGH DAVIS GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY, 1960–1972, at 249-250 (1990) ("[T]he agency was prepared to defy Title VII's restrictions and attempt to build a body of case law that would justify its focus in effects.").

32. George Cooper & Richard B. Sobol, *Seniority and Testing Under Fair Employment Laws*, 82 HARV. L. REV. 1598, 1601 (1969) (discussion of the facts of this case by law professors who helped formulate the case theory in *Griggs*); *see also* Determination after Investigation at 1-2, Johnson v. Ritz Assocs., Inc., C-12750-66 (on file with author).

33. Cooper & Sobol, *supra* note 32 at 1601.

34. MORENO, *supra* note 29, at 117.

35. Neal E. Devins, *The Civil Rights Hydra*, 89 MICH. L. REV. 1723, 1725, 1729-30 (1991) (critiquing Graham's thesis and arguing that group rights approaches were well entrenched from the early days of the Kennedy administration).

the 1960s, including President Johnson's War on Poverty, articulated effects-based employment discrimination ideas.[36]

Despite the efforts of Devins and others to set the historical record straight,[37] legends persist about *Griggs*' supposedly dubious historical pedigree. These myths can have a pernicious influence on public policy debates about Title VII's future: If disparate impact doctrine is of marginal legitimacy in light of longstanding tradition, then it perhaps should not survive searching constitutional scrutiny, as Justice Scalia recently hinted.[38] It is thus worth correcting the historical record to show that disparate impact doctrine, along with structural approaches to solving the problems of society-wide discrimination and subordination more generally, has a long and distinguished pedigree arising from moderate, pro-business civil rights activism.[39]

Of course, the fact that commentators are inaccurate in assuming that an intentional discrimination paradigm was the historically prior preoccupation of civil rights activists does not mandate any particular conclusion about the future of civil rights law. But if intentional discrimination is not the historically prior concept, why should it now assume such a central status, especially if a longstanding goal of civil rights activism has been to solve problems of structural subordination? Current statistics show still enormous race-based disparities in a host of important indicators of human well-being, as other

---

36. *See, e.g.*, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 232–33 (1968) (recommending that public and private employers remove "[a]rtificial barriers to employment and promotion," and explaining that "[r]acial discrimination and unrealistic and unnecessarily high minimum qualifications for employment or promotion often have the same prejudicial effect"; "[p]resent recruitment procedures should be reexamined"; and "[t]esting procedures should be revalidated or replaced by work sample or actual job tryouts. . . . These procedures have already been initiated in the steel and telephone industries.")

37. George Rutherglen, *Disparate Impact under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297, 1344-45 (1987) (arguing that disparate impact was within Congress's intent in Title VII).

38. *See* Ricci, 129 S. Ct. at 2681–82 (Scalia, J., concurring) (arguing that the Court's "resolution of this dispute merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII . . . consistent with the Constitution's guarantee of equal protection?" and citing Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 585–87 (2003) (questioning the constitutionality of disparate impact doctrine but then concluding that it is constitutionally permissible in embodying an important "structural and historical orientation" in this nation's civil rights policy)).

39. *See, e.g.*, Cheryl I. Harris & Kimberly West-Faulcon, *Reading* Ricci*: White(ning) Discrimination, Race-ing Test Fairness*, 58 UCLA L. REV. 73 (2010) (demonstrating empirically that the city's use of promotion tests with disparate impact disadvantages more whites than minorities); Lani Guinier & Susan Sturm, Op-Ed., *Trial by Firefighters*, N.Y. TIMES, July 11, 2009, at A19, *available at* www.nytimes.com/2009/07/11opinion11guinier.html (observing that pen and paper tests are not good predictors of later performance in emergency services jobs).

participants in this Symposium discuss.[40] These facts prove the need for further attention to structural or systemic fixes.

II. MYTH NUMBER TWO: FEDERAL CIVIL RIGHTS LAW DEVELOPED PRIMARILY THROUGH THE EFFORTS OF LAWYERS WHO BROUGHT HIGH-PROFILE TEST CASE LITIGATION IN FEDERAL COURTS

A second historical misimpression assumes that civil rights law developed primarily through high visibility impact litigation that lawyers directed in federal courts. Again, presentist lenses lead to this mistaken assumption: because we today focus so much on high impact cases, we assume this was always so. The facts are more complex.

I have already discussed *Griggs* as an example of this fallacy: The mistaken claim that the EEOC invented disparate impact doctrine after Title VII's enactment arises because the early development of this doctrine was not visible from the vantage point of federal courts. Instead, disparate impact doctrine arose through the work of moderate, pro-business civil rights leaders who sought to keep their work away from the courts' disciplinary supervision. Another example I have already discussed involves the FEPCs established after A. Philip Randolf threatened to march on Washington to protest federal contractor race discrimination in World War II. These FEPCs supported early experiments with goals and time tables for minority hiring and advancement, again outside the scope of judicial supervision.[41]

Traditional legal scholarship does not readily turn up these early experiments because it tends to focus on case research rather than foregrounding the activities of lawyers and activists, as I seek to do here. To scholars using conventional legal research techniques, *Griggs* does seem to come out of nowhere, just as effects-based discrimination concepts seem not to predate *Washington v. Davis,* because these are the first Supreme Court cases on point. In fact, the concepts underlying these cases had a much longer

---

40. *See, e.g.*, Lia B. Epperson, *Legislating Inclusion: Harnessing Section 5 Power to Alleviate Racial Isolation and Increase Educational Opportunity*, 7 STAN. J. C.R. & C.L. 213 (forthcoming 2011) (noting increasing racial and economic segregation in schools); Danfeng Soto-Vigil Koon, *Cal. Gov't Code § 11135: A Challenge to Contemporary State-Funded Discrimination*, 7 STAN. J. C.R. & C.L. 239 (forthcoming 2011) (noting large racial disparities in measures of education and health). John Relman's presentation for the Symposium likewise highlighted the extreme disproportionate effects of the current economic recession and mortgage foreclosure crisis on communities of color.

41. *See* CHEN, *supra* note 18, at 1-31 (arguing that this lack of court supervision was the cause of the rise of affirmative action ideas, to which he is opposed). I believe Chen is wrong in this causal account: affirmative action concepts are rooted in traditional remedial mechanisms stretching far back in the history of labor law. *See, e.g.*, 29 U.S.C. §160(c) (original Wagner Act provision granting the NLRB the power to take "such affirmative action . . . as will effectuate the policies of this Act"). Nevertheless, his point that use of an administrative scheme allowed law to develop in directions courts may have blocked is correct.

history, just not one visible through the lens of case analysis. Their history resided in activists' and regulators' experiments in settings distant from the U.S. Supreme Court, including state agencies, federal commissions that lacked litigating authority, and regulatory alliances between activists and government bureaucrats. Sometimes these experiments drew from traditional, litigation-centric views about law, sometimes they eschewed them, and sometimes they ended up producing hybrid approaches.[42]

The history of *Griggs* is but one example of many long, twisting narratives of activists' trial-and-error experimentation with both litigation-focused and litigation-averse strategies for bringing about social change through law. The many-decades-long history underlying the Court's decision in *Brown* stands as yet another example, better known because of the popular focus placed on that iconic case.[43] Similar narratives, starting in local activism and winding through many intermediate stages of experimentation, have been constructed for other important civil rights concepts,[44] as well as for cases and strategic efforts not widely recognized as iconic triumphs in the end.[45]

The common assumption that the best way to develop future civil rights law is through high-profile cases may often be correct, since this strategy allows the concentration of effort and expertise. The *Dukes v. Wal-Mart* class-certification case just decided by the U.S. Supreme Court stands as one such example, reflecting the costly and intensive efforts of a team of expert plaintiffs-side employment discrimination litigators, unfortunately with unsuccessful results.[46] Such defeats before the Court have been frequent, but

---

42. *See, e.g.*, Carle, *supra* note 12, at 295-96 (discussing productive tensions between the NAACP and state and federal regulators).

43. *See, e.g.*, MARK TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950 (1987) (tracing early efforts of NAACP that eventually led to its litigating strategy in *Brown*).

44. *See generally* CIVIL RIGHTS STORIES (Myriam Gills & Risa Goluboff eds., 2007) (tracing background stories underlying important civil rights cases).

45. *See, e.g.*, SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION (forthcoming 2011), Chapter 5 draft (on file with author) (tracing creative efforts of litigating counsel and amici in the little known case of Andres v. Drew Municipal Separate School Dist., 371 F. Supp. 27 (N.D. Miss. 1973), which challenged on race and gender grounds a school district's firing of an employee after discovering her status as an unwed mother. Rather than grappling with the important issues the case raised, the U.S. Supreme Court unfortunately dismissed it on the urging of more conservative civil rights organizations on grounds that certiorari had been improvidently granted.)

46. 564 U.S. __ (2011); *see also* Walmart Class – Attorney Profiles, *available at* http://walmartclass.com/public_attorneyprofiles.html (listing counsel associated with this case); *see also* Nancy Levit, *Megacases, Diversity, and the Elusive Goal of Workplace Reform*, 49 B.C. L. Rev. 367, 379 (2008) ("The last decade has witnessed an evolution from cases brought by individual and isolated plaintiffs' counsel to repeat players as lead counsel for plaintiffs' classes, as well as class actions supported by advocacy organizations that amass foundational support for litigation and offer financial support, technical expertise, and litigation assistance in complex employment discrimination cases"); Robert Fisher, Dukes v. Wal-Mart*: Can 1.5 Million Women Save Employment Discrimination Class Actions?*, 12

civil rights law has continued to develop even in the face of such big defeats. Many examples show that advances in civil rights principles have come about through varied, uneven, sometimes circuitous, and highly unpredictable paths.

Thus, while high-profile test case litigation is one important path, both historically and for the future, it is far from the only fruitful path to pursue depending on the issue and the social and political context. Especially with respect to novel principles that may not survive judicial scrutiny in their tentative infancy, the best strategies for the intermediate-term future may be ones that remain lower profile, outside the scope of judicial oversight. Experiments along the lines of the programs Susan Sturm has studied are examples of such innovations,[47] as are the calls of Michael Dorf, Charles Sabel, William Simon and others to explore democratic experimentalist techniques for civil rights litigation and resulting negotiated settlements. As these scholars explain, democratic experimentalism involves a form of governance in which "power is decentralized to enable citizens and other actors to utilize their local knowledge to fit solutions to their individual circumstances."[48] In the context of public impact litigation, law can serve as a background legal threat, motivating the parties to negotiate solutions to complex institutional reform problems rather than having such solutions imposed from without.[49] Robin Lehnardt's excellent article in this Symposium Issue reflects such an experimentalist sensibility, and I commend that article to readers rather than further belaboring a discussion of democratic experimentalism here.[50]

The mistaken idea that civil rights law developed primarily through high profile, federal court case litigation leads to the further erroneous assumption that the principal actors involved were lawyers. In fact, lawyers were not always the primary movers in the development of civil rights doctrine. This point has been developed at some length in the part of Tomiko Brown-Nagin's important new book that examines the relationships during in the height of the civil rights movement between impatient direct action protestors from the Student Nonviolent Coordinating Committee (SNCC) and the Congress on Racial Equality (CORE), on the one hand, and Thurgood Marshall and the

---

CARDOZO J.L. & GENDER 1009, 1023-31 (2006) (discussing the development of the case and the strategic decisions of the coalition of plaintiffs' attorneys).

47. *See, e.g.*, Susan Sturm, *The Architecture of Inclusion: Advancing Workplace Equality in Higher Education*, 29 HARV. J.L. & GENDER 249 (2006) (studying a project among several elite science and math faculties that sought to brainstorm new solutions through internal processes to improve on the hiring and advancement of female faculty members, and noting the benefits of avoiding judicial scrutiny); see also R.A. Lenhardt, *Localities as Equality Innovators*, 7 STAN. J. C.R. & C.L. 265, 269 (forthcoming 2011) (discussing Sturm's work).

48. *See, e.g.*, Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

49. Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1067 (2004).

50. Lenhardt, *supra* note 47.

NAACP, on the other.[51] Marshall sought to apply the brakes to the relatively uncontrollable trajectory of direct-action protest strategies. He worried that these strategies could create costly demands for legal defense and derail decades of cautiously orchestrated test case litigation.

Other historical examples likewise point to the importance of the contributions of non-lawyers to the development of innovative civil rights approaches. I will here very briefly discuss two such examples, one based on my own research and another on a fascinating new dissertation by legal historian Karen Tani.

The importance of recognizing non-lawyers' contributions to the development of civil rights law first struck me based on surprises I encountered in my search for the historical origins of disparate impact law. I expected to find those origins in the work of civil rights lawyers, probably from the NAACP, which had by far the most well developed legal operations of the civil rights organizations in existence during the early twentieth century.[52] Several facts greatly surprised me as I pursued my research. First, I learned that the NAACP initially shed private-sector employment issues from its agenda, by agreeing right after its founding in 1910 to divide its jurisdiction with the non-law-focused National Urban League.[53] Second, I discovered that the staff members of the National Urban League who took up employment discrimination issues were not lawyers but were instead trained in the social sciences.[54] When these National Urban League leaders began to think seriously about using legal strategies to combat employment discrimination, they did not approach the matter from the perspective of lawyers interested in defining a cause of action through which individuals would have legal recourse. Instead, these social architects were far more interested in how the backdrop of a legal mandate could be used to engineer broad-scale voluntary change in the practices of employers. Their approach bore the marks of problem-solving by persons trained in social science disciplines, aimed at inducing systemic change through education and public awareness campaigns.[55] Far from being skeptical about businesses' motives, these moderate civil rights leaders were pro-business, often carrying Republican credentials.[56] Rather than compelling employers to undertake specific practices by litigating against them, these National Urban League figures wanted to induce employers to self-scrutinize

---

51. *See* TOMIKO BROWN-NAGIN, COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT 133-304 (2011).

52. *See generally* Susan D. Carle, *Race, Class, and Legal Ethics in the Early NAACP (1910-1920)*, 20 LAW & HIST. REV. 97, 106-15 (2002) (describing the composition and activities of the NAACP's first national legal committee).

53. NANCY J. WEIS, THE NATIONAL URBAN LEAGUE, 1910-1940, at 65-66 (1974).

54. On the social science backgrounds and methods of many National Urban League leaders, see TOURÉ F. REED, NOT ALMS BUT OPPORTUNITY: THE URBAN LEAGUE AND THE POLITICS OF RACIAL UPLIFT, 1910-1950, at 14-15, 17-19 (2008).

55. *See* Carle, *supra* note 12, at 280 (describing SCAD's focus on public education).

56. *Id.* at 278-79.

and modify their employment practices while preserving their business flexibility and discretion.

A second example of the importance of non-lawyers' contributions to the development of civil rights law comes from legal historian Karen Tani's dissertation in progress entitled "Securing a Right to Welfare: Public Assistance Administration and the Rule of Law, 1938-1960." In a beautifully researched conference paper presented at the 2010 American Society for Legal History Annual Meeting, Tani explores the tension that existed within the New Deal Public Assistance Administration between lawyer and social worker approaches to defining a legal right to public assistance.[57] Lawyers thought about these questions in legalistic terms while the social workers within the agency thought about them according to the professional norms they had inherited through their socialization into a different professional discipline. From the social workers' perspective, public assistance should be thought about as a right based in human need, not as charity or a limited legalistic entitlement. In the end, the lawyers' views won out and the social workers' perspective faded from view, for a number of reasons related to the changing politics of the nation. But Tani's careful research captures the alternative voice of a distinct professional discourse community that would have recognized basic subsistence as a human right and thus altered the nation's discourse legacy on economic and social welfare issues.

These several examples, drawn from different historical eras, show how civil rights principles have and could have developed not only, or even primarily, through the work of lawyers, but also through the interactions—often in the form of strained tensions—between lawyers and other actors steeped in different discourse traditions. Those different traditions could be the product of training in different professional disciplines or immersion in different experiential traditions, as in the tension between direct action protestors and Marshall and the LDF during the zenith of the civil rights movement.[58] Such tensions have produced synergies resulting in new directions in the development of civil rights law that would not have occurred had lawyers been working in isolation: The National Urban League thought about the potential of state antidiscrimination law in experimental terms, emphasizing its promise in shaping the conduct of a large employer community by inducing self-study to search for ways to improve minority hiring and advancement without a heavy reliance on the intervention of courts; the social workers within the Public Assistance Administration emphasized the importance of determining access to assistance based on need rather than formally defined legal entitlement; the

57. Karen M. Tani, "Legal Rights and Human Needs in New Deal Welfare Administration" (unpublished paper on file with author).

58. BROWN-NAGIN, *supra* note 51, at 133-304; *see also* TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 175 (1988) (discussing tension between Thurgood Marshall and the NAACP, on the one hand, and Martin Luther King, Jr., and the direct action protestors he inspired, on the other).

leaders of SNCC and CORE eschewed the court-centered strategies of the NAACP in favor of more dramatic techniques that would call the nation's attention to the struggle for racial justice with an urgency that drawn out proceedings within court house walls could not match.

I have elsewhere written about the potential dangers of undue lawyer domination of social change movements.[59] Historical examples abound. The tight grip of relatively conservative and privileged white lawyers over the NAACP's very early reform agenda is one example of this problem. As Elliott Rudwick and August Meier have shown, it took a leadership takeover within the NAACP by a new generation of mostly African American leaders to set the NAACP on its brilliant mid-century path, in which it exploited the tiny crevices available for the exercise of political agency to move the country in the direction of improved racial justice.[60] A clash of perspectives can be seen within other early twentieth century social reform organizations as well. National Consumers League leader Florence Kelley's agenda for social welfare reform sometimes clashed with the views of Louis Brandeis and other lawyer-advisors.[61] Such historical examples counsel against lawyer domination and lawyer-centric idea generation about directions for reform. Law-centered reform strategies have benefits and strengths, but downsides and weaknesses as well.

These lessons suggest that a fruitful way to generate ideas for future civil rights directions would be to share perspectives across professional discourse traditions. The emphasis on new collaborative models for social change lawyering represents just this kind of productive new thinking,[62] as does the push for reform of multidisciplinary practice strictures for the legal profession

---

59. *See* Susan Carle, *Re-envisioning Models for Pro Bono Lawyering: A Comparative Study of the Early NAACP and the National Consumers League*, 9 AM. U. J. GENDER SOC. POL'Y & L. 81 (2001).

60. August Meier & Elliott Rudwick, *Attorneys Black and White: A Case Study of Race Relations within the NAACP*, *in* ALONG THE COLOR LINE: EXPLORATIONS IN THE BLACK EXPERIENCE (August Meier & Elliott Rudwick eds., 1976); August Meier and Elliott Rudwick, *The Rise of the Black Secretariat*, *in id.*, at 109-11. The metaphor of exploiting tiny crevices comes from a presentation by historian John Bracey at the Organization for American History Annual Meeting in Seattle, Washington, in May 2009.

61. Carle, *supra* note 59, at 90-92 (discussing the role of lawyers in controlling the agenda of the National Consumers League).

62. *See, e.g.*, Amy Killelea, *Collaborative Lawyering Meets Collaborative Doctoring: How a Multidisciplinary Partnership for HIV/AIDS Services Can Improve Outcomes for the Marginalized Sick*, 16 GEO. J. ON POVERTY L. & POL'Y 413 (2009) (arguing for cross disciplinary approaches to address the intersection of health care law and poverty); Barbara Glesner Fines, *Ethical Issues in Collaborative Lawyering*, 21 J. AM. ACAD. MATRIM. LAW. 141 (2008) (noting many versions of collaborative lawyering and addressing the need for more examination of them); Ascanio Piomelli, *Appreciating Collaborative Lawyering*, 6 CLINICAL L. REV. 427 (2000) (exploring the history and various strains of collaborative lawyering theory).

generally.[63] In antidiscrimination law, more effort is being made to draw on the perspectives of other professional disciplines, including organizational psychology, sociology, cognitive science, economics, business management, applied mathematics, and other fields.[64] Lessons of the past suggest that such collaboration should include attention to translating perspectives drawn from sometimes incompatible professional disciplines for the courts, because courts can prove quite hostile to, or at least skeptical about, non-law based ideas.[65] Alternatively, collaborative cross-disciplinary efforts could consider developing strategies for social change that do not rely heavily on resort to courts.

A final, related lesson arising from study of civil rights history questions civil rights lawyers' tendency to focus on causes of action vindicated by filing lawsuits in court. In my project investigating the early history of disparate impact analysis, for example, I noticed that early NAACP litigators held this view, frequently showing skepticism about enforcement schemes other than court-based litigation.[66] That they took this stance is completely understandable given the historical context: state courts and administrative schemes often had not proven friendly to civil rights claims, while federal court cases had produced at least a few more promising developments.[67] But too great a focus on this standard story minimizes the evidence that legal change occurred in many forums, not all of them federal courts. When the U.S. Supreme Court invalidated major portions of the Reconstruction -era civil rights statutes in the 1883 *Civil Rights Cases*,[68] for example, civil rights activists in the North turned to state legislatures to enact civil rights protections and filed test cases in state

63. *See, e.g.*, Paul Paton, *Multidisciplinary Practice Redux: Globalization, Core Values, and Reviving the MDP Debate in America*, 78 FORDHAM L. REV. 2198 (2010); Louise G. Trubek & Jennifer J. Farnham, *Social Justice Collaboratives: Multidisciplinary Practices for the People*, 7 CLINICAL L. REV. 227 (2000).

64. *See, e.g.*, Frank Dobbin & Alexandra Kalev, *The Architecture of Inclusion: Evidence From Corporate Diversity Programs*, 30 HARV. J.L. & GENDER 279 (2007) (analyzing corporations' diversity initiatives through the lens of sociology); Debra Meyerson & Megan Tompkins, *Tempered Radicals as Institutional Change Agents: The Case of Advancing Gender Equity at the University of Michigan*, 30 HARV. J.L. & GENDER 303 (2007) (analyzing the same issues using theory from the field of organizational studies); Richard R.W. Brooks & Valerie Purdie-Vaughns, *The Supermodular Architecture of Inclusion*, 30 HARV. J.L. & GENDER 379 (2007) (using economics to predict conditions for diversity hiring).

65. *Cf.* Charles Kester, *The Language of Law, the Sociology of Science and the Troubles of Translation: Defining the Proper Role for Scientific Evidence of Causation*, 74 NEB. L. REV. 529, 556-61 (1995) (noting the difficulties of translating scientific concepts into legal concepts in proving causation).

66. *See* Carle, *supra* note 12, at 281 & nn. 180-84.

67. *See generally* KLARMAN, *supra* note 9 (describing development of civil rights law over the course of the twentieth century with a heavy emphasis on federal court litigation).

68. 109 U.S. 3 (1883).

courts,[69] facts often overlooked in standard historical accounts.[70] The administrative enforcement scheme set up under the Ives Quinn Act permitted civil rights regulators to experiment with structural approaches to employment antidiscrimination law that probably went beyond what state courts would have permitted, as already discussed.

Another important example comes from Sophia Lee's investigation of the NAACP's work in the 1940s and 1950s before the National Labor Relations Board (NLRB).[71] Lee traces how the NAACP pursued unfair labor charges and duty of fair representation claims before the NLRB in order to promote recognition of unions' legal duty not to discriminate on the basis of race. She explains that the NAACP's decision to pursue this route was motivated not only by legal considerations but also by political perspective: Labor Director Herbert Hill wanted to work with the labor movement whenever possible and to encourage African American union membership because he "viewed the labor movement, not litigation, as the preferred vehicle for producing" change in African American workers' situations.[72] The NAACP "sought to facilitate class-based collective action,"[73] and wanted to develop constitutional nondiscrimination principles within the agency that oversaw collective labor representation.

Lee shows how the NAACP's carefully orchestrated labor strategy under Hill in the 1950s produced, after much effort and perseverance, a major administrative law victory when the NLRB announced an expansive reading of the state action doctrine in a key NLRB case.[74] For a time at least, this victory prompted the NLRB to vigorously police labor union discrimination. In later years, the Board's vigilance decreased, frustrating Hill and causing the NAACP's workplace constitutionalism to "fade out" by the late 1970s.[75] But Lee's research nevertheless shows that administrative law strategies were important in reaching civil rights goals related to securing desirable, well-paying jobs for African American workers.

---

69. *See, e.g.*, Ill. Rev. Stat. ch. 38, §§ 42i–42j (1887) (nondiscrimination in public accommodations statute); Davis v. Euclid Ave. Garden Theatre Co., 17 Ohio C.C. 495, 495–97 (1911) (holding a theater owner liable under a similar Ohio public accommodations law after his agent refused to sell a ticket to an African American); DU BOIS, THE PHILADELPHIA NEGRO 418 (Cosmo Books ed. 2007) (1899) (citing the 1887 Pennsylvania Civil Rights Act).

70. For example, Klarman argues that in the late nineteenth century African Americans continued to unsuccessfully litigate because of an absence of viable alternatives, but does not sufficiently discuss the modest victories that were made through statutory initiatives and litigation at the state level. *See* KLARMAN, *supra* note 9, at 58.

71. Sophia Z. Lee, *Hotspots in a Cold War: The NAACP's Postwar Workplace Constitutionalism, 1948-1964*, 26 LAW & HIST. REV. 327 (2008).

72. *Id.* at 344, 348.

73. *Id.* at 331.

74. Hughes Tool, 147 N.L.R.B. 1573 (1964).

75. Lee, *supra* note 71, at 375.

It may be that future civil rights directions should, in some situations, likewise focus on strategies other than the creation of federal, court-based causes of action. While I am not arguing that federal causes of action are unimportant, I am suggesting more agnosticism about preferable designs for civil rights protections. Many creative ideas could be explored. In the employment context, for example, it does not stretch the bounds of theoretical or even political plausibility to consider establishing workplace-based tribunals as a forum of first recourse for employment discrimination along with other kinds of workplace unfairness claims, as legal systems in some other countries do.[76] Despite some civil rights advocates' traditional aversion to such ideas, it is worth imagining the establishment of an administrative agency with powers more robust than those currently possessed by the EEOC to handle civil rights matters, either as limited to employment discrimination or under a new system that would consolidate various areas of civil rights concern.[77] I am not especially advocating any of these ideas but simply suggesting that they should remain on the table in brainstorming about future civil rights directions, out of a recognition of both the benefits and drawbacks of federal, judicially policed, private cause-of-action enforcement schemes.

At the same time, civil rights advocates should avoid the opposite tendency of some recent civil rights scholars to jump from empirical evidence showing that plaintiffs are unjustly failing to prevail in antidiscrimination cases to conclusions that the laws in question are a failure and should be abandoned.[78] If plaintiffs are not prevailing in court despite indicators showing continuing legal violations, the appropriate question is why plaintiffs are not winning meritorious cases. Possibilities of jury and court bias come to mind, as well as problems with the construction of burdens of proof or other procedural or substantive legal roadblocks. In the case of disparate impact claims, for example, virtually all commentators agree that such cases are exceedingly difficult to maintain because of the difficult threshold showing for the prima facie case. This threshold requires not only sophisticated proof of a statistically significant disparity between groups on the basis of a protected characteristic, but also highly specific proof of the particular employment practice producing that disparity.[79] Indeed, a recent Supreme Court case discussing the showing

76. *See, e.g.*, National Labour Profile: South Africa, *available at* http://www.ilo.org/public/english/dialogue/ifpdial/info/national/sa.htm#9 (describing system of labor laws and remedies in South Africa).

77. *See, e.g.*, Leroy D. Clark, *The Future Civil Rights Agenda: Speculation on Litigation, Legislation, and Organization*, 38 CATH. U. L. REV. 795, 817 (1989) (arguing that the EEOC should be granted power to conduct administrative hearings and issue cease and desist orders as the National Labor Relations Board is empowered to do).

78. *See, e.g.*, Selmi, *supra* note 2.

79. *See, e.g.*, Elaine W. Shoben, *Disparate Impact Theory in Employment Discrimination: What's* Griggs *Still Good for? What Not?*, 42 BRANDEIS L.J. 597, 597–98 (2004) (noting that disparate impact cases "are difficult, if not impossible, for private plaintiffs to undertake").

required to identify a "particular employment practice" suggests new expectations of precision and detail that may stump even the most expert industrial psychologists. [80]

These problems are serious and require solution. They do not, however, suggest that the entire enterprise of seeking non-blame based solutions to employment discrimination should be abandoned. Even imperfectly working laws—indeed, even miserably inadequate laws—can be much better than no legal proscription at all, such as permitting employers to freely use exclusionary employee selection devices, which would be the state of the law if disparate impact analysis were abandoned.

Statutory prescriptions are important in part because law serves functions other than providing causes of action a plaintiff may vindicate in court. Law also shapes behavior. This is what former NUL leader and SCAD commissioner Elmer Anderson Carter thought the Ives Quinn Act could do best. As he argued in an article describing his goals for SCAD, Ives Quinn gave employers an excuse to do the right thing.[81]

Law can also have important incentive-producing effects. This is one of the insights of Susan Sturm's pathbreaking article on solving "second generation" employment discrimination challenges.[82] To illustrate her point, Sturm uses the Supreme Court's construction of an affirmative defense to vicarious liability for supervisor sexual harassment. Sturm suggests that this affirmative defense allowed the Court to create a legal incentive to encourage employers to establish internal sexual harassment prevention and investigation policies, because implementation of such policies would immunize an employer from vicarious liability in supervisory sexual harassment cases.[83]

Similarly, I have argued elsewhere that the civil rights bar should not completely despair about the Court's opinion in *Ricci*—and certainly should not consider abandoning disparate impact analysis, as some have argued—because even though that decision makes it appreciably harder for plaintiffs to prevail on disparate impact claims, it still preserves an incentive for employers to seek professional validation of employment selection and promotion devices

---

80. *See* Smith v. City of Jackson, 544 U.S. 228, 241 (2005) (holding that the plaintiffs failed to identify with sufficient precision the exact "practice" that caused disparate impact on the basis of age in a city's formula for raising the salaries of junior public safety officers to compete with other jurisdictions).

81. *See* Elmer A. Carter, *Practical Considerations of Anti-Discrimination Legislation: Experience Under the New York Law Against Discrimination*, 40 CORNELL L.Q. 40, 41, 50 (1954) (describing "tremendous significance in the administration of the new statute . . . of individual employers [that] voluntarily abandon previous discriminatory hiring practices" and stating his view that the only hope for elimination of "pandemic" discrimination in the United States "lies in the extent to which voluntary compliance with the provisions of the law can be achieved").

82. Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 479-521 (2001).

83. *Id.*

in order to avoid potential liability under *Ricci*'s new standard requiring good-faith conduct by employers.[84]

Of course, one can argue that the incentives created by legal rules have been set too low or are otherwise not effective. I have raised such a query about the Court's affirmative defense for sexual harassment vicarious liability, noting that a survey of court cases suggests that many courts tend to rubber stamp employer sexual harassment policies without a sufficiently searching inquiry into those policies' adequacy.[85] Likewise, civil rights advocates have eloquently argued that *Ricci* creates far too wide a safe harbor for employers against disparate impact liability.[86] These arguments, however, go to questions of how to construct effective incentives through law, not to whether incentive creation is an important function of law in the first place.

Thus when it comes to legal rules, sometimes even a quarter of a glass, or even an eighth of a glass, is better than an empty one. Given the extremely hard-fought battles that have been waged to get even these quarter-glass-full solutions, it seems important to protect grossly imperfect civil rights laws from being dismantled wherever possible, even if they are not working as well as hoped.

A tendency to downplay the importance of the less-than-perfect victories of the civil rights movement characterizes some currently popular critiques of the accomplishments of that movement in other respects as well. I turn to the historical myths on which such critiques are based, and the fallacies they tend to introduce into forward-looking civil rights thinking, in Part III below.

III. MYTH NUMBER THREE: THE CIVIL RIGHTS MOVEMENT UNDULY FOCUSED ON A "LEGAL LIBERALIST" AGENDA

In the wake of the fifty-year anniversary of *Brown v. Board of Education*, it has become popular to critique that case, and the American civil rights movement in general, for pursuing a so-called "legal liberalist" agenda. In the words of one leading legal historian, Ken Mack, legal liberalism's core elements include: "courts as the primary engines of social transformation; formal conceptual categories such as rights and formal remedies such as school desegregation decrees, as the principal mechanisms for accomplishing that change; and a focus on reforming public institutions (or, in some versions, public and private institutions without much distinction) as a means of

84. Carle, *supra* note 12, at 299. On *Ricci*'s good faith standard, see Joseph A. Seiner & Benjamin N. Gutman, *Does* Ricci *Herald a New Disparate Impact?*, 90 B.U. L. REV. 2181, 2204-07, 2213 (2010).

85. *See* Susan Carle, *Acknowledging Informal Power Dynamics in the Workplace: A Proposal for Further Development of the Vicarious Liability Doctrine in Sexual Harassment Cases*, 13 DUKE J. GENDER L. & POL'Y 85 (2006).

86. *See, e.g.*, Seiner & Gutman, *supra* note 83.

transforming the larger society."[87] The legal liberalist critique of the civil rights movement argues that civil rights lawyers and other activists erred in overemphasizing the importance of "formal" equality rather than pursuing changes that would improve the everyday material conditions of people's lives.[88]

This critique of the so-called legal liberalist agenda of the civil rights movement has produced a counter-critique, which points out that the goals and accomplishments of the civil rights movement were far richer than a legal liberalist gloss assumes. In his important article on mid-twentieth-century civil rights lawyering, for example, Mack shows that African American civil rights lawyers' goals were far from legal liberalist ones. They were instead strongly influenced by a long tradition of effort aimed at intra-group advancement.[89] Another trend, which Mack focuses on less but which to me also deserves emphasis, was a commitment to broad-scale social reform extending beyond racial justice and embracing the restructuring of resource distribution for all. As Mack does note, many leading African American lawyers committed to the pursuit of racial justice issues in the inter-war era, such as Charles Hamilton Houston and Raymond Alexander, were socialists or similar economic radicals, willing to work with organizations far to the left on the American political spectrum.[90]

This tradition of combining racial justice concerns with a commitment to economic justice for all persons regardless of race has long roots, tracing back to a founding period in the late nineteenth century in which basic principles that would guide nationally coordinated civil rights activism throughout the twentieth century were first being worked out. In that period, civil rights activists clearly articulated a vision of racial justice activism that spanned both political and civil rights and economic and social welfare concerns.

I have previously investigated the thought and activism of one civil rights leader during this founding era: T. Thomas Fortune, who founded the first nonpartisan national civil rights organization intended to have permanent status, which he named the Afro American League (AAL).[91] Fortune was a law-trained newspaper editor and public intellectual, who in the first half of his

87. Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before* Brown, 115 YALE L.J. 256, 258 (2005).

88. *See, e.g.*, Jack M. Balkin, Brown *As Icon*, *in* WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION 3, 12 (Jack M. Balkin ed., 2001) ("In the half century since *Brown*, it is clear that although the elimination of Jim Crow has done much good, blacks as a group still lag behind whites in many of the most important social measures of well-being and success—household income, infant mortality, life expectancy, educational opportunity, and employment levels.").

89. *Id.*; August Meier traces this strain of African American civil rights thought in AUGUST MEIER, NEGRO THOUGHT IN AMERICA, 1880-1915, at 121-60 (1963).

90. Mack, *supra* note 87, at 344-45.

91. *See* Carle, *supra* note 11, at 1482.

life served as a visionary theorist of strategies for achieving racial justice, and broader social justice as well.[92] Many of the ideas he propounded became tenets of early civil rights organizations that set the agenda for twentieth-century civil rights activism.[93]

Fortune saw the problem of racial injustice as requiring a two-pronged strategy. On the one hand, Fortune saw the need for court-based political and civil rights litigation. He was not optimistic about convincing the courts to enforce the principles of equality of citizenship rights that supposedly underlay the country's constitution, but he thought this fight should take place anyway, if only to expose the courts for their hypocrisy and to shame the country in the eyes of the world.[94] In the mid-1880s, two Baltimore-based lawyers active in a regional civil rights organization called the Brotherhood of Liberty—which was engaging in test-case litigation along with other strategies—published an analysis in Fortune's newspaper of the potential for test case litigation to provide a national civil rights organization-building strategy.[95] Fortune appears to have taken these ideas strongly to heart and wrote frequently in the pages of his newspaper about litigation taking place on transportation and public accommodations segregation, even becoming a plaintiff in such a case himself.[96] A study of Fortune and the AAL is thus illuminating in showing the origins of ideas about using the framework of a national civil rights organization to support litigation pursuing political and civil rights issues in the courts, all several decades before the founding of the NAACP.

But a study of Fortune's thought is even more interesting for what it reveals about matters Fortune thought were equally pressing to the project of racial justice but not amenable to litigation-based solutions. As important to Fortune as political and civil rights reform was fundamental economic and social restructuring. Fortune saw such restructuring as key to racial justice in the long term, and further saw the most pressing issue—even more important than racial justice—to be economic justice, or the elimination of stark disparities between the haves and the have-nots regardless of race.[97] Fortune understood that such overall economic restructuring could not occur except as the result of coalition-based democratic politics uniting constituencies of similar economic interests across race lines. Fortune was as strikingly optimistic about the chances of such sweeping political transformation as he was pessimistic about the use of courts to achieve civil rights gains.

---

92. In his middle age years Fortune became associated with Booker T. Washington and, weighed down with financial anxieties and a condition that might today be diagnosed as manic depression, lost his status as a vanguard civil rights leader. *Id.* at 1485.

93. *Id.* at 1524-33.

94. *Id.* at 1507, 1516.

95. *Id.* at 1483 & n.14, 1519-20.

96. *Id.* at 1523.

97. *Id.* at 1502-07.

As evidence that building such a coalition-based political movement aimed at economic change was possible, Fortune pointed to the Knights of Labor movement, which was rapidly expanding based on a racially egalitarian labor-organizing philosophy. The Knights of Labor emphasized the potential of labor organizing to achieve political change, and stood in contrast to a trade union model of interest-group bargaining, which would become the prevailing ideology of the U.S. labor movement in a slightly later period.[98]

By the late 1890s, however, the Knights of Labor had collapsed and a racially exclusionary trade-union-organizing model had taken its place, led by Samuel Gompers of the American Federation of Labor.[99] These developments disappointed the hopes of Fortune and other civil rights activists of like political bent, though similar ideas continued to influence civil rights activism long into the future, as the work of Goluboff, Lee and many other historians shows. Although today Fortune's political vision appears naïve, it remains important in showing that the political and civil rights aspects of racial-justice strategies were long conceived as existing side-by-side with an economic and social reform agenda.

A focus on dual sides to the struggle for racial justice—on both political and civil rights *and* economic and social welfare reform—is evident throughout the twentieth-century history of the civil rights movement. Just as civil rights activism has historically involved a focus on racial justice in many dimensions, there is no reason such multi-dimensional perspectives should not continue to drive future directions. It is worth quickly summarizing some of the recent historical scholarship uncovering this rich, multi-dimensional history because of the light it sheds on future possibilities.

One important scholar on this topic is Risa Goluboff, who has convincingly traced the NAACP's work on matters related to economic justice in the 1940s.[100] As Goluboff explains, in the 1930s and 1940s:

> . . . civil rights law barely resembled the field as we now know it. In particular, both laypeople and legal professionals included not only the rights with which we associate the term today but also collective labor rights to governmentally provided economic security and affirmative rights to material and economic

98. *Id.* at 1503-06.

99. *See, e.g.*, Bernard Mandel, *Samuel Gompers and the Negro Workers, 1886-1914*, 40 J. NEGRO HIST. 34, 53-60 (1955) (tracing the rise of Jim Crow thinking by the American Federation of Labor and its President Samuel Gompers).

100. *See, e.g.*, RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS (2007). Goluboff emphasizes the civil rights movement's interest in these years on developing litigation theories to boost economic as well as political and civil rights. *See, e.g., id.* at 6 (explaining that her book will explore the potential of black workers' claims "to spur the creation of new civil rights doctrines"); *id.* at 13 (the book's goal is "to highlight the consequences of lawyers' strategic litigation choices about which cases to pursue and which to avoid, which harms to emphasize and which to ignore . . . ."); *id.* at 14 (lawyers should not only have established "norm[s] of racial nondiscrimination" but also "rights to work, to join a union, to participate in the labor market, to minimal subsistence").

> equality. Contemporaries saw an explicit connection between discrimination and economics, rights and reform, individual entitlement and government obligation. Lawyers who took the cases of black workers treated as civil rights issues labor-based and economic harms as well as racial ones, and they placed responsibility for rights protection within government as well as in opposition to it.[101]

Goluboff focuses primarily on NAACP and U.S. Department of Justice litigation efforts aimed at economic rights issues. Other legal scholars have pushed Goluboff's discoveries even further by investigating the non-litigation-focused initiatives of the NAACP. Sophia Lee, as already discussed, shows this breadth in the NAACP's work extending into the 1950s.[102]

Still other important work demonstrating the breadth of civil rights leaders' strategies abounds. Carol Anderson's *Eyes Off the Prize* shows the NAACP's efforts to use the principles of international human rights law to pursue its domestic civil rights agenda.[103] Although this NAACP campaign suffered defeat due to a lack of sufficient support by key actors including Eleanor Roosevelt, Anderson's work shows yet another creative and bold experiment in varied methods of providing pressure to bring about improved racial justice, this time using the international human rights paradigm.

Similarly, Tomiko Brown-Nagin's new book already discussed, as well as her prior work, has emphasized how socio-economic class issues affected civil rights activists' strategies. In tracing the clash of perspectives between a new generation of radical lawyers and other militants who led the SNCC direct-action sit-ins in Atlanta in the 1960s on the one hand, and older generations of race-activist lawyers on the other, Brown-Nagin demonstrates that neither of these generations held views about the relationship between courts and social change resembling the legal liberalist caricature. Her story is instead far more complex and interesting, exploring not only intergenerational conflict but also class and gender differences within the movement. Thus Brown-Nagin's initial focus is on Atlanta from the 1940s through the direct-action protests of the 1950s and 1960s. She then continues her examination of activism in that city through the 1970s, depicting the African American women involved in welfare rights organizing and the relationship of that work to the civil rights activism that came before it.[104]

Still another voice is that of Athena Mutua, who in the course of describing the Northeastern University School of Law Project on Civil Rights and Restorative Justice, argues for conceiving of "the civil rights era" as beginning

---

101. *Id.* at 5.

102. Lee, *supra* note 71.

103. CAROL ANDERSON, EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944-1955 (2003).

104. *See* BROWN-NAGIN, *supra* note 51.

in the 1930s and continuing to pursue a still unfinished radical agenda.[105] Mutua concludes that:

> . . . [T]he abbreviated story of the civil rights movement cuts it off from its roots in the protest activism of the 1930s and its wings in the black power movement. In doing so it not only excludes a host of people involved in the movement, people who passed their traditions on to future generations, but it guts the movement of its central message and goal of a broad egalitarian democratic order. That is, the movement recognized that both slavery and Jim Crow, as well as today's oppressive racial isolation, were not just racial systems meant to oppress and offend human dignity but also economic systems meant to facilitate the exploitation of black labor, to deny black material well-being, and to assist the few in hoarding the resources created by the many including th[ose] created by black people as a whole. [106]

Other interesting work exploring alternate strands of civil rights activism includes Thomas Jackson's tracing of the ways in which Martin Luther King, Jr. was working to connect ideas concerning racial justice with ideas concerning substantive economic justice.[107] Nikhil Pal Singh argues that the standard narrative of the civil rights movement "fails to recognize the historical depth and heterogeneity of black struggles against racism, narrowing the political scope of black agency and reinforcing a formal, legalistic view of black equality."[108] Focusing on the 1930s and after, Singh points to an internationalist group of black intellectuals who analyzed the connections between colonialism and racism, and further notes that "blacks were the one political constituency that consistently supported the expansion of social as well as civil rights, or the development of a full-employment welfare-state in the United States."[109]

In short, a large quantity of recent scholarship has made it abundantly clear that rich strains of thought and activism existed throughout the history of the civil rights movement that were connected with economic and social welfare concerns, class analysis and awareness, and the articulation of a rights discourse embracing far more than a negative nondiscrimination principle. The critique of legal liberalism as the dominant paradigm of the movement for racial justice is another myth that threatens to perniciously influence visions of the future by placing restrictive blinders on views of the past. Awareness of a far richer, more diverse, highly experimental past can point the way to a

---

105. Athena D. Mutua, *Restoring Justice to Civil Rights Movement Activists?: New Historiography and the "Long Civil Rights Era"*, *available at* http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=athena_mutua.

106. *Id.* at 52.

107. THOMAS F. JACKSON, FROM CIVIL RIGHTS TO HUMAN RIGHTS: MARTIN LUTHER KING, JR., AND THE STRUGGLE FOR ECONOMIC JUSTICE (2007) (exploring Martin Luther King, Jr.'s efforts to reclaim and further develop ideas connecting racial and economic justice).

108. NIKHIL PAL SINGH, BLACK IS A COUNTRY: RACE AND THE UNFINISHED STRUGGLE FOR DEMOCRACY 6 (2004).

109. *Id.* at 48, 54.

similarly rich and experimentalist future, which continues to embrace ambitious goals and refuses to be constrained by an awareness that some important goals, especially the lessening of economic inequality and hardship, have not yet been achieved. In thinking ahead to the future for civil rights law and policy, it may be that these unattained, but nevertheless historically prominent, goals require the most attention. Rather than running from as yet unsolved problems of vast economic disparities corresponding with (but not limited to) racial lines in our society, it may be that the future of civil rights activism should emphasize these areas of as yet unfulfilled concern.

IV. MYTH NUMBER FOUR: EFFORTS TO ADDRESS SOCIAL RESOURCE INEQUALITIES THROUGH CIVIL RIGHTS LAW HAVE LARGELY FAILED AND ARE DOOMED TO FAIL DUE TO THE LIMITS OF LAW IN REACHING PRIVATE SOCIAL ORDERINGS

The fourth and final myth I want to rebut relates to what I will call a "depressive turn" in civil rights scholarship. Legal scholars as varied as Derrick Bell, Jr., Michael Klarman, and Sam Bagenstos have engaged in this depressive turn.[110] The despair about disparate impact law discussed above is one example of it, but there are a great many others. Most generally described, this depressive turn looks at the many failures of attempts to achieve broad-scale structural reform through law and suggests that legal engineering cannot achieve such desired broad-scale or structural reforms.

There is, of course, much evidence to support the conclusions of these and other accomplished scholars pointing out the less-than-effective results of many legal reform efforts in the civil rights arena. Pollyannaish optimism or a refusal to deal with the problems of unintended consequences that bedevil all legal reform efforts, no matter how well intentioned, certainly do not help advance the cause of social justice. Certainly many very bad results have been produced

110. *See, e.g.*, KLARMAN, *supra* note 9, at 385-442 (arguing that *Brown* was counterproductive because it produced a ferocious backlash that slowed down change that would have happened through other means); Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 4 (2006) (arguing that "[t]here is little reason to believe that a structural approach to employment discrimination law will actually be successful."); Derrick Bell, Jr., *Diversity's Distractions*, 103 COLUM. L. REV. 1622, 1633 (2003) (arguing that civil rights campaigns intended to remedy racial barriers usually provide more benefit to whites than blacks); Derrick Bell, Jr., *The Unintended Lessons in* Brown v. Board of Education, 49 N.Y.L. SCH. L. REV. 1053, 1056 (2004-2005) ("*Brown* was not a revolutionary decision. Rather, it is the definitive example that the interest of blacks in achieving racial justice is accommodated only when and for so long as policymakers find that the interest of blacks converges with the political and economic interests of whites."); *id.* at 1059 ("Even when interest convergence results in a potentially effective racial remedy, that remedy will be abrogated as soon as it threatens the superior societal status of whites, particularly those in the middle and upper classes."); Derrick Bell, Jr., *Racial Realism*, 24 CONN. L. REV. 363, 375-78 (1992) (arguing that civil rights law and racial equality ideology will never change the permanent subordinate status of blacks).

by well meaning but misguided efforts at reform. At the same time, there can be significant, and ultimately destructive, normative consequences to the depressive turn in civil rights scholarship, just as there are normative consequences to all descriptive projects.[111] The descriptive conclusion that no good has been achieved as the result of prior efforts at social reform produces the normative conclusion that nothing ought to be tried, because such efforts never produce improvements, and may produce a worse state of affairs than originally existed. Such broad conclusions lead to a state of apathy or resignation worse than a failed experiment.[112] Imagine a country in which the NAACP had not fought its many civil rights campaigns. While critical scholars have become fond of attacking the hagiographic "legal liberalist" retelling of the NAACP's victories,[113] and while their critiques have an important point,[114] a world without efforts at social reform would surely be a far less just world overall than one in which activists have tried, often unsuccessfully, to achieve such results. Should the NAACP have litigated *Brown* or should it not have done so? That is a debate some scholars relish.[115] To me it seems a less than fruitful question, since assessments of what alternatives were open at the time requires a kind of counterfactual speculation that can never be conclusive.[116] But the question whether civil rights activists should have bothered to try to achieve broad-scale social change through the wide variety of experiments in which they engaged seems to me to require a definitive answer in the affirmative. A mature balance of cautious skepticism, on the one hand, and tenacious willingness to forge ahead, on the other, appears preferable to

---

111. *See* John Dewey, *Theory of Valuation*, *in* 2 INTERNATIONAL ENCYCLOPEDIA OF UNIFIED SCIENCE 1, 33 (exploring relationship between descriptive and normative inquiry in social science research).

112. *See, e.g.*, Joel F. Handler, *Post-modernism, Protest, and the New Social Movements*, 26 LAW & SOC'Y REV. 697, 719-28 (1992) (criticizing post-modernist activism for failing to attempt sustained, large-scale political change).

113. *See, e.g.*, Richard Delgado & Jean Stefancic, *The Racial Double Helix: Watson, Crick, and* Brown v. Board of Education *(Our No-Bell Prize Award Speech)*, 47 HOW. L.J. 473, 492 (2004) (critiquing traditional understandings of *Brown*).

114. For example, economic indicators show that on some key measures persons of color as a group in the United States today are faring even worse relative to whites than prior to the civil rights revolution. *See, e.g.*, JULIA B. ISAACS, THE BROOKINGS INSTITUTION, ECONOMIC MOBILITY OF BLACK AND WHITE FAMILIES 4 (2008) (summarizing results of a longitudinal survey finding that two of three white children from middle-income families grow up to have higher real family incomes than their parents while only one out of three African American children from the same income group surpass their parents in absolute income levels).

115. *See, e.g.*, KLARMAN, *supra* note 9, at 385-442 (arguing that means other than *Brown* would have led to faster racial progress); GERALD ROSENBURG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 156 (arguing that *Brown* was a mistake because it did little to bring about real change).

116. *See* Robert Chang, *The Fred T. Korematsu Center for Law and Equality and Its Vision for Social Change*, 7 STAN. J. C.R. & C.L. 197, 202 (forthcoming 2011) ("Rosenberg's and Klarman's backlash arguments . . . present an unprovable counterfactual).

disappointment at the fact that many attempts to achieve important but difficult social goals fail.

CONCLUSION

An analysis of the history of civil rights activism strongly supports the continued pursuit of experimental approaches to address fundamental economic inequalities and continuing structural differences in persons' life chances as affected by a combination of factors involving both class and race. Those issues are not something "other than" civil rights; they are the remaining issues on a civil rights agenda that stretches back to the founding ideas upon which T. Thomas Fortune formed the Afro American League. Some of that agenda has been fulfilled, but some of it has not. Continued pursuit of ideas aimed at achieving greater economic and social welfare equality is not only bold and forward-looking, but is also fully consistent with longstanding civil rights activist traditions.