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A Social Movement History of Title VII Disparate Impact Analysis

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A SOCIAL MOVEMENT HISTORY OF TITLE VII DISPARATE IMPACT ANALYSIS

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Abstract

This Article examines the history of Title VII disparate impact law in light of the policy and potential constitutional questions the Court's recent decision in *Ricci v. DeStefano* raises. My analysis shows that, contrary to popular assumptions, disparate impact doctrine was not a last-minute, ill-conceived invention of the EEOC following Title VII's passage. Instead, it arose out of a moderate, experimentalist regulatory tradition that sought to use laws to motivate employers to reform employment practices that posed structural bars to employment opportunities for racial minorities, regardless of invidious intent. Non-lawyer activists within the National Urban League first pioneered these experimentalist regulatory strategies at the state level. They then passed them on to the EEOC for use in the early years of its existence, backed by the potential litigation threat posed by the NAACP.

This Article argues that a closer look at the origins of disparate impact law should change the assessments of participants on all sides of the current debate about the future of this doctrine. Both critics of *Ricci* and disparate impact law should realize that this doctrine can do important legal work even if *Ricci* creates a new defense for employers who undertake good faith efforts to comply with disparate impact standards. Those who question the doctrine's constitutionality should recognize its legitimacy as a "soft" regulatory approach that can lead to an appropriate balancing of pro-employer concerns about preserving business discretion and enhancing business rationality with the civil rights movement's central concerns about identifying and dismantling intent-neutral but historically laden sources of unnecessary structural exclusion.

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I. INTRODUCTION: THE CURRENT CRISIS FACING DISPARATE IMPACT DOCTRINE

In its recent decision in *Ricci v. DeStefano*,[1] a five-to-four majority of the U.S. Supreme Court held that the City of New Haven, Connecticut (City), violated Title VII of the Civil Rights Act of 1964[2] when it administered a written exam to the City's firefighters to determine eligibility rankings for promotion but then decided not to certify the exam scores because they resulted in a severe "disparate impact" on the basis of race.[3] The underlying facts were socially and politically complex: The City had hired professional test developers to design a pencil-and-paper exam for promotions to the positions of fire captain and lieutenant, and these

1. 129 S. Ct. 2658 (2009).

2. Civil Rights Act of 1964, Title VII, Pub. L. No. 88-352, §§ 701–716, 78 Stat. 253, 253–66 (codified as amended at 42 U.S.C. §§ 2000e–2000e-17 (2006)).

3. For background on disparate impact doctrine, see *infra* Part II.

experts had undertaken extensive efforts to develop written questions relevant to the job at issue.[4] Despite these efforts to design a valid test, the City discovered after giving the exam that the rank ordering of candidates produced by its scores would have resulted in almost all white promotions.[5] After public hearings, the City's Civil Service Board deadlocked by tie vote and thus failed to certify the exam results.[6] Eighteen of the top scoring candidates, including Frank Ricci, a white firefighter who suffered from dyslexia and had gone to considerable expense and effort to hire readers in order to study for the test, sued the City. Their novel case theory alleged that the City had violated Title VII by considering race in deciding not to make promotions based on the exam results.[7]

Both the district court and Second Circuit rejected the plaintiffs' theory, but the Court held that the City should not have refused to certify the test results absent a "strong basis in evidence for the City to conclude it would face disparate-impact liability."[8] The Court further concluded on the limited summary judgment record before it that such a showing could not be made and took the unusual step of entering judgment in favor of the plaintiffs on this factually disputed, incomplete record.[9]

Many aspects of the Court's decision in *Ricci* disappointed civil rights supporters. Some critics argued that the Court should have remanded the case for further factual findings on the test's validity, and others noted that many fire departments have abandoned the use of pen-and-paper tests to select employees for leadership positions because the qualities most important to successful performance in such jobs, such as good judgment and the ability to remain calm under pressure, are better evaluated through assessment centers where candidates' performances in simulated emergency situations can be observed.[10] Still others expressed concern that *Ricci* may signal the end of disparate impact analysis by allowing a new "burden to third parties" defense through which employers can easily defeat disparate impact challenges.[11]

Most troubling for supporters of disparate impact law were the hints in *Ricci* of possible constitutional trouble ahead for disparate impact

4. *Ricci*, 129 S. Ct. at 2665–66.
5. *Id.* at 2666.
6. *Id.* at 2671.
7. *Id.* at 2667, 2671.
8. *Id.* at 2677.
9. *Id.* at 2681.
10. *See, e.g.*, 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).
11. Joseph A. Seiner & Benjamin N. Gutman, *Does* Ricci *Herald a New Disparate Impact?*, 90 B.U. L. REV. 2181 (2010). Excellent discussions of the issues raised by *Ricci* include Cheryl I. Harris & Kimberly West-Faulcon, *Reading* Ricci*: White(ning) Discrimination, Race-ing Test Fairness* (UCLA Sch. of Law. Pub. Law & Legal Theory Res. Paper No. 09-30, 2009), *available at* http://ssrn.com/abstract=1507344.

analysis. Although Justice Anthony Kennedy, writing for the majority, took pains to point out that "we need not reach the question whether respondents' actions may have violated the Equal Protection Clause,"[12] Justice Antonin Scalia, in his concurrence, exhibited no such restraint in explaining the ticking time bomb issue Kennedy's opinion narrowly avoided detonating. Justice Scalia observed 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?"[13]

The Court's judgment in *Ricci* occurred in a climate in which a number of legal scholars have begun to question the continued viability of disparate impact doctrine. In pointing out the doctrine's vulnerability to constitutional challenge, Justice Scalia cited a recent law review article by Professor Richard Primus.[14] Other scholars have argued that Title VII's core mandate prohibits intentional discrimination but not practices that produce disparate racial effects.[15] Professor Michael Selmi, for example, notes that plaintiffs in Title VII disparate impact cases rarely succeed today, and Professor Sam Bagenstos argues that courts generally have difficulty handling the kinds of "structural" discrimination claims involved in disparate impact cases.[16] These critiques have helped weaken the perceived legitimacy of disparate impact doctrine.

Such critiques of disparate impact doctrine often rely, either implicitly or more overtly, on a commonly held assumption that the EEOC invented disparate impact after passage of Title VII as a kind of last-minute, ill-conceived afterthought to support its case theory in *Griggs v. Duke Power Co*.[17] Even though questions concerning Congress's intent with respect to

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12. *Ricci*, 129 S. Ct. at 2664–65.

13. *Id.* at 2681–82 (Scalia, J., concurring).

14. *Id.* (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)).

15. *See, e.g.*, 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."); Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 732–45 (2006) (expressing reasons to conclude that disparate impact theory was a "mistake").

16. Bagenstos, *supra* note 15, at 3; Selmi, *supra* note 15, at 753.

17. 401 U.S. 424 (1970) (prohibiting, despite employer's lack of discriminatory intent, an employment practice that operates to exclude a suspect class when the practice cannot be shown to be related to job performance). For a sample of critiques of disparate impact, see, for example, HUGH DAVIS GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY, 1960–1972, at 249–50 (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 on effects and its disregard of intent."); *see also* Michael Evan Gold, Griggs' *Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 INDUS. REL. L.J. 429, 491–500 (1985) (arguing that Congress intended only to reach intentional discrimination). Other scholars have refuted Professor Hugh Davis Graham's thesis

disparate impact doctrine technically became moot after Congress explicitly codified the *Griggs* disparate impact test into the language of Title VII in 1991,[18] doubts about the historical pedigree of disparate impact doctrine linger in policy debates today.

In this Article, I take a new look at the historical origins of disparate impact analysis. I show that the civil rights activists who first pioneered strategies to combat structural employment subordination were based in the National Urban League (NUL), and they sought to use what I will refer to as "experimentalist"[19] regulatory techniques to induce employers to voluntarily scrutinize and revise traditional employment practices to open more employment opportunities for racial minorities. Indeed, at the earliest stages of the NUL campaign to address structural racial exclusion in employment, activists did not rely on law at all because the Court defined private employment as a sphere largely outside the reach of legal regulation. In 1945, when the State of New York passed the first employment antidiscrimination law to reach the private sector,[20] these civil rights leaders and sympathetic state regulators continued to rely heavily on experimentalist approaches that viewed law as a means of motivating employers to engage in voluntary self-scrutiny and revision of their employment practices to increase minority employment opportunities.

Somewhat surprisingly, the activists who pioneered these broad-based institutional reform efforts aimed against the structural racial exclusion in employment were not the movement's radicals but held moderate, pro-business views. The movement's more militant activists, especially lawyers from the NAACP, distrusted voluntarist strategies and wanted to press for victories in court to prove that employers continued to engage in

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about Congress's intent. *See, e.g.*, PAUL D. MORENO, FROM DIRECT ACTION TO AFFIRMATIVE ACTION: FAIR EMPLOYMENT LAW AND POLICY IN AMERICA 1933–1972, at 2 (1997) (tracing group rights approaches to the 1930s); Neal E. Devins, *The Civil Rights Hydra*, 89 MICH. L. REV. 1723, 1725, 1729–30 (1991) (critiquing Graham's thesis and showing that group rights approaches were well entrenched from the early days of the Kennedy administration); 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).

18. The language from *Griggs* was added to Title VII by the Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074 (codified as amended in 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006)), which rejected a Supreme Court decision that Congress viewed as unduly restricting disparate impact analysis. *See infra* Part II.

19. On experimentalism generally, see, e.g., Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 267 (1998) (defining democratic experimentalism as 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"); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1067 (2004) (developing an experimentalist view of how public impact litigation can and should work by providing a background legal threat that motivates the parties to negotiate solutions to complex institutional reform problems). On applying experimentalist approaches to contemporary employment discrimination problems, see Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 479–521 (2001).

20. 1945 N.Y. Laws 457–64.

bad discriminatory acts. This dynamic between litigation-centric militants and more moderate structural or institution-wide reform advocates existed both in the early years of New York's Ives Quinn Act enforcement and in the complementary enforcement efforts of the EEOC and NAACP in the early years of Title VII enforcement.

On the basis of these findings, I conclude that disparate impact doctrine today embodies a tension between experimentalist, incentive-shaping approaches to remedying employment subordination, on the one hand, and litigation-centric strategies aimed at proving unlawful discrimination, on the other. The current jurisprudential and scholarly "trouble" surrounding disparate impact analysis arises from a failure to appreciate this as yet unexplored tension within the social movement history underlying disparate impact doctrine.

A new understanding of this history is particularly important at this juncture in light of the debate about disparate impact doctrine currently taking place within the courts and among commentators. Although historical analysis does not in itself prove the policy benefits or constitutionality of disparate impact doctrine, it does reveal new considerations of importance to these questions. If the doctrine's origins lie in experimentalist alternatives to heavily litigation-centric approaches to discrimination law, then the views of all participants in the debate about the continued viability of disparate impact doctrine may require adjustment.

Part II of this Article offers a short background discussion of the contemporary policy debates about disparate impact analysis. Part III sketches the social and legal conditions that early civil rights activists faced in formulating strategies to tackle structural employment subordination. Part IV examines how these social and legal conditions both constrained and offered avenues of possibility for civil rights activism, and how that activism in turn affected those conditions. Part V analyzes the implications of my analysis, and Part VI offers a brief conclusion, bringing the history I uncover back to the key issues presented in the aftermath of *Ricci*.

II. A BRIEF PRIMER ON DISPARATE IMPACT ANALYSIS

Title VII of the Civil Rights Act of 1964[21] calls on employers to avoid using employment practices that disproportionately disadvantage persons on the basis of race or other protected characteristics unless the practice is "job related for the position in question and consistent with business necessity,"[22] and no alternative practice with less adverse effect exists.[23] The Court first approved disparate impact analysis—quite readily and

21. Civil Rights Act of 1964, Title VII, Pub. L. No. 88-352, §§ 701–716, 78 Stat. 253, 253–66 (codified as amended at 42 U.S.C. §§ 2000e–2000e-17 (2006)).

22. *Id.* § 2000e-2(k)(1)(A)(i).

23. *Id.* § 20002-2(k)(1)(A)(ii).

without analytic trouble—in its 1971 case *Griggs v. Duke Power Co.*[24] It continued to endorse this method of analysis in several subsequent cases under Title VII[25] and, quite recently, under the Age Discrimination in Employment Act[26] as well.[27] In 1989, the Rehnquist Court offered a severely restrictive interpretation of disparate impact analysis in *Wards Cove Packing Co. v. Atonio*,[28] but Congress quickly rejected it in the Civil Rights Act of 1991,[29] when it added statutory language to define the burdens of proof under that theory.[30]

Although the Civil Rights Act of 1991 rejected the restrictive interpretation of disparate impact analysis offered by *Wards Cove*, the disparate impact test remains difficult for plaintiffs. This is a fact upon which virtually all commentators agree.[31] Proving a disparate impact case requires both sophisticated statistical analysis to show disparate effects and identification of the precise practice causing these effects.[32] It is today very rare for plaintiffs other than highly sophisticated and well-funded litigants, such as the U.S. Department of Justice, to prevail under Title VII on a disparate impact theory. For this reason and because Title VII cases rarely succeed in general,[33] disparate impact analysis is far from a robust source of litigation victories today.

Even though plaintiffs rarely win disparate impact cases today, many

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24. 401 U.S. 424, 424–31, 436 (1970) (disapproving an employer's use of a high school diploma requirement and written tests that had a severe racial disparate impact where the employer had not evaluated whether these requirements were a "reasonable measure of job performance").

25. *See, e.g.*, Watson v. Forth Worth Bank Trust, 487 U.S. 977, 989–91 (1988) (holding that disparate impact analysis can be used to challenge subjective decision-making processes that produce significant racially disparate impact); Albemarle Paper Co. v. Moody, 422 U.S. 405, 427–34 (1975) (applying *Griggs* to disapprove an employer's use of written tests with a severe racial disparate impact without considering whether the tests measured job performance).

26. 29 U.S.C. §§ 621–634 (2006).

27. *See* Smith v. City of Jackson, 544 U.S. 228, 239–40 (2005).

28. 490 U.S. 642, 658–59 (1989) (holding that an employer need only offer evidence of a "business justification" for its challenged business practice and that plaintiffs in disparate impact cases have the burden of proof in rebutting the employer's proffered business justification).

29. Civil Rights Act of 1991, Pub. L. No. 102-166, §§ 105–106, 105 Stat. 1071, 1074–75.

30. *See* 42 U.S.C. § 2000e-2(k) (2006).

31. *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"); Selmi, *supra* note 15, at 734–43 (analyzing, with empirical analysis, the difficulty of proving disparate impact cases).

32. *See Smith*, 544 U.S. at 241 (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).

33. *See, e.g.*, Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 432–46 (2004) (presenting data showing plaintiffs' low chances of winning employment discrimination cases); Michael J. Zimmer, *The New Discrimination Law:* Price Waterhouse *Is Dead, Whither* McDonnell Douglas*?*, 53 EMORY L.J. 1887, 1943–44 (2004) (summarizing evidence that employment discrimination plaintiffs who allege claims other than sexual harassment fare much worse than plaintiffs in other types of lawsuits).

civil rights advocates see continuing importance in retaining this theory as an aspect of employment antidiscrimination law. Without disparate impact analysis, Title VII would only prohibit employers and their agents from engaging in invidious acts of prejudiced decision-making. Disparate impact supporters view a legal requirement that employers also attend to the *effects* of their employment practices, even those adopted without discriminatory motive, as key to the ongoing project of opening greater employment opportunities to workers whose social origins are in groups not traditionally advantaged within the host of institutions that pass on privilege in American society.

Supporters of disparate impact analysis also advance arguments based on the difficulty of proving hidden prejudice, the problems of subtle and subconscious bias,[34] and the benefits of encouraging employer rationality and fairness in employment practices, a policy that opens opportunities for all, not just minorities. Professors Cheryl Harris and Kimberly West-Faulcon demonstrate this point in analyzing the facts of *Ricci*: the use of an invalid test disserved far more whites than minorities in that very case.[35] As Professors Lani Guinier and Susan Sturm point out, if pen and paper tests do not measure the key aspects of job performance required for leaders of firefighting crews, such as good judgment under pressure, then it would be best, in terms of rationality and efficacy alone, to use procedures that better assess this key qualification.[36] Reevaluation of workplace practices with an eye to who is excluded and who is included can lead to many overall benefits, such as a better fit between employee evaluation procedures and job performance requirements and more rational consideration of a wider variety of the skill sets that are most important for particular jobs.[37] On this argument, disparate impact analysis does not require employers to forgo business benefits in the interests of racial diversity, but uses racial impact as a warning sign that should trigger scrutiny of the rationality or fit between means and objectives with respect to the employment practice in question.[38]

Popular perception sometimes conflates disparate impact analysis with

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34. *See, e.g.*, Shoben, *supra* note 31, at 607–13 (portraying disparate impact doctrine as a "mighty mouse" that can rescue meritorious cases that would fail under an intentional discrimination test).

35. Harris & West-Faulcon, *supra* note 11, at 64–69 (presenting in-depth analyses of the test in *Ricci*).

36. Guinier & Sturm, *supra* note 10.

37. *See* Steven R. Greenberger, *A Productivity Approach to Disparate Impact and the Civil Rights Act of 1991*, 72 OR. L. REV. 253, 258 (1993) (arguing that, "[D]isparate impact . . . foster[s] the creation and implementation of personnel practices which will insure that business accurately evaluates its applicants and employees."); *cf.* MARTHA MINNOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 7–9 (1990) (noting that policies of inclusion have many collateral policy benefits).

38. *Cf.* LANI GUINIER & GERALD TORRES, THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY 11–14 (2002) (using the miner's canary metaphor to highlight how attention to racial injustice can highlight policy deficiencies that threaten all citizens).

affirmative action,[39] but the two antidiscrimination concepts are actually quite different. Disparate impact analysis and affirmative action are similar insofar as both devices require some measure of race consciousness, but disparate impact analysis ideally leads employers to proactively design their employment practices to avoid disparate impact, thus obviating the need for the kinds of "back end" adjustments to the results of selection processes that are sometimes made in the name of affirmative action.[40]

The media have also tended to improperly conflate these two doctrines, especially in the wake of *Ricci*.[41] This confusion may be due to the Court's peculiar approach in that case, which more resembles its typical affirmative action analysis than the prescribed test for disparate impact. In focusing on the burden the City's action placed on innocent third parties who studied for the exam, the Court deployed its analytic technique of "burden balancing," which it typically uses in affirmative action cases, rather than Congress's rules for disparate impact analysis, which require searching inquiry into the validity of a test once adverse impact has been shown.[42]

Read narrowly, *Ricci* squarely stands only for the proposition that an employer may not *first* put employees or job applicants to the expense and effort of preparing for a high-stakes test or other employment process and *then* rescind the results on race-based grounds (at least not unless the evidence of the test's illegality is strong).[43] Thus, as Justice Ruth Bader Ginsburg noted in her dissent, it is possible that *Ricci* "will not have staying power."[44] But it is also possible that Justice Scalia's "evil day"[45] of

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39. *See, e.g.*, Juan Williams, *Affirmative Action's Untimely Obituary*, WASH. POST, July 26, 2009, at B1 (characterizing *Ricci* as signaling the death of affirmative action).

40. *Cf.* Grutter v. Bolinger, 539 U.S. 306, 361–62 (2003) (Thomas, J., concurring in part and dissenting in part) (noting angrily the cynical use of affirmative action adjustments to tests scores when an alternative would be to avoid using tests that produce disparate impact in the first place). From a historical perspective as well, the development of disparate impact analysis deserves attention separate from the rise of affirmative action because the rationales underlying activists' efforts in the development of these two doctrines differ in important respects. Historians have tended to focus exclusively on, and often to criticize, the rise of affirmative action. *See, e.g.*, ANTHONY S. CHEN, THE FIFTH FREEDOM: JOBS, POLITICS, AND CIVIL RIGHTS IN THE UNITED STATES, 1941–1972, at 232 (2009) (arguing that the conservative opposition caused the spread of state employment antidiscrimination statutes to be "too little too late," resulting in the rise of unhelpful affirmative action policies); 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 affirmative action in the first federal executive orders banning discrimination by government contractors); GRAHAM, *supra* note 17, at 472 ("The organized beneficiaries of affirmative action programs have entrenched themselves . . . ."); MORENO, *supra* note 17, at 189–90 (tracing and criticizing the rise of affirmative action).

41. *See, e.g.*, Williams, *supra* note 39 (describing *Ricci* as an affirmative action case).

42. *See, e.g.*, Ricci v. DeStephano, 129 S. Ct. 2658, 2676, 2681 (2009) (discussing burden balancing).

43. The majority holds that race consciousness in deciding to rescind results *after* test takers have endured an onerous testing process goes too far. *Id.* This holding does not address an employer's duty to avoid disparate impact in designing selection procedures in the first place.

44. *Id.* at 2690 (Ginsberg, J., dissenting).

45. *Id.* at 2682 (Scalia, J., concurring).

constitutional reckoning will soon be at hand, and if so, the general atmosphere of ambivalence about disparate impact, within both the Court and the legal academy, will undoubtedly influence those deliberations. Because that ambivalence arises in part from historical misimpressions, these bear evaluation at this critical juncture. This is the inquiry I undertake in Part III below.

III. THE CIVIL RIGHTS CAMPAIGN AGAINST RACIAL EMPLOYMENT SUBORDINATION

Civil rights activism around employment discrimination can be roughly divided into three periods. In a first period, extending to the late 1930s, civil rights activists viewed the structural subordination of African Americans in the private-sector labor market as a key aspect of racial injustice, but they did not view law as a promising means for attacking this problem. In a second period, from approximately 1940 until the early 1960s, activists developed legal strategies for attacking structural employment subordination, and especially focused on the enactment of state statutes that defined private-sector employment discrimination as unlawful. In a third period, the civil rights movement achieved a private-sector employment antidiscrimination edict in federal law as part of the Civil Rights Act of 1964, and the NAACP and NAACP Legal Defense Fund, Inc. (LDF)[46] immediately pursued disparate impact test cases, building on case theories already developed at the state level and leading to *Griggs* as one piece of such test case litigation.

In the narrative I present below, I discuss some of the highlights of this three-stage history, focusing especially on the thought and activism of early civil rights leaders that remain less well known today while pointing to the already well established literature documenting later stages.

A. *Early Social Movement Activism on Employment Subordination, 1830–1910*

Employment issues were on the radar screen of civil rights activists as early as the African American Convention Movement starting in the 1830s.[47] Indeed, the first national convention meeting was precipitated by an 1829 Cincinnati, Ohio, labor conflict between skilled African American craftsmen and white laborers.[48] In 1848, a Cleveland convention meeting

46. LDF was created as a separate entity than the NAACP in 1940 and became a completely autonomous organization in 1957. *See* JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION 19, 223 (1994). The two organizations coordinated their disparate impact campaigns. *See id.* at 413–14.

47. *See generally* HOWARD HOLMAN BELL, A SURVEY OF THE NEGRO CONVENTION MOVEMENT 1830–1861, at 13–15 (describing convention movement activities in more detail) (Arno Press, Inc. 1969) (1953); AUGUST MEIER, NEGRO THOUGHT IN AMERICA, 1880–1915, at 4–16 (Ann Arbor Paperback ed., Univ. of Mich. Press 1988) (1966) (discussing the convention movement).

48. *See* BELL, *supra* note 47, at 12 (explaining that the 1830 meeting was called based on the perceived need to respond to an "emergency [growing] out of the increasing friction between Negro and white laborers in Cincinnati").

developed a manifesto signed by Frederick Douglass and other leading African American abolitionists who expressed a determination, according to one newspaper account, "to abandon shaving beard[s], blacking boots, and carrying trunks or parcels—their ambition is roused to higher occupations."[49] To Douglass, "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."[50]

From 1869 to 1871, according to historian August Meier, convention meetings were "devoted largely to the problems of Negro workers."[51] At the 1869 Colored National Labor Convention, participants protested "the exclusion from apprenticeships and workshops practiced by trade unions," and organized a new national union that would "make no discrimination as to nationality or color."[52] Convention attendees pointed out that it was "suicidal for members of the laboring class to be arrayed against each other," and emphasized the close links among the issues of labor, education and political rights, proclaiming as their motto "liberty and labor, enfranchisement, [sic] and education!"[53]

This linking of labor and employment issues with political and civil rights concerns continued in the later 19th Century with the founding of the Afro-American League (AAL) in 1887,[54]and then W.E.B. Du Bois's Niagara Movement in 1905.[55] These organizations were short lived, and I have elsewhere explored in detail the transmission and transformation of ideas linking issues of economic and employment justice to civil and political rights through them, so I will not trace that process here.[56] Suffice it to say that recognition of the importance of tackling structural employment subordination was passed on, primarily through Du Bois, from those predominantly African-American, precursor organizations to the NAACP, founded by a racially mixed group of progressive activists in 1909.[57] Participants at the NAACP's founding convention engaged in a great deal of talk about the systemic barriers blocking African-American employment opportunity and economic advancement, but decided that the organization should focus its energies on a "political and civil rights bureau," which "would bend its energies" to "obtaining court decisions upon the disenfranchising laws and other discriminatory legislation."[58]

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49. *Great Abolition Movement—Manifesto of the Negros*, BENNETT'S N.Y. HERALD, *reprinted in* THE NORTH STAR, Nov. 19, 1848.

50. *Id.*

51. MEIER, *supra* note 47, at 8.

52. *Id.* at 9.

53. *Id.*

54. Susan D. Carle, *Debunking the Myth of Civil Rights Liberalism: Visions of Racial Justice in the Thought of T. Thomas Fortune, 1880–1890*, 77 FORDHAM L. REV. 1479, 1482 (2009).

55. *Id.* at 1526.

56. *See, e.g.*, Carle, *supra* note 54, at 1517–24.

57. *Id.* at 1530 & n.265.

58. Oswald Garrison Villard, *The Need of Organization*, *in* PROCEEDINGS OF THE NATIONAL NEGRO CONFERENCE 1909, at 197, 203 (William Loren Katz ed., 1969).

To handle non-legal economic and social matters, the NAACP's first board decided to partner with the National Urban League (NUL), a sister organization that had come into being in New York City in 1910, and to divide the work based on each organization's special strengths.[59] The NAACP and NUL divided their respective terrains according to the conceptual divide under the Court's constitutional jurisprudence between political and civil rights matters reachable by law, on the one hand, and social and economic matters largely outside the scope of law's reach, on the other.[60] Political and civil rights issues, amenable to test case litigation in the courts, would fall under the purview of the NAACP, which was already developing a national legal committee of leading lawyers.[61] Matters of social and economic justice, falling in the private sphere and thus reachable primarily through tactics of persuasion and voluntary action, would be assigned to the NUL.[62]

An evaluation of the early 20th Century civil rights campaign to combat employment subordination on the basis of race must start with an understanding of the social and legal conditions activists faced as they sought to develop effective strategies. These conditions included, most importantly, a massive and virtually airtight structural bar on opportunities for disfavored minorities' employment advancement, imposed by a complex set of institutions including law, tradition, white violence, and racially exclusionary trade union policies. At the same time, the U.S. Supreme Court's jurisprudence carved a legal landscape that blocked some avenues for reform but left open others. Activists responded to these social and legal conditions by fashioning strategies that fit their historical context.

1. Social Conditions

Subordination in the sphere of employment has long been a central aspect of racial injustice in the United States. Prior to emancipation, that subordination included not only the institution of slavery in the South, of course, but also the limiting of employment opportunities for free persons of color in the North.[63]

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59. *See* NANCY J. WEISS, THE NATIONAL URBAN LEAGUE, 1910–1940, at 65–66 (1974).

60. *Id.* at 65–66.

> In February 1911, representatives of the NAACP and the Committee on Urban Conditions met and agreed that the two organizations should cooperate without overlapping in their work. The NAACP would "occupy itself principally with the political, civil and social rights of the colored people," while the Committee on Urban Conditions would deal "primarily with questions of philanthropy and social economy."

Id. at 65 (external citation omitted).

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

62. WEISS, *supra* note 59, at 66 ("[T]he NAACP worked chiefly through political and legal channels and advocated public protest and agitation . . . . [while the] Urban League concerned itself primarily with seeking employment opportunities for blacks and providing social services . . . .").

63. *See* LEON F. LITWACK, NORTH OF SLAVERY: THE NEGRO FREE STATES, 1790–1860, at vii–

Although one might forecast that employment opportunities for African Americans would improve after emancipation, precisely the opposite trend occurred. Between the end of Reconstruction and the mid-20th Century, a time aptly termed the "nadir" of American race relations,[64] African Americans of all levels of educational and occupational attainment found themselves squeezed out of more desirable occupations and forced into the least remunerative and lowest-status employment sectors.[65]

The forces that produced such dramatic downward mobility on the basis of race across the broad range of occupational classifications were of several types. Prejudice in the hearts of individual employers and potential business clients was certainly a major factor, but it was not the only one. Indeed, even in the South, employers focused on lowering production costs recognized that African Americans could be hired for significantly lower wages than whites due to discrimination in a race-stratified labor market and viewed this labor pool as a desirable source of inexpensive labor.[66] The block that prevented these employers from employing African Americans was not their own prejudice but resistance from white workers, who exercised means ranging from legislation to violence to force African Americans out of desirable work.[67]

Such resistance took place in both the North and South. In the South,

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ix, 153, 155, 157, 178–80 (1961) (describing employment discrimination that existed in the antebellum North).

64. *See* RAYFORD W. LOGAN, THE NEGRO IN AMERICAN LIFE AND THOUGHT: THE NADIR 1877–1901, at ix–x (1954) (naming and defining the historical period of "the nadir"); *see also* RAYFORD W. LOGAN, THE BETRAYAL OF THE NEGRO FROM RUTHERFORD B. HAYES TO WOODROW WILSON 11 (New, Enlarged ed., Collier Books 1965) (1954) (noting in a new edition to his classic book the debate about dating the nadir and suggesting that it extended into the 1920s).

65. *See, e.g.*, JOHN DITTMER, BLACK GEORGIA IN THE PROGRESSIVE ERA: 1900–1920, at 32–34 (1977) (describing late 19th Century employment conditions for African Americans in railroads and textiles in Atlanta, Georgia); ALMA HERBST, THE NEGRO IN THE SLAUGHTERING AND MEAT-PACKING INDUSTRY IN CHICAGO 17 (1932) (describing change in white workers' attitudes towards African American meatpacking workers in the 1890s); JAMES W. LOEWEN, SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM 35 (Simon & Schuster 2006) (2005) (noting that, "Occupationally, blacks fared even worse" with the rise of Jim Crow. "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: THE MAKING OF A NEGRO GHETTO, 1890–1920, at 29–35 (1967) (describing decline in job prospects for working class African Americans in Chicago at turn of the 20th Century). Chicanos had similar experiences. *See* Juan Gómez-Quiñones, *The First Steps: Chicano Labor Conflict and Organizing, 1900–1920*, 3 AZATLAN CHICANO J. SOC. SCI. & ART 13, 22–24 (1972).

66. *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, "Colored 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.").

67. *See, e.g.*, 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.").

labor-related white violence included spontaneous mob lynchings[68] and more sustained campaigns by white-led trade unions in industrial sectors, such as railroads, construction, and textiles, to bar African Americans from all but the least desirable and most difficult jobs.[69] The 1909 railroad strike in Georgia, in which railway unions struck to insist on the removal of African American workers from more desirable operating positions, provides one of many such examples. The racial violence that ensued included the murder of African American workers, but the governor of the state refused to intervene, instead expressing support for the aims of the strikers.[70]

In the South, as Professor Michael Klarman has shown, Jim Crow was both an informal, private practice and was instantiated in public laws. The informal, private-actor aspects of Jim Crow, including the constriction of private employment opportunities for African Americans, went hand-in-hand with the public and legal aspects of that institution. Just as Jim Crow pervaded essential public and social goods such as education, housing, transportation, and public accommodations, it also had deeply entrenched aspects in the sphere of private employment.[71]

In the North, white violence aimed at excluding workers of color from desirable jobs often involved attacks against African American strikebreakers, whom employers sometimes imported by the trainload from the South, offering wages that were low by Northern standards but attractive in comparison to the race-segregated and economically depressed Southern labor market.[72] Such strike-related racial violence followed

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68. *See* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II 172–76, 339–40, 366–67 (2008) (documenting the extent and brutality of the peonage labor system imposed on African Americans in the timber, turpentine, and phosphate industries); W. FITZHUGH BRUNDAGE, LYNCHING IN THE NEW SOUTH: GEORGIA AND VIRGINIA, 1880–1930, at 113 (First Paperback ed. 1993) (1959) (noting that a deep cause of lynchings was "planters' reliance upon the threat of violence to . . . secure a hold over subdued and inarticulate black laborers"); GEORGE C. RABLE, BUT THERE WAS NO PEACE: THE ROLE OF VIOLENCE IN THE POLITICS OF RECONSTRUCTION 22–25, 35, 38, 49, 69 (1984) (describing labor competition between whites and African Americans as a cause of mob violence); ENCYCLOPEDIA OF AMERICAN RACE RIOTS, VOL.1: A–M 361 (Walter Rucker & James Nathaniel Upton eds., 2007) [hereinafter RACE RIOTS I] (describing various labor-related incidents of racial violence in the post-Reconstruction Era); ENCYCLOPEDIA OF AMERICAN RACE RIOTS, VOL. 2: N-Z AND PRIMARY DOCUMENTS 460 (Walter Rucker & James Nathaniel Upton eds., 2007) [hereinafter RACE RIOTS II] (describing various labor-related incidents of racial violence in the post-Reconstruction Era).

69. *See* DITTMER, *supra* note 65, at 32–34 (describing exclusion in Georgia of African Americans by most white trade unions and strikes by these unions to protest the hiring of African American workers).

70. *Id.* ("[Blacks were] stoned and beaten by mobs" during the strike and when "[t]he company asked [the] Governor . . . to protect the trains . . . the governor sympathized with the strikers and refused to act.").

71. KLARMAN, *supra* note 67, at 61–97 (discussing the complex interrelationship between informal practice and law regarding race in the Progressive era).

72. *See* HERBST, *supra* note 65, at 17–18, 18 n.1 (describing violence against African-American strikebreakers in the Pullman Strike of 1894); KLARMAN, *supra* note 67, at 64 ("Massive outbreaks of white-on-black violence erupted in East St. Louis in 1917 . . . killing an estimated

longstanding patterns of ethnic conflict between older and newer immigrant groups that characterized labor competition in many employment sectors.[73] But the salience of race as a social identity characteristic meant that race-based labor competition did not dissipate over time as it had for immigrant groups that eventually became ethnically "white." Instead, in cosmopolitan northern cities such as Chicago and New York, a race-based structural ceiling on employment mobility became ever more oppressive between the end of Reconstruction and the mid-20th Century as it became locked in deepening layers of history and tradition.

By the early 20th Century, Jim Crow attitudes pervaded the American Federation of Labor (AFL), which abandoned even the pretense of racially non-discriminatory policies.[74] Although some visionary labor leaders continued to advocate racially inclusionary organizing models,[75] policies of racial exclusion dominated the trade union movement until the rise in the 1930s of the far less racially prejudiced (though still less than perfect) Congress of Industrial Organizations (CIO).[76]

African American workers' downward mobility in the post-Reconstruction period affected not only members of the working class but also professionals, who saw their white client bases shriveled as the nation divided into separate worlds. Educated African American male professionals had long worked as lawyers, doctors, successful business owners, and public servants,[77] but the coming of Jim Crow negatively affected these employment sectors as well,[78] further contributing to the

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forty-eight . . . people . . . most of them black."); 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."); RACE RIOTS II, *supra* note 68, at 552–53 (describing 1919 national steel industry strike that led to white mob attacks on African American workers in many parts of the country).

73. *See, e.g.*, John R. Commons, *Labor Conditions in Meat Packing and the Recent Strike*, 19 Q.J. ECON. 1, 6–7, 28–30 (1904) (describing patterns of ethnic competition and conflict in the meat packing industry as successive waves of new immigrant groups vied for more desirable, higher skilled occupations dominated by members of immigrant groups who had arrived earlier).

74. *See* 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 former AFL President Samuel Gompers and the AFL).

75. William M. Tuttle, Jr., *Labor Conflicts and Racial Violence: The Black Worker in Chicago, 1894–1919*, 10 J. LABOR HIST. 408, 411–13 (1969) (describing progressive racial views of the president and secretary treasurer of a Chicago meat cutters union).

76. On the improved but mixed race record of the CIO, see Rick Halpern, *Organized Labor, Black Workers, and the Twentieth Century South: The Emerging Revision*, *in* RACE AND CLASS IN THE AMERICAN SOUTH SINCE 1890, at 43, 61–75 (Melvyn Stokes & Rick Halpern eds., 1994) (describing the complex history of CIO's record on race).

77. *See generally* WILLARD B. GATEWOOD, ARISTOCRATS OF COLOR: THE BLACK ELITE, 1880–1920 (1990) (describing the occupations of this African American "upper class").

78. *See* MARK SCHNEIDER, BOSTON CONFRONTS JIM CROW, 1890–1920, at 7 (2009) (describing how the tightening of professional opportunities motivated members of the African American elite to greater activism); MEIER, *supra* note 47, at 154 (discussing African American professionals' reaction to the rise of Jim Crow in Chicago); *see also* ALBERT S. BROUSSARD,

pervasive exclusion of persons of color from traditional routes for professional—and thus economic–advancement.

In short, although particularized acts of prejudiced employer decision-making certainly constituted one salient factor blocking African American employment mobility through the course of the late 19th and early 20th Centuries, third party agency also played a major role. White majorities used democratic processes to prevail on legislatures to enact sometimes facially and sometimes indirectly discriminatory laws to bar African Americans from jobs desired by native-born and European-immigrant whites, and tradition, mob violence, and organized campaigns by white trade unions, including exclusionary membership bars and striker violence, further contributed to the imposition of pervasive structural bars against employment opportunities on the basis of race.[79]

Statistics reflect the structural character of the employment discrimination early civil rights activists confronted as they developed reform strategies.[80] New York City, the country's largest metropolitan area at the turn of the 20th Century, is an illustrative example. There, NUL leader George Edmund Haynes prepared a 1905 report of African American employment patterns that played an important role in guiding the NUL's early strategy.[81] Haynes found that the overwhelming majority of African American wage earners worked in domestic and personal service while much more limited numbers were bookkeepers, accountants, and workers engaged in transportation, manufacturing, and mechanical occupations.

Among African American male wage earners, the most common occupations were in domestic and personal service (40.2%), followed by trade (20.6%), transportation (9.4%), manufacturing and mechanical pursuits (7.9%), and public service jobs (1.4%). Among African American women wage earners, domestic and personal services accounted for the vast bulk of paid employment (89.3%), followed by manufacturing and mechanical pursuits, mostly in the garment industry (5.5%), and trade (0.6%).[82] Few African American workers engaged in skilled trades or were

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AFRICAN-AMERICAN ODYSSEY: THE STEWARTS, 1853–1963 (1998) (chronicling the declining professional opportunities available to two generations of lawyers from a prominent African American family based in New York City); W.E.B. DU BOIS, THE PHILADELPHIA NEGRO 114–15 (Cosmo Books 2007) (1899) (discussing the late-19th Century struggle of African American lawyers in Philadelphia).

79. *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, 51–52, 58, 66, 75, 86 (2001) (compiling many examples of state and federal labor legislation that directly or indirectly discriminated against African Americans).

80. *See* BUREAU OF THE CENSUS, NEGROES IN THE UNITED STATES 57 (1904) (finding that in 1900, 83.6% of African Americans in gainful employment were agricultural workers, laborers, servants, waiters, or laundry workers).

81. *See* GEORGE EDMUND HAYNES, THE NEGRO AT WORK IN NEW YORK CITY 69, 72–76 (1912).

82. *Id.* at 73–76.

members of associated trade unions.[83] Fewer than 500 African Americans in the city served as proprietors of establishments, ranging from boarding houses, hotels, restaurants, and saloons to merchandising.[84] Business directories showed others owning barber, grocery, and tailoring enterprises, with the typical business being a small retail establishment with two or fewer employees and little floor space.[85] But these businesses were experiencing increasingly severe competition from white firms with larger capital bases and more extensive credit, as well as declining support among white customers.[86]

Not only these structural social conditions but also the contours of law affected civil rights activists' strategies, and it thus bears exploring why early 20th Century activism on employment discrimination took the direction that it did.

2. Legal Conditions

A key feature of the law that shaped early 20th Century race activism was the U.S. Supreme Court's constitutional jurisprudence. Until the mid-20th Century, the relevant test for the reach of civil rights law focused not on the intent versus effects standards so pertinent today, but on the distinction between public and private action. Private action in the economic realm was to late 19th and early 20th Century jurists generally not reachable through law, and thus, legislation aimed at protecting workers against discrimination—at least as applicable to able-bodied citizens, as opposed to legally infirm and weaker beings such as women—was rarely constitutionally permissible. The Court carved this jurisprudence in two lines of cases.

a. The Civil Rights Cases

In 1883, the Court decided *The Civil Rights Cases*, declaring invalid the Civil Rights Act of 1875,[87] which provided that all citizens of the United States "'shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations . . . applicable alike to citizens of every race and color.'"[88] The Court decided that this statute impermissibly sought to regulate action beyond that of the state itself by laying "down rules for the conduct of individuals in society towards each other."[89] In his dissent, Justice John Marshall Harlan disputed where the Court had chosen to draw the line between public and private action, arguing that Congress's power to legislate to remove the badges of

83. *Id.* at 82–83.
84. *Id*. at 97.
85. *Id*. at 107–08.
86. *Id*. at 123–24.
87. 109 U.S. 3, 25 (1883).
88. *Id.* at 9 (quoting Civil Rights Act of March 1, 1875, ch. 114, § 1, 18 Stat. 335).
89. *Id.* at 14.

inferiority associated with slavery should extend to "at least, such individuals and corporations as exercise public functions and wield power and authority under the state."[90] Noting that corporations such as railroads are granted special powers under law to carry out public purposes and are subject to state control for public benefit, Harlan reasoned that the right of a person of color to use the public services provided by such corporations was a fundamental freedom just as other state-provided civil and political rights were.[91]

The Civil Rights Cases met with passionate criticism among civil rights leaders,[92] but the Court's holding appeared clear: federal civil rights legislation could not seek to control the conduct of private actors. Activists detected room for expansion of the state action doctrine to cover quasi-public functions, as Harlan had argued, and focused on passing state public accommodations nondiscrimination statutes in a few northern states.[93] They also found their hands more than full seeking to fight various anti-civil rights legislative initiatives in the South. But one avenue of legislative activism they did *not* pursue was an effort to extend the reach of law into private-sector employment. This legal avenue was not completely barred by *The Civil Rights Cases*, which had addressed the power of the national government to legislate against racial discrimination; the question of each individual state's power to enact state legislation against discrimination was a separate one.[94] The states could regulate local matters, and some states did adopt legislation banning segregation in intrastate public transportation and accommodations, as already noted.[95] But even though activists did secure a handful of proactive state legislative initiatives on civil rights issues in the late 19th and early 20th Centuries, none ventured into the area of private-sector employment discrimination, giving rise to the question of why they did not attempt this legislative strategy.

b. *Lochner v. New York*

One part of the explanation lies in the *Lochner* Court's jurisprudence on labor regulation. That jurisprudence insulated employers from much government regulation (federal *or* state) on "freedom of contract" and/or

90. *Id.* at 36 (Harlan, J., dissenting).

91. *Id.* at 39.

92. *See generally* Marianne L. Engelman Lado, *A Question of Justice: African-American Legal Perspectives on the 1883* Civil Rights Cases, 70 CHI.-KENT L. REV. 1123 (1995) (discussing criticism of the *Civil Rights Cases*).

93. *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, *supra* note 78, at 418 (citing the 1887 Pennsylvania Civil Rights Act).

94. In its 1877 ruling in *Hall v. DeCuir*, 95 U.S. 485 (1877), the Court struck down a Louisiana statute that prohibited discrimination on account of color in transportation on the ground that it extended to interstate transportation, a field reserved exclusively to the federal government. This ruling did not, however, bar state regulation of intrastate affairs. *Id.* at 487.

95. *See, e.g.*, sources cited *supra* note 93.

commerce clause grounds. The Court in *Lochner v. New York*[96] struck down a state law setting maximum hours for male bakery workers and reached similar results in many more employment regulation cases,[97] continuing until President Franklin Roosevelt's Court-packing plan finally precipitated the end of its era of formalist jurisprudence and opened the way to greater regulation of the employment relationship during the New Deal.[98]

But this legal landscape only partly explains why civil rights activists did not seek to regulate private employment discrimination. The fact that they could have pursued a legislative strategy is clearly demonstrated by the counterexample of late 19th and early 20th Century white women reformers' pursuit of legislative strategies for worker protection laws well before the New Deal.[99] To be sure, these initiatives risked being struck down by the Supreme Court,[100] but these reform groups nevertheless continued to press for such laws. Civil rights activists clearly knew about this work because the two activist networks overlapped.[101] Thus, other factors must explain why civil rights leaders did not pursue legislative strategies to address racial harms in private employment until the New Deal.

One factor must have involved civil rights activists' realistic assessment of their relatively weak political power and need to conserve scarce resources for the most potentially winnable legislative campaigns, as well as their accurate perceptions that they would have met with insurmountable opposition from the politically powerful AFL. But another factor arguably

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96. 198 U.S. 45 (1905).

97. *See, e.g.*, R.R. Ret. Bd. v. Alton R.R. Co., 295 U.S. 330 (1935) (invalidating pension legislation for retired railroad workers); Adkins v. Children's Hosp., 261 U.S. 525 (1923) (invalidating minimum wage law for women); Hammer v. Dagenhart, 247 U.S. 251 (1918) (holding child labor legislation unconstitutional on commerce clause grounds); Southern Pac. Co. v. Jensen, 244 U.S. 205 (1917) (invalidating a worker's compensation statute); Adams v. Tanner, 244 U.S. 590 (1917) (invalidating a state law regulating employment agencies); Coppage v. Kansas, 236 U.S. 1 (1915) (deciding that a state could not prohibit "yellow dog" contracts as this interfered with liberty of contract); Adair v. United States, 208 U.S. 161 (1908) (providing that a statute could not prohibit discrimination in employment on the basis of labor union membership as this interfered with the right to personal liberty and property).

98. *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding the constitutionality of the National Labor Relations Act as a legitimate exercise of Congress's power to regulate interstate commerce); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 399 (1937) (upholding the constitutionality of a state minimum wage law for women on the ground that, "[R]ecent economic experience has brought into a strong light. . . . [t]he exploitation of a class of workers who are in an unequal position with respect to bargaining power . . . .").

99. *See generally* JULIE NOVKOV, CONSTITUTING WORKERS, PROTECTING WOMEN: GENDER, LAW, AND LABOR IN THE PROGRESSIVE ERA AND NEW DEAL YEARS 112, 132 (2001).

100. *See* cases cited *supra* note 97.

101. For example, Florence Kelly, the head of the National Consumer League, which spearheaded many of these legislative reform efforts, also sat on the board of the early NAACP. Susan D. Carle, *Gender in the Construction of the Lawyer's Persona*, 22 HARV. WOMEN'S L.J. 239, 256 & n.62 (1999).

at play involves activists' focus on the idea of becoming equal civil and political citizens.[102] To many late 19th and early 20th Century civil rights activists, freedom of contract did not appear as an impediment to their plans but was, to the contrary, a positive good.[103] Considered from the vantage point of slavery's legacy, freedom of labor *was* the point. The doctrine of formally equivalent rights on the part of employers and employees had helped liberate African American workers from coerced labor, as in peonage cases such as *Bailey v. Alabama*.[104] Under *Lochner*-era jurisprudence, to ask the state for employment protection would have seemed tantamount to an acknowledgment of inferior citizenship status or disability on the part of the workers so protected. Just such arguments of inferiority had been used to support protective labor regulation for women in cases such as *Muller v. Oregon*.[105] Civil rights activists understandably avoided strategies that would have involved asking the state for protections special to persons of color at this early stage in the development of strategies to combat employment subordination.

In short, law and legal ideologies shaped the social and political landscape within which civil rights movement activists planned their strategies and also arguably shaped their normative consciousness about what they wanted law to do. A campaign aimed at achieving passage of employment antidiscrimination law covering the private sector was beyond the scope of both what was possible and what was desirable in the eyes of civil rights activists prior to the New Deal.

Activists did begin to succeed in initiatives to require state and municipal (i.e., public) employers to avoid discrimination in their employment practices, and by World War I, they had begun to make arguments about the nondiscrimination duties of government contractors as well. But it would not be until World War II that serious efforts would get under way to extend the antidiscrimination mandate to private employment generally.

B. *The Early Employment Opportunity Work of the National Urban League, 1910–1930*

The NUL was well suited to handle the non-law, social and economic conditions work of the early 20th Century civil rights movement because social work had been the specialty of the two prior organizations that merged to create the NUL. These two organizations were the National League for the Protection of Colored Women, whose work had

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102. *Cf.* KEVIN K. GAINES, UPLIFTING THE RACE: BLACK LEADERSHIP, POLITICS, AND CULTURE IN THE TWENTIETH CENTURY 52, 107 (1996) (discussing the importance of respectability and "manhood rights" in early 20th Century civil rights activism).

103. This is most clearly true of the ideology of more conservative race leaders of the time, such as Booker T. Washington, who espoused a strong self-help, intra-group advancement or "lift by our own bootstraps" ideology. *See* MEIER, *supra* note 47, at 100–06 (analyzing Washington's employment ideology).

104. 219 U.S. 219 (1911) (striking down an Alabama peonage statute).

105. 208 U.S. 412, 421–23 (1908).

concentrated on providing assistance to African American women migrating to New York City, following a model pioneered by African American journalist and club woman Victoria Earle Matthews through her White Rose Mission, founded in 1897, and the Committee for Improving the Industrial Conditions of the Negro, which had been founded in 1906 by William Lewis Bulkley and others to help African-American workers acquire the skills, training, and willing employers to secure economically sustainable work, and "to educate whites about black capabilities and enlist their help in improving industrial conditions."[106]

After the merger, Bulkley became one of the NUL's most dedicated leaders while also continuing to work on a host of other civil rights and social betterment activities.[107] With distinguished academic credentials, Bulkley held the honor of being the first African American principal to be appointed within New York City's newly consolidated school system.[108] He initiated an evening program at his school to offer industrial and commercial training to youth,[109] hoping in this way to help his predominantly African American students learn trades through which they could improve their employment prospects.

In a 1906 article, Bulkley articulated his views about the causes of racial employment discrimination.[110] He argued that the cause was the nature of the structural caste system,[111] and pointed to three main aspects, namely: (1) bars to hiring by white-led unions,[112] (2) employer prejudice,[113] and (3) a systemic lack of training opportunities. In his 1909 speech at the NAACP's founding convention, Bulkley similarly pointed to the "unjust industrial restrictions" placed "upon us as a people,"[114] and addressed its many manifestations, such as the 1909 Georgia Railroad Strike then underway, in which white railroad unions had demanded the exclusion of African Americans from desirable operating positions. Bulkley attacked

106. WEISS, *supra* note 59, at 27.

107. On Bulkley's work with organizations other than the NUL, see GUICHARD PARRIS & LESTER BROOKS, BLACKS IN THE CITY: A HISTORY OF THE NATIONAL URBAN LEAGUE 11–12, 187 (1971).

108. WEISS, *supra* note 59, at 21. For a brief summary of Bulkley's educational history and professional background prior to this appointment, see *Colored School Principal: William L. Bulkley To Be Nominated to Public School No. 80*, N.Y. TIMES, Feb. 18, 1901, at 2.

109. *Id.* at 22.

110. William L. Bulkley, *The Industrial Condition of the Negro in New York City*, 27 ANNALS AM. ACAD. POL. & SOC. SCI. 128, 129–31 (1906).

111. *Id.* at 131.

112. *Id.* at 129.

113. Bulkley saw this factor as especially salient in the lack of opportunities in business. Bulkley described experiences he had in striving to place good students as office workers, only to receive the "expected reply that no [African American], however promising, was wanted." *Id.* at 130. Ardent as Bulkley was, the lenses of his historical period did not yet provide him with the perspective that such employer conduct was unlawful. Instead, Bulkley reported that in response to such experiences, he "heaved a sigh and went on." *Id.*

114. *See* William L. Bulkley, *Race Prejudice As Viewed from an Economic Standpoint*, *in* PROCEEDINGS OF THE NATIONAL NEGRO CONFERENCE 1909, *supra* note 58, at 89, 89.

the structures under which there are "classes of skilled labor which it is not permitted a Negro to enter," and further noted that "even certain vocations which belonged almost exclusively to the Negroes ever since the days of slavery are fast being closed against them," thus "keeping within the bounds of unskilled labor those who might do credit in the ranks of skilled labor."[115] In the North, Bulkley argued it was not "prejudice that keeps Negroes out of the industrial fields" as much as "the native white man and the foreigner['s]" jealous guarding of approaches to skilled labor.[116] Expressing optimism about the future, Bulkley described a strategy focused both on improved education and on the creation of increased economic and employment opportunities through activist appeals to employers for voluntary action.[117]

Bulkley was a civil rights radical, but other leaders and funders of the early NUL were far more moderate.[118] This mix of leaders meant that the NUL's character quickly took on a more conservative and staid quality than that of the NAACP.[119] The NUL is often criticized on this ground, dismissed for being the NAACP's more conservative cousin, but the contrast in the reputations of NUL and NAACP was a shrewd strategy, allowing the NAACP to engage in more strident political and legal demands without impeding the ability of NUL to put on a more conciliatory face in working with white employers. This difference permitted the NUL to pursue its central objective of achieving greater industrial opportunities for African American workers through voluntary persuasion directed toward the employer community. The NUL focused on voluntarist strategies, but at the same time, held a structural perspective on the problem of racial employment subordination.[120] Its leaders, many of whom were trained in sociology, applied a sociological perspective Reed has emphasized.[121]

Consistent with this philosophy, the NUL's early work in New York City focused on campaigns to persuade employers to hire African

115. *Id.* at 91.

116. *Id.* at 93–94.

117. *See id.* at 96.

118. Bulkley was a Niagara Movement member and anti-Bookerite, but many NUL leaders and funders supported Washington's accommodationist politics. *See* WEISS, *supra* note 59, at 26–27, 35–36.

119. *See, e.g.*, *id.* at 56 ("[T]he most advanced members of the NAACP were considerably more radical than their counterparts in the League."); *id.* at 60 ("What distinguished the NAACP most strikingly from the Urban League, however, was its strong concentration of radical black leaders who rejected accommodation and insisted upon outspoken protest and agitation to achieve immediate equality.").

120. *See* TOURÉ F. REED, NOT ALMS BUT OPPORTUNITY: THE URBAN LEAGUE AND THE POLITICS OF RACIAL UPLIFT, 1910–1950, at 4–5 (2008) (citing JESSE THOMAS MOORE, JR., A SEARCH FOR EQUALITY: THE NATIONAL URBAN LEAGUE, 1910–1961, at 32–34, 54–60 (1981)) (noting that later historians in a different "camp" from Weiss have emphasized that "the League's social-work focus stressed structural . . . remedies for inequality").

121. *See* REED, *supra* note 120, at 14–15, 17–19 (noting social science training and methods of other important NUL figures such as George E. Haynes and many later leaders).

American candidates.[122] At the same time, the NUL offered training programs and employment counseling and placement services so that job applicants would have the qualifications to interest employers. The NUL hoped to duplicate similar models in other major urban centers.[123]

NUL historian Nancy Weiss has pointed out that although the NUL took many of its goals and strategies from the settlement house movement, it did not in its early years work for legislative reform as settlement house workers did.[124] Weiss properly sees this as a somewhat curious fact, but does not explore how the law shaped NUL leaders' strategic decisions. As I have suggested in Part III.A.2, the constraints imposed by the U.S. Supreme Court's jurisprudence help explain why civil rights leaders did not pursue employment antidiscrimination legislation in this early period.

Another part of the NUL's early work involved efforts to reach out to the white-led labor movement,[125] then consolidating under a private trade union model after the demise of the Knights of Labor, which had been far more inclusive of African Americans.[126] The AFL's rise to dominance took place under the leadership of Samuel Gompers, whose attitude became increasingly racially prejudiced as the Jim Crow Era progressed.[127] The NUL and the NAACP were unsuccessful in their persuasive efforts at the time; a new day for labor on race issues would have to await the coming of the more racially inclusive Congress of Industrial Organizations (CIO) in the 1930s.[128]

The commencement of the great migration of African Americans to the industrial centers of the North with the onset of World War I[129] brought new challenges and opportunities to the NUL. Migration brought newcomers to the cities, which in turn, led to increasing race conflict and discrimination.[130] NUL leaders saw growing urgency to their goal of

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122. PARRIS & BROOKS, *supra* note 107, at 64, 110–12, 179–83, 208–09 (describing NUL activities aimed at persuading private employers to hire African Americans); WEISS, *supra* note 59, at 50, 66, 88.

123. WEISS, *supra* note 59, at 27–28, 90–91.

124. *Id.* at 88 ("[T]he Urban League in its early decades eschewed the legislative process. It never considered seeking congressional action to make equal employment opportunity the law of the land . . . . Instead, it tried to change individual practices in different business or cities by private, individual persuasion.").

125. PARRIS & BROOKS, *supra* note 107, at 50–51, 135–45 (describing NUL's largely unsuccessful efforts prior to 1930s to work with the AFL); WEISS, *supra* note 59, at 67; REED, *supra* note 120, at 81–91 (describing NUL affiliates' focus on working with labor).

126. For information on the Knights of Labor's more inclusive policies toward African Americans, see JOSEPH GERTEIS, CLASS AND THE COLOR LINE: INTERRACIAL CLASS COALITION IN THE KNIGHTS OF LABOR AND THE POPULIST MOVEMENT 7 (2007). *But see id.* at 50 (noting exclusion of Chinese laborers).

127. *See* Mandel, *supra* note 74, at 50, 53.

128. *See* Sumner M. Rosen, *The CIO Era, 1935–55*, *in* THE NEGRO AND THE AMERICAN LABOR MOVEMENT 188, 188 (Julius Jacobson ed., 1968).

129. *See generally* NICHOLAS LEMANN, THE PROMISED LAND: THE GREAT BLACK MIGRATION AND HOW IT CHANGED AMERICA (1991) (discussing the significance of the northward and westward migration of African Americans at the onset of World War I).

130. WEISS, *supra* note 59, at 122 (quoting NAACP spokesperson William Pickens).

expanding employment opportunities.[131] The war also highlighted the close relationship between the government and the private sector. This connection would become even clearer during World War II, but even during World War I activists saw opportunity in the government's spending on wartime defense to boost African American employment in defense-sector industries.[132]

C. *Consumer Boycotts and the Road to Private Employment Antidiscrimination Law, 1930–1945*

By the early 1930s, in the face of the Great Depression, the mood of African Americans, and the country as a whole, had become less patient and more pessimistic. The NUL, along with local and regional civil rights groups, found itself being asked to employ more confrontational approaches to persuade recalcitrant employers to change their hiring practices.[133] Learning from the tactics of the labor movement, NUL leaders began to see the benefits of using pressure tactics against employers to demand the hiring of persons of color.[134] Even some formerly staid NUL activists began to take to the streets—albeit in a dignified manner—to picket employers who refused to hire African Americans.[135] Some historians date the rise of a "group oriented" approach to assessing the presence of employment discrimination to the rise of this "Don't Buy Where You Can't Work" campaign.[136]

African American intellectuals debated the benefits and drawbacks of this tactic. Ralph Bunche, for example, argued that group-interest tactics served only to pit white and African American workers against each other and proved ineffective once pickets left anyway.[137] These debates would

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131. *Id.* at 123.

132. L. Hollingsworth Wood, *The Urban League Movement*, 9 J. NEGRO HIST. 117, 122 (1924) (discussing the NUL board chair report on its 1918 conference "on the Negro in industry," at which it urged the Department of Labor to work on "adjusting and distributing Negro labor to meet war and peace needs" (internal citations omitted)).

133. *See* WEISS, *supra* note 59, at 306–07.

134. *Id.* at 282.

135. *Id.*; *see, e.g.*, Kenneth Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before* Brown, 115 YALE L.J. 256, 302–03, 318 (2005).

136. *See, e.g.*, MORENO, *supra* note 17, at 30–31, 54.

137. Ralph J. Bunche, *The Programs of Organizations Devoted to the Improvement of the Status of the American Negro*, 8 J. NEGRO ED. 539, 543 (1939) (arguing that, "The philosophy of this movement is narrowly racial. . . . [and] could only result in a vicious cycle of job displacement . . . ."); *see also* T. Arnold Hill, *What Price Jobs*, 8 OPPORTUNITY 310, 310 (1930) (assessing the benefits and drawbacks of boycott campaigns and concluding that race competition over jobs would not solve the problem of jobs for all); Arthur M. Ross, *The Negro Worker in the Depression*, 18 SOC. FORCES 550, 553 (1940) ("[The campaign's] success was small, a pitifully weak reflection of displacement in the other direction. Most of the jobs obtained were lost when the organizations dissolved."); Mack, *supra* note 135, at 305 (citing Raymond Pace Alexander's *The Negro Lawyer*, 9 OPPORTUNITY 268 (1931), as noting with alarm the increasing competition between African American and white workers for limited jobs and arguing that civil rights activists should shift their attention to arguing for "the fundamental right to work, free from race influences"

continue long into the future, but by 1940, new legal avenues for change opened up, which enticed activists to attempt a legal-regulatory approach.

D. *Passage and Enforcement of the Nation's First State Statute Banning Private-Sector Employment Discrimination, 1945–1960*

A confluence of factors brought about the conditions for passage of a state law banning private-sector employment discrimination. The Great Migration, with its associated movement of African American workers into industrial employment during both World Wars, followed by their ejection at each war's end,[138] increased African Americans' voting power in the North and their vocal frustration about discrimination in employment. Proud contingents of African American soldiers returning from brave service in both wars conveyed important symbolism to both African Americans and whites.[139] At the same time, the rise of nationalist rhetoric and racial and religious hostilities in Europe shocked white Americans into a greater recognition of the perniciousness of race prejudice in their own society.[140] A number of developments signaled gradual cultural change, including the rise of the less racially prejudiced CIO[141] and some white religious groups' growing concern about racial injustice.[142]

The legal terrain was also shifting. A. Phillip Randolph, president of the first nationally powerful African American labor union, the Brotherhood of Sleeping Car Porters, threatened President Franklin Roosevelt with a massive march on Washington to protest race discrimination in employment by federal government contractors during World War II, leading to negotiations that resulted in the President's adoption of Executive Order 8802, which banned discrimination by government contractors during the war effort.[143] In the late 1930s, Roosevelt's Court-packing plan indirectly brought about the end of the *Lochner* Era, and Congress was able to pass, without the Court invalidating, a host of new labor laws, including the National Labor Relations Act and minimum wage and maximum hours laws for some employment sectors outside domestic service and agriculture. Civil rights leaders saw both of these pieces of legislation as contrary to the interests of many workers of color, and as likely motivated by racial bias as well,[144] but these statutes at least

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(internal citations omitted)); *id.* at 319 ("The boycotts produced a vigorous debate within civil rights politics.").

138. *See* WEISS, *supra* note 59, at 98, 107, 144.

139. *See, e.g.*, DEBORAH GRAY WHITE, TOO HEAVY A LOAD: BLACK WOMEN IN DEFENSE OF THEMSELVES, 1894–1994, at 114 (1999) (describing "[t]he 1919 triumphant march of the 369th United States Infantry regiment down New York's Fifth Avenue and uptown in Harlem").

140. KLARMAN, *supra* note 67, at 174.

141. *See* Halpern, *supra* note 76, at 61–62.

142. *See* CHEN, *supra* note 40, at 42–43 (describing religious organizations' work on employment antidiscrimination issues during the war period and after).

143. ERIC ARNESEN, BROTHERHOODS OF COLOR: BLACK RAILROAD WORKERS AND THE STRUGGLE FOR EQUALITY 188–90 (2001) (describing these negotiations).

144. On civil rights activists' perceptions of racial bias in these New Deal initiatives, see JOHN

showed the feasibility of new employment legislation approaches.

Thus, even at the close of World War II, civil rights activists faced an important strategic decision about whether to pursue protective employment legislation as a solution to the problem of employment subordination. Varied ideas developed through prior decades remained in play, including a voluntarist, racial uplift and liberty of contract strain; radical Marxist analysis; and antidiscrimination concepts.[145] Civil rights leaders chose the legislative route; however, in doing so, they did not abandon earlier strategic models based on entreating employers to engage in voluntary institutional self-analysis, but now with the specter of law as a more effective background threat to persuade them to engage in such efforts. Activists asked employers not only to dismantle blatantly exclusionary bars to African American employment but also to search for and eliminate other unnecessary impediments to increased participation of persons of color in their workforces. At this point, the issue of intent was by no means foremost in activists' minds. They sought broad-scale progress in hiring and employment advancement as the means for the systemic change necessary to reverse a long legacy of structural exclusion.

The first state to enact legislation banning private-sector employment discrimination was New York. Its statute, named the Ives Quinn Act after its sponsors, was passed in 1945 as the result of a highly effective coalition effort by civil rights, religious, political, and labor groups.[146]

1. The Campaign for Passage of the Ives Quinn Act

The coalition effort that produced the Ives Quinn Act had three main organizational leaders: the NUL, the NAACP, and the American Jewish Congress (AJC).[147] These organizations were joined by numerous local civil rights organizations, including African American, Puerto Rican, and Italian groups;[148] the CIO; and, ostensibly at least,[149] the AFL.[150] A broad

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B. KIRBY, BLACK AMERICANS IN THE ROOSEVELT ERA: LIBERALISM AND RACE 40–42 (1980); WEISS, *supra* note 59, at 273–75.

145. *See* Mack, *supra* note 135, at 300–02 (noting these several "frames" in play with respect to pre-Depression civil rights activists' analysis of the private labor market).

146. Leo Egan, *Anti-Bias Bill Foes Admit Defeat by 'A Highly Organized Minority,'* N.Y. TIMES, Feb. 22, 1945, at A1 (noting the bill's opponents blamed defeat on efforts of "the three major religious groups, the two largest labor union organizations, the two large minority political parties and numerous racial groups [who] arrayed themselves in favor of the measure").

147. *See* MARTHA BIONDI, TO STAND AND FIGHT: THE STRUGGLE FOR CIVIL RIGHTS IN POSTWAR NEW YORK CITY 105, 107 (2003). Ives Quinn covered discrimination on the basis of religion as well as race, which helped cement the coalition bonds between religious and civil rights groups. *See id.* at 15–16 (discussing shared interests and mutual collaboration between the AJC and NAACP).

148. *See* 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) (noting testimony of Italian Civic League about discrimination against persons of Italian descent).

149. *Id.* at 1249 (noting that the state Federation of Labor showed "decidedly less enthusiasm than CIO-affiliated unions").

150. *See* Leo Egan, *Anti-Bias Bill Splits Republicans in Albany*, N.Y. TIMES, Feb. 18, 1945, at

array of local and national religious organizations and their leaders also joined the effort.[151]

The campaign took almost a decade. Citizen pressure by way of "[f]requent letters and delegations directed toward Albany from New York City" led to the creation of the New York State Temporary Commission on the Condition of the Urban Colored Population, which documented in compelling detail the massive structural employment subordination faced by African American workers in the state.[152] The commission found that "the operation of deliberate as well as unconscious forces [restrict] the Negro to certain of the less desirable types of employment and generally [bar] him from the more desirable fields," such as the mercantile and financial industries, much factory work, and employment by public utilities, insurance companies, and banks.[153] African Americans' attempts to move into these desirable occupational fields "have been prevented . . . by the opposition of community forces variously motivated."[154] The commission concluded that employers' failure to hire African Americans was due more to "indifference" than to personal prejudice.[155]

Still locked in a *Lochner*-era mind set, the commission argued that the "employment policies of private employers constitute a field not easily susceptible to legislative action."[156] Nevertheless, the commission proposed thoughtful remedial steps that helped put in motion the broad legislative fix it could not yet embrace.[157]

10E ("Supporting [the bill] are Negro groups, Jewish groups, several other religious groups, the Congress of Industrial Organizations, the American Federation of Labor, the American Labor party, the Liberal party and the Democratic membership . . . [of the Legislature]."); *Dewey Intervenes for Anti-Bias Bill*, N.Y. TIMES, Feb. 16, 1945, at 21 (describing meeting of the state governor with the Citizens' Committee on Harlem to confer on the bill and the role of the New York Urban League and other organizations in lobbying for its passage); *90 Groups to Urge Anti-Racial Bill*, N.Y. TIMES, Feb. 19, 1945, at 18 (listing representatives of church groups and others slated to testify in favor of the bill).

151. *New York: Against Discrimination*, N.Y. TIMES, Feb. 25, 1945, at 2E (noting that representatives of labor, African American, and Protestant, Catholic and Jewish organizations spoke in favor of the bill); *see* sources cited *supra* note 150.

152. STATE OF N.Y., REPORT OF THE NEW YORK STATE TEMPORARY COMMISSION ON THE CONDITION OF THE URBAN COLORED POPULATION TO THE LEGISLATURE OF THE STATE OF NEW YORK 5 (1938).

153. *Id*. at 16.

154. *Id.* at 17. It noted that African American boycott campaigns had sometimes "won slight concessions," but these had been temporary and the number of jobs gained small. *Id.*

155. *Id.* at 18.

156. *Id.* at 19.

157. Using an analysis similar to Justice Harlan's *Civil Rights Cases* dissent, the commission proposed that large private institutions, such as banks and insurance companies, which "enjoy a measure of statutory protection" and thus possess a "quasi-public character," could be subject to antidiscrimination regulation on the ground that "[t]he State has a special obligation in this field." *Id.* at 42–43. The commission further suggested that the state require public employers to adopt reforms, such as limiting the discretion of appointing officers, engaging in more regular and publicly announced procedures, requiring hiring officers to maintain records of and state reasons for

The momentum for a broader legislative fix soon swept past the commission with the entry of the United States into World War II.[158] Concerns about ensuring full employment in wartime jobs led several Harlem legislators to push for fair employment legislation barring discrimination by wartime defense contractors, and the governor established a temporary War Council Committee on Discrimination in Employment to deal with complaints of job bias. When the war ended the commission recommended that it be given permanent status, and hearings highlighted the need for comprehensive legislation to prohibit discrimination on the basis of race and religion by public and private employers alike.[159] Legal commentators debated the constitutionality of such a measure, with supporters suggesting that employers' Lochnerian freedoms from labor regulation had already "been whittled away" by other labor regulations and that the public interest in banning discrimination outweighed the employer's liberty interests.[160] Opponents fought back with their own legal and political arguments, especially claims that the measure would intensify, rather than eliminate, discrimination and promote quota hiring and promotions.[161]

After several years of battle, the Ives Quinn coalition's coordinated political pressure prevailed, and the legislation passed both houses of the legislature by impressive margins, after which a supportive governor, the liberal Republican Thomas E. Dewey, quickly signed it into law.[162]

The text of the Ives Quinn Act defined "[t]he opportunity to obtain employment without discrimination because of race, creed, color or national origin" as a civil right protected both by the state's police power and state constitution civil rights provisions.[163] It explained that the Act reached all defined employers, labor organizations, and employment agencies.[164] In an interesting choice reflecting the recognition that factors other than employer prejudice were keeping employees out of jobs, the Act defined it as unlawful for employees and other third parties to "aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this

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the outcomes of selection processes, and instituting formalized procedures to regulate promotion, salary increases, and retention, all with an eye to "bringing to light, and correcting" race discrimination problems. *Id*. at 38, 42–43. Finally, the commission detailed the evidence it had collected about discrimination by labor unions, and proposed prosecuting them on unfair labor practice theories and possibly enacted new legislation in this area as well. *Id*. at 71.

158. This phase of Ives Quinn's legislative history is well told by Chen, *supra* note 148, at 1242–45.

159. *See* Note, *Legislative Attempts to Eliminate Racial and Religious Discrimination*, 39 COLUM. L. REV. 986, 994 (1939).

160. *Id.* at 993.

161. On the arguments raised by the bill's opponents, see generally Chen, *supra* note 148, at 1249–51.

162. Leo Egan, *Anti-Bias Bill Is Passed, 109-32, by Assembly Without Amendment*, N.Y. TIMES, Mar. 1, 1945, at 1; Chen, *supra* note 148, at 1258 (noting that the Senate margin was 49–6); *Id.* at 1261 ("[Governor] Dewey signed Ives-Quinn into law on March 12, 1945.").

163. 1945 N.Y. Laws 458.

164. *Id.* at 458–59.

article."[165]

To implement its provisions, the Act established a new agency, the New York State Commission Against Discrimination (SCAD).[166] It authorized SCAD to conduct investigations and prosecute charges it found to be meritorious before an adjudicatory branch in an administrative process.[167] Civil and criminal fines of up to $500 and one year's imprisonment could be imposed for failure to comply with SCAD orders or procedures,[168] but before SCAD could prosecute violations, the Act required SCAD to engage in conciliation, mediation, and other persuasive means to resolve any complaint it found justified.[169]

The work of giving life to Ives Quinn lay in the enforcement choices of regulators. Those choices focused on pushing broad-scale, structural change by using law as an incentive-creating backdrop to induce employers to self-scrutinize their traditional employment practices. SCAD regulators were less keen on case-by-case litigation, a view that would bring them into disagreement with civil rights litigators.

2. SCAD's Enforcement Work

Nothing more graphically demonstrates the historical origins of SCAD in the work of the NUL than the transfer of long-time NUL leader Elmer Anderson Carter, editor of NUL's *Opportunity* magazine, to SCAD's five-person commission and eventually to the position of chair.[170] Carter, an African American, a Republican, and a Harvard University graduate, had the credentials to mollify the business community and, at the same time, from the perspective of Ives Quinn supporters, was an impressive pick due to his long experience as a civil rights leader.[171] Carter's publications examining race discrimination in employment demonstrated his understanding of the problem he had been appointed to address.[172]

Carter perceived the key to Ives Quinn's potential effectiveness to lie in SCAD's enforcement strategies.[173] Consistent with the NUL's long-standing philosophy, Carter was a strong advocate of encouraging

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165. *Id.* at 461.

166. *Id.* at 459.

167. *Id.* at 461–62.

168. *Id.* at 463–64.

169. *Id.* at 461–62.

170. *See* MORENO, *supra* note 17, at 116–17, 144.

171. *Carter Will Head State's Bias Unit*, N.Y. TIMES, Jan. 28, 1959, at 19; WEISS, *supra* note 59, at 232.

172. Carter frequently used his editorial seat to survey and critique employer and labor union progress on minority employment. *See, e.g.*, *Editorial: The Defense Industry*, OPPORTUNITY, Oct. 1941, at 290 (describing some, but not sufficient, improvement in defense-industry minority employment); *Editorial: Industrial Democracy*, OPPORTUNITY, May 1941, at 130 (arguing that unions should place race discrimination on par with "other industrial problems").

173. *See generally* Elmer A. Carter, *Practical Considerations of Anti-Discrimination Legislation: Experience Under the New York Law Against Discrimination*, 40 CORNELL L.Q. 40 (1954) (discussing the success of the enforcement of the Ives Quinn Act).

voluntary compliance,[174] as were the bill's Republican supporters in the state legislature.[175] SCAD focused its resources on education and outreach campaigns, publishing educational literature and meeting with major employer groups to encourage compliance with Ives Quinn's antidiscrimination mandate.[176]

According to SCAD reports and some external accounts, employer resistance to complying with Ives Quinn was far less than might have been expected.[177] Statistical reports began to show promising gains within a few years in African American women in clerical sales jobs and men in semi-skilled jobs, with corresponding declines in their concentrations in domestic and service occupations.[178]

Not all those involved in the enforcement process saw the glass as nearly so full, however. In an initiative led by assistant special counsel Marian Wynn Perry,[179] the NAACP pursued public media campaigns and

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174. *Id.* at 41 (describing "tremendous significance in the administration of the new statute . . . of individual employers [that] voluntarily abandon previous discriminatory hiring practices," and lauding "business concerns, some of which employ thousands of people" that "elected to move swiftly toward compliance without coercion," including "one of America's great life insurance companies which employed a Negro with exceptional experience in the field of human relations as one of its personnel officers to see to it that hitherto excluded groups would have a fair chance"); *see also id.* at 50 (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").

175. *See, e.g.*, *Ives Sees Promise in Anti-Bias Law*, N.Y. TIMES, May 29, 1945, at 15 (reporting on Republican Assembly leader Irving Ives' speech to the Citizens Committee on Harlem warning that frequent use of the penalties available under the Act would "indicate 'that something is fundamentally wrong' which the law cannot correct," and stating his opinion that the objectives of "'conference, conciliation and persuasion'" could be attained "through 'united community effort'").

176. *See* N.Y. STATE COMM. AGAINST DISCRIMINATION, ANNUAL REPORT 13–14 (1946) (describing SCAD's broadly targeted education campaign aimed at inducing voluntary compliance).

177. *See, e.g.*, Carter, *supra* note 173, at 41–42. Carter claimed that "[w]ithin an incredibly short time Negro men and women began to appear in the personnel of companies that never before had employed them," and he argued that this was because the Act "gave to employers who perhaps had harbored a genuine desire to end discriminatory hiring practices a rationale which was unassailable. To their questioning or disapproving colleagues or to a resentful labor force they could say, this is the law." *Id.* at 42; *see also* BIONDI, *supra* note 147, at 98 (noting that SCAD advertised with pride during its first decade that "it had not forced compliance in a single instance").

178. *See, e.g.*, Morroe Berger, *The New York State Law Against Discrimination: Operation and Administration*, 35 CORNELL L.Q. 747, 792 (1950). Berger reported that, whereas in 1940 64% of working African American women in New York City were in domestic service and 40% of men were in service occupations, by 1947, these proportions had declined to 36% and 23%, respectively. *Id.* These changes were the result of a variety of factors, including not only Ives Quinn but also the federal wartime FEPC and war-related labor demands. *Id.*; *see also* REED, *supra* note 120, at 163 (describing improvements in employment statistics that the Urban League of Greater New York attributed to its work and SCAD's work).

179. Perry, a 1943 Brooklyn Law School graduate, had been secretary of the Constitutional Liberties Committee of the New York National Lawyers' Guild. NAACP Legal Director Thurgood Marshall met her during the campaign for Ives Quinn and hired her to handle employment and housing discrimination cases in New York, including litigation over recruitment and hiring

enforcement actions where it viewed SCAD as doing too little.[180] The NAACP filed letters with the agency, protesting an insufficient volume of litigated cases. The social action committee of the AJC pitched in to help conduct a survey of employment agencies specializing in white collar jobs, which found that only about one quarter were complying with the new law.[181] Another joint initiative of the NAACP, Urban League of Greater New York, and AJC sought to hire a full-time professional to "stimulate the filing" of SCAD complaints, especially "test cases" aimed at "large employers, strategic industries or job classifications, or novel questions of law."[182] This project, the organizations announced, had the goal of "test[ing] employer compliance with the law by stimulating, [sic] large scale applications from minority groups," to allow a statistical showing that employers could not have the pretext that arises for individuals.[183] NAACP Secretary Walter White lambasted the agency for long delays in processing cases and for spending too much time on press releases and pamphlets rather than on "attacking discrimination at its roots."[184]

SCAD and the NAACP continued to argue about enforcement strategies for many years, but they also sometimes collaborated on the development of new initiatives and case theories. These collaborations sometimes resulted in prototypical disparate impact cases, decades before *Griggs*. SCAD, for example, investigated race discrimination complaints sent by the NAACP involving hiring and promotions by General Motors, including the absence of African American foremen and office workers. On investigation, SCAD found "'certainly not the kind of compliance which

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practices of contractors involved in construction of the Brooklyn Battery Tunnel. *See* MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961, at 35, 46 (1994); PAPERS OF THE NAACP, Group II, Box A 457, folders entitled "New York State Commission Against Discrimination, 1945–46 & 1947–53" (Library of Congress) (containing various correspondence to and from Perry regarding Ives Quinn and NAACP enforcement efforts); BIONDI, *supra* note 147, at 102–04 (describing Perry's work). For more on the NAACP's work on Ives Quinn, see Risa Lauren Goluboff, *"Let Economic Equality Take Care of Itself": The NAACP, Labor Litigation, and the Making of Civil Rights in the 1940s*, 52 UCLA L. REV. 1393, 1416–17 (2005).

180. *See, e.g.*, *Lax Enforcement of Job Law Seen*, N.Y. TIMES, Feb. 20, 1949, at 48 (reporting that the Committee to Support the Ives Quinn Act worked out of the headquarters of the Harlem Urban League, where a paid secretary recorded discrimination cases and aided complainants in filing charges, and that the NAACP, League and AJC had charged that SCAD was not processing enough cases); Berger, *supra* note 178, at 785–86 (further describing activities of Committee to Support the Ives Quinn Act).

181. *See* Letter from Edward Lawson, to Marian Perry, NAACP (Feb. 26, 1946), *located at* PAPERS OF THE NAACP, Group II, Box A 457, folders titled "New York State Commission Against Discrimination 1945–46" (Library of Congress).

182. Press Release, NAACP, A Project to Promote Better Enforcement of the New York Ives-Quinn Law (Jan. 19, 1948), *located at* PAPERS OF THE NAACP, Group II, Box A 457, folders titled "New York State Commission Against Discrimination 1947–53" (Library of Congress).

183. *Id.*

184. Statement of Walter White, NAACP Secretary, re SCAD (Jan. 22, 1946), *located at* PAPERS OF THE NAACP, Group II, Box A 457, folders titled "New York State Commission Against Discrimination, 1945–46" (Library of Congress).

one would hope for in a giant industrial organization which is so much the symbol of American genius and enterprise,'" and "recommended that the company broaden its recruitment base for white collar jobs."[185]

Another initiative concerned a building trades apprenticeship program that had previously excluded African Americans.[186] SCAD worked with New York University (NYU) to develop a pen-and-pencil test to select an apprentice class, only to find that this test had a severe disparate impact, with only one African American of sixty-five obtaining a passing score. For the next apprenticeship class, SCAD directed NYU to redesign the test; this time, the pass rate for African Americans and Puerto Ricans turned out to be a far more acceptable eleven out of thirty-three.[187]

In still another years-long initiative, SCAD worked with labor and community groups to encourage New York's vast hotel industry, an employer of many African Americans, to develop more white-collar jobs for them. SCAD persuaded employers to set up on-the-job training programs to prepare African American entry-level workers for such jobs, as well as to fund an industry-wide committee on employment and promotional opportunities, administered by paid staff charged with carrying out an "action plan."[188]

The hotel industry became the locus of a disparate impact case when Shellman Johnson, an experienced African American hotel worker, filed a complaint against an "East Side hotel" that maintained a policy of considering for employment only applicants with at least five years of experience in another east side hotel.[189] SCAD pursued the case before an investigating commissioner on a theory that emphasized the policy's effect. As the final opinion pointed out, because few if any African Americans had the requisite five years of "east side experience," such a rule "can only be considered a prohibition against the employment of Negroes."[190]

In its first decades, SCAD rarely litigated in court—a strategy that, as one historian has pointed out, left the way open for SCAD to develop what was clearly a disparate impact approach to its mission.[191] When SCAD did litigate, it did so in a seemingly carefully chosen case involving religious discrimination, where it succeeded in obtaining helpful precedent that blurred the line between intent and effects theories of discrimination. The

185. MORENO, *supra* note 17, at 129.

186. *See* State of N.Y. EXEC. DEP'T, N.Y. STATE COMM'N FOR HUMAN RIGHTS, Annual Report 1965, at 20 (1965) (discussing a case involving the Sheet Metal Workers Union).

187. *Id.* at 20–21.

188. *Id.* at 22–24.

189. Determination After Investigation at 1–2, Johnson v. Ritz Assocs., Inc, C-12750-66 (on file with author); *see also* George Cooper & Richard B. Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598, 1601 (1969) (including a discussion of the facts of this case by law professors who helped formulate the case theory in *Griggs*).

190. Determination After Investigation, *supra* note 189, at 2.

191. *See, e.g.*, MORENO, *supra* note 17, at 117 ("[B]y staying out of court, the SCAD left the door open for the disparate-impact standard of discrimination, since the disparate-treatment formula was not tested and articulated in case law.").

Court of Appeals of New York affirmed a finding of discrimination on the basis of religion, based solely on a prospective employer's persistent inquiry into an applicant's maiden name, noting that employers "intent on violating the Law Against Discrimination" were likely to pursue such practices "in ways that are devious, by methods subtle and elusive."[192]

The New York Court of Appeals' sensitivity to the difficulties of proving intentional discrimination reflected an ongoing discussion among observers and activists about how to interpret Ives Quinn's mandate. The statute's enactment represented a major development, and it therefore garnered much discussion among experts in business, labor relations, and law. Many of the hot-button issues still debated in the field surfaced for the first time in this discourse. One of these, not surprisingly, involved the question of intent. On this there was no need to start afresh because similar issues had already arisen in implementing the unfair labor practice provisions of the National Labor Relations Act (NLRA), which prohibited discrimination against employees for exercising their protected rights under that Act.[193] The National Labor Relations Board and the courts were developing standards of proof for detecting discriminatory intent[194] that could guide interpretation of Ives Quinn as well. The idea that proof of intentional discrimination *sufficed* to establish an unlawful act under Ives Quinn thus was never an issue; the big question was instead whether intentional discrimination was *necessary* to establish a violation.[195] Here, the policy objectives of the NLRA and Ives Quinn were not necessarily the same, and commentators began a heated debate about this question, which became more urgent as Ives Quinn became the model for proposed federal employment antidiscrimination legislation.[196] As often happens today, the

192. Holland v. Edwards, 119 N.E.2d 581, 584 (N.Y. 1954).

193. *See* National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169 (2006)); *see also* 29 U.S.C. § 158(a)(3) (defining as an unfair labor practice "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization").

194. *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 29, 45–46 (1937) (describing the task of determining whether an employer's true motive was an unlawful or legitimate one); Associated Press v. NLRB, 301 U.S. 103, 131–32 (1937) (sorting between employer's "ostensible reason" and actual reason for an employee's discharge).

195. One insightful commentator, writing in 1949, argued that "discrimination may exist independently of malice or intention to discriminate," noting that "SCAD has held that while intention to discriminate is not an essential element of a violation of the Anti-Discrimination Law, the good faith of the respondent will be considered in determining" the remedy. Note, *An American Legal Dilemma—Proof of Discrimination*, 17 U. CHI. L. REV. 107, 109 & n.10 (1949) (citing 1948 SCAD Annual Report). This author also presciently analyzed the potential uses of statistical evidence and burden shifting devices, offering proposals much like those the courts would develop in later decades. *See, e.g.*, *id.* at 110 ("The question arises . . . whether the law in dealing with cases of group discrimination may make use of an inductive process [using statistics] similar to that used by the sociologist."); *id.* at 124–25 ("[I]t would seem that if a job applicant could show . . . that he possessed the objective qualifications for the job in question, the burden could reasonably be placed on the employer to justify his actions . . . .").

196. *See, e.g.*, *id.* at 109 & n.10 (noting SCAD's position in 1948 that intent was not an essential element); MORENO, *supra* note 17, at 114 n.10 (noting similar statements in SCAD reports

question of whether intent was necessary to establish a violation of the Act became enmeshed in analytically muddy ways with related issues, such as the weight to give evidence of statistical disparities, the relevance of discriminatory effects, the threat of "quota" requirements, employers' obligations to engage in "affirmative action,"[197] and the like.

Also like today's debates, commentary assessing the operation of Ives Quinn tended to fall into two "camps," one championing a greater reach for the Act and the other arguing for reining in the Act's interpretation. One progressive labor expert argued that SCAD's enforcement policy should recognize "that the most important matter is not the settlement of individual cases but the opening of new job opportunities for members of minority groups."[198] Another scholar worried about "novel attempts at evasion or subterfuge," and argued for the benefits of an administrative approach to investigation and enforcement because "such provisions are not penal" and thus "can also be construed broadly."[199] Writing prior to what they hoped would be the success of national legislative efforts, two other professors presented a comprehensive articulation of the discrimination caused by unnecessary educational and job requirements, which, they argued, meant that "almost no change in racial employment patterns could occur."[200]

On the opposite side of the question, more conservative commentators argued for an intent-based standard.[201] This debate was by no means resolved in the 1950s (nor, indeed, has been resolved to this day), but what is clear on historical examination, as even disparate impact foe Paul Moreno acknowledges, is that "[t]he idea of systemic or 'institutional' racism and discrimination, although not yet clearly articulated, was present

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from 1950 and 1951); *id*. at 135, 144 (noting shifts in SCAD's orientation through the 1950s as the civil rights movement heated up).

197. This term had different connotations at the time, related not to the grant of racial preferences but to the taking of proactive steps to remedy violations of law. *Cf.* 29 U.S.C. § 160(c) (1940) (granting the NLRB the power "to take such affirmative action including [ordering] reinstatement of employees . . . as will effectuate the policies of this [Act]"). The current debate about affirmative action often forgets these remedy-based aspects that remain fully consistent with the term's earliest uses.

198. Berger, *supra* note 178, at 795.

199. Arthur Earl Bonfield, *State Civil Rights Statues: Some Proposals*, 49 IOWA L. REV. 1067, 1117–18 (1964).

200. PAUL H. NORGREN & SAMUEL E. HILL, TOWARD FAIR EMPLOYMENT 20 (1964). Indeed, this treatise, published prior to Title VII's enactment, frequently and clearly articulated the concepts underlying disparate impact doctrine. *See, e.g.*, *id.* at 23 ("[L]ess overt practices . . . can be used to exclude Negroes from employment opportunities almost as effectively as Southern practices."); *id.* at 27 (noting the importance of the problem of "simple inertia," and adding that, "Traditional racial employment patterns tend to persist for long periods of time unless there is a conscious decision on the part of top management to move in the direction of an integrated work force . . . .").

201. *See, e.g.*, Arnold H. Sutin, *The Experience of State Fair Employment Commissions: A Comparative Study*, 18 VAND. L. REV. 965, 993–94 (1965) (writing by southern business school professor with suggestions about implementation of Title VII, including that it be confined to intentional discrimination and avoid "quota arguments" made under the SCAD system).

in antidiscrimination thinking in the 1950s."[202]

What was also clear by the early 1960s was the permanence of state private-sector employment antidiscrimination edicts. By 1963, half of the states in the nation had enacted such laws.[203] Illinois, one of the last states to enact this legislation,[204] quickly generated an effects-based case that would soon gain notoriety in the debates on Title VII. That case, decided in 1963, involved Motorola's rejection of Leon Myart's job application for an electrician's position. Motorola claimed that it had rejected Mr. Myart for this job because he had failed a general aptitude test, but was unable to produce his test score. When the Illinois Fair Employment Practice (FEP) Commission administered the test to Mr. Myart, he obtained a passing score.[205] The first ground for the Illinois FEP Commission hearing examiner's ruling against Motorola thus involved his finding of pretext. As an alternate ground, the hearing examiner noted that Mr. Myart's extensive vocational training and work experience as an electrician clearly established that he possessed strong qualifications for the job, and the evidence in the record further showed that the general aptitude test Motorola claimed to have administered was both "obsolete" and did not "lend itself to equal opportunity to qualify for . . . disadvantaged groups."[206]

Before Congress, the *Motorola* case, garbled as to its facts and grossly distorted as to its holding, became the conservative bugaboo about how far Title VII could reach.[207] In the end, both conservatives and liberals approved after revision an amendment offered by Senator John Tower that authorized at least some types of "professionally developed" employment testing.[208] This language left open the critical question of whether such tests had to adhere to professional norms as to how to measure relevant job performance criteria. It also in no way addressed the use of employment practices other than testing. These ambiguities left ample room for civil rights activists and the EEOC to push the theory of disparate impact analysis farther.

With Title VII's final enactment, the focus of further development of disparate impact theory shifted primarily to the federal level. Again, an interaction between civil rights activists, primarily from the NAACP and the LDF, and responsible regulating agencies, especially but not

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202. MORENO, *supra* note 17, at 126.

203. *See* CHEN, *supra* note 40, at 118 tbl.4.1 (listing twenty-five state FEP statutes passed before Title VII was enacted and their dates of passage).

204. *See* CHEN, *supra* note 40, at 154–55 (discussing efforts in Illinois to pass FEP legislation).

205. Myart v. Motorola, Inc., No. 63C-127 (Ill. Fair Empl. Prac. Comm. 1964), *reproduced in* 110 CONG. REC. 5312–14 (1964).

206. *Id.* at 5313.

207. *See, e.g.*, 110 CONG. REC. 11,251 (1964) (statement of Sen. Tower expressing concern that Motorola case might lead the EEOC to "regulate the use of tests by employers").

208. This amendment provides that it is not "an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin." Civil Rights Act of 1964, Pub. L. No. 88-352, § 703, 78 Stat. 241, 257 (codified as amended at 42 U.S.C. § 2000e-2(h) (2006)).

exclusively the EEOC, pushed forward a "good cop, bad cop" approach.

E. *A Federal Antidiscrimination Edict for the Private Employment Sector*

1. Federal Executive Order Enforcement

At the same time that states were developing an employment discrimination jurisprudence that included disparate impact analysis, government officials working at the federal level under Presidential Executive Orders were also experimenting with goals and timetables for increasing minority hiring rather than merely seeking to ferret out individual discriminatory acts.[209] There is ample historical literature on these federal programs, so I will not discuss them here, except to point out that at the federal administrative level as well, so-called "group based," institution-wide, or structural approaches to solving the problem of racial employment subordination were well entrenched in the relevant public actors' discourse.

In short, by the early 1960s the discourse that was developing through the enforcement of employment antidiscrimination edicts at both the state and national levels emphasized broad interpretation of antidiscrimination mandates to address all aspects of a multi-faceted problem.[210] Civil rights groups "now argued that the problem of discrimination in employment was more complicated, deeply rooted, and structural," and not so much a problem of "blatant exclusion, but of business practices that reinforced the effects of past exclusion."[211]

To be sure, at this point, intent versus impact tests for employment discrimination had not yet been carved into sharply distinct theories. But this was *not* because civil rights activists or government officials had yet to conjure up the idea of effects-based discrimination. The idea that both invidious and neutral employment practices could cause discrimination was familiar to both public officials and activists seeking solutions to

209. *See* CHEN, *supra* note 40, at 231 (describing these efforts under various Executive Orders). *See generally* LOUIS RUCHAMES, RACE, JOBS, & POLITICS: THE STORY OF FEPC (1953) (presenting a classic history of the Fair Employment Practice Commissions (FEPCs) organized under these Executive Orders); Boris, *supra* note 40 (exploring the work of these federal FEPCs).

210. *See, e.g.*, Robert A. Girard & Louis L. Jaffe, *Some General Observations on Administration of State Fair Employment Practice Laws*, 14 BUFF. L. REV. 114, 116 (1964) ("Commissions should strive to induce those controlling job opportunities . . . to abandon frequent unnecessary tests and requirements . . . ."); Herman Schwartz, *Discussion Summary*, 14 BUFF. L. REV. 126, 128 (1964) (noting the employer view that, "[T]here was very little overt employer discrimination on the part of top management; tradition is the real problem . . . ."); Henry Spitz, *Tailoring the Techniques to Eliminate and Prevent Employment Discrimination*, 14 BUFF. L. REV. 79, 81 (1964) (noting comments by the New York Commission for Human Rights General Counsel that, "History, custom, usage and countless other factors have built barriers into the system which may not have been motivated by prejudice in their inception, yet today constitute effective roadblocks . . . .").

211. MORENO, *supra* note 17, at 199–200.

structural racial subordination.[212]

The rigid doctrinal separation of intent and effects-based tests for discrimination would occur in the Court's important 1972 opinion in *Washington v. Davis*,[213] where it rejected the lower courts' application of the *Griggs* test for disparate impact in a case challenging a police department's use of written employment tests under the Equal Protection Clause. Before that, in the words of LDF's leading employment discrimination litigator Robert Belton, who would serve as LDF's lead counsel in *Griggs*, "[i]t was all discrimination [to us]."[214]

By the time the House Education and Labor Committee reported out fair employment practices bills in 1961 and 1963, structural or effects-based conceptions of employment discrimination were well entrenched in the public discourse, though the legislative record leaves unclear precisely how such arguments were understood by both those legislators who supported and those who opposed the legislation that finally passed in Congress in 1964. I will not rehash the arguments about whether Congress intended to approve disparate impact analysis when it enacted Title VII; the inconclusive evidence has been evaluated by many others who have reached opposing conclusions.[215]

But another important aspect of the legislative history of Congress's passage of Title VII does require brief mention here because of the way it shaped the subsequent complementary enforcement efforts of the EEOC NAACP, and LDF in the early years after the statute's enactment. The final compromise measure Congress enacted into law as Title VII newly created the EEOC, but at the same time stripped it of all the litigating authority it had been granted under earlier versions of the bill modeled after the Ives Quinn Act.[216] As one commentator put it, the EEOC

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212. *See, e.g.*, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 232–33 (1968) (recommending that public and private employers remove "artificial barriers to employment and promotion"). The Commission explained:

> Racial discrimination and unrealistic and unnecessarily high minimum qualifications for employment or promotion often have the same prejudicial effect. . . .
>
> Present recruitment procedures should be reexamined. Testing 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.

Id.

213. 426 U.S. 229, 232–33, 239, 241–42 (1972).

214. *See* Selmi, *supra* note 15, at 723 & n.89.

215. *See supra* note 17 (summarizing literature on this question). The 1991 Civil Rights Act, which inserted explicit statutory language embracing the *Griggs* disparate impact approach, renders moot questions concerning Congress's initial statutory intent. *See* Peter M. Leibold et al., *Civil Rights Act of 1991: Race to the Finish—Civil Rights, Quotas, and Disparate Impact in 1991*, 45 RUTGERS L. REV. 1043, 1043–44, 1058, 1084–1086 (1993) (noting, in article by counsel to the bill's sponsors, that the 1991 Act explicitly codifies the *Griggs* disparate impact test).

216. *See* Robert Belton, *Title VII at Forty: A Brief Look at the Birth, Death, and Resurrection*

was constituted as a "'poor enfeebled thing'"[217] with authority only to investigate and attempt to conciliate discrimination charges levied against private employers but no authority to back up such efforts through enforcement in the courts.

This scheme obviously had an enormous impact on the EEOC's enforcement strategies, until the 1972 amendments gave litigation authority to the EEOC in private-sector cases. Republican champions of weak EEOC powers may have hoped to gut Title VII's effectiveness in this manner, but the regulatory context they produced was more interesting than that because it ended up encouraging collaboration between the EEOC and civil rights lawyers from the NAACP and LDF. The EEOC carried forward the experimentalist tradition pioneered in SCAD's prior work in encouraging employers to open more employment opportunities to traditionally excluded outsiders while the NAACP and LDF threatened aggressive litigation against recalcitrant employers who failed to play along with the EEOC's voluntarist agenda.

2. Early Title VII Enforcement: EEOC and NAACP Complementary Efforts

Few historians would dispute that activists and agency staff deeply steeped in the traditions of the civil rights movement brought the ideas of the movement with them as they sought to give life to Title VII. In so doing, they acted much like a prior generation of activists and government agency representatives had in implementing the Ives Quinn Act in New York State. Early 1960s actors at the federal level included EEOC staff member Sonia Pressman Fuentes, whom some credit with the authorship of disparate impact doctrine within the EEOC.[218] EEOC Chief of Conciliation Alfred W. Blumrosen was another 1960s EEOC staffer who articulated the

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of the Disparate Impact Theory of Discrimination, 22 HOFSTRA LAB. & EMP. L.J. 431, 433 (2005).

217. *Id.* (quoting MICHAEL I. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 205 (1966)).

218. *See, e.g.*, GRAHAM, *supra* note 17, at 244–45 (describing an EEOC memo authored by Pressman discussing the use of statistical evidence). Of course, to an employment discrimination law expert, the use of statistical evidence and disparate impact analysis are not coterminous concepts, since statistical evidence is also important in intent-based "pattern or practice" cases. *See, e.g.*, Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 339–40 (1977) (discussing important role of statistics in pattern or practice cases). I have not been able to verify the claim that Pressman was first to articulate the disparate impact theory within the EEOC. Pressman had been a staff member at the NLRB and founder of the National Organization for Women, and thus had ample background and theoretical sophistication in discrimination concepts. In oral histories, however, she concentrates on her role in convincing the EEOC to take sex discrimination seriously. *See, e.g.*, Interview with Sonia Pressman Fuentes, Founder, National Organization for Women (Dec. 27, 1990), *available at* http://www.utoronto.ca/wjudaism/contemporary/articles/history_eeoc.htm. The issue of authorship of the disparate impact concept within the EEOC is inconsequential in any event because, as I have shown, no one within the EEOC needed to "invent" disparate impact theory at all since the concept pre-dated the agency's creation.

concepts underlying disparate impact theory.[219] Other key players in the early interpretation of disparate impact doctrine under Title VII were litigators for the NAACP, including Robert Belton, who played a major role for LDF in employment cases[220] and was counsel in *Griggs*,[221] and Jack Greenberg, LDF general counsel, who argued *Griggs* before the U.S. Supreme Court.[222] Law professors George Cooper and Richard Sobol also made important contributions.[223] All have recounted the key place of *Griggs* in LDF's strategy in building on *Brown v. Board of Education* to attack what the organization viewed as a next major priority in dismantling structural racial subordination.[224]

The early days of implementation of Title VII bore analogies to the implementation of SCAD, not only in the sharing of perspectives between government agents and activists but also in the synergies produced by complementary enforcement efforts. The EEOC immediately began to encourage broad-scale reform across targeted industrial sectors, much as the New York SCAD had done but with broader national authority. In its early internally authored history, the EEOC reported with pride on its campaigns to induce broad voluntary dismantling of discriminatory barriers to African American employment, which it aimed especially at carefully targeted employment sectors in the South.[225]

According to this EEOC account, when it opened for business, the Commission found itself flooded with far more discrimination charges than it had anticipated.[226] Most of these charges came from southern states and involved race discrimination, and "[o]ver one-third of them were stimulated by the NAACP, whose prime concern was with getting cases in a posture to take to court."[227] This EEOC account corresponds with the

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219. *See, e.g.*, Alfred W. Blumrosen, *The Duty of Fair Recruitment Under the Civil Rights Act of 1964*, 22 RUTGERS L. REV 465, 503 (1968) (arguing that some "objective tests are 'carriers,' which translate discrimination in education into discrimination in employment"); Alfred W. Blumrosen, *Strangers in Paradise*: Griggs v. Duke Power Co. *and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 59–61 (1972) (discussing his attempt as first EEOC Chief of Conciliations to negotiate a model agreement on employment testing and the subsequent development of the EEOC's disparate impact employment testing guidelines).

220. *See* GREENBERG, *supra* note 46, at 447 (describing Belton's role).

221. Griggs v. Duke Power Co., 515 F.2d 86, 87 (4th Cir. 1975).

222. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

223. *See generally* Cooper & Sobol, *supra* note 189 (outlining disparate impact theory).

224. *See, e.g.*, Robert Belton, *Title VII of the Civil Rights Act of 1964: A Decade of Private Enforcement and Judicial Developments*, 20 ST. LOUIS L.J. 225, 246 (noting the importance of *Griggs*); GREENBERG, *supra* note 46, at 443 (describing the impact of the *Griggs* campaign as "almost on a par with the campaign that won *Brown*").

225. Part II, Equal Employment Opportunity Commission: Administrative History, *microformed on* Civil Rights During the Johnson Administration, 1936–1969, Reel 1, Slides 119–69 (Steven F. Lawson ed., 1984) [hereinafter Administrative History].

226. *Id.* at 105–06.

227. *Id.* at 106.

recollections of key players within the NAACP, who confirm that their strategy was to force cases to court.[228]

The Commission found itself internally divided over whether enforcement through the courts was preferable to investing efforts into obtaining voluntary plans by employers, but in the end, it found itself so swamped with work that workload alone "made academic . . . the debate going on both inside and outside the Commission on the most desirable approach for eliminating employment discrimination."[229] The EEOC thus called for discussions with attorneys from the NAACP and LDF and obtained an agreement from them "to concentrate on the quality of . . . charges rather than on quantity so that the charges would be as strong as possible when they came to the Commission."[230]

With the NAACP and LDF focused on finding and developing cases with strong facts, the Commission concentrated its efforts on negotiating complex and far reaching conciliation agreements, which it viewed as its first "landmark" accomplishments.[231] Some of these cases reflect the agency's experimentation with disparate impact analysis.[232] One case, which the NAACP developed and the Commission then pursued, involved the nation's largest shipbuilder, the Norfolk, Virginia, Newport News Shipbuilding and Drydock Company. The Commission's 1966 conciliation agreement with that employer, which it billed as "the most extensive and detailed agreement ever negotiated in the field of employment discrimination up to the time," had as its "most significant aspect" Newport News's agreement to retain the services of an outside expert "to review its industrial relations system and to make changes in its wage and promotion system" to open up more opportunities for African American workers.[233]

Another landmark agreement involved Kaiser Aluminum and Chemical Corporation and its associated union, which jointly agreed to replace their collectively bargained position-based seniority system with a plant-wide system that would increase promotion opportunities for African American workers by allowing them to bid into higher paid jobs. This, the EEOC proudly explained, "was the first agreement to make an inroad into the problems created when seniority systems are used, intentionally *or*

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228. For a description of the NAACP and LDF strategy in filing these complaints, see GREENBERG, *supra* note 46, at 413 ("The complaints focused on areas of large black population, high black unemployment, and industrial growth."); *id*. at 414–15 ("[LDF targeted] semiskilled and skilled blue-collar jobs, which paid well but didn't require much formal education. . . . and discriminatory hiring and promotion practices, mainly, testing, unnecessary high school diploma requirements, and word of mouth recruiting."). The LDF focused on litigation and distrusted "timid bureaucrats." Belton, *supra* note 224, at 229–30. The NAACP's labor director similarly argued that state FEP agencies had failed. *See* Herbert Hill, *Twenty Years of State Fair Employment Practice Commissions: A Critical Analysis with Recommendations*, 14 BUFF. L. REV. 22, 23 (1964).

229. Administrative History, *supra* note 225, at 129–30.

230. *Id.* at 106.

231. *Id.* at 119–20.

232. *Id.* at 248.

233. *Id.* at 120–21.

inadvertently, as a means of perpetuating race discrimination."[234]

The EEOC also undertook public hearings to "prod[] employers to institute affirmative action programs designed to broaden opportunities for minority group members."[235] The Commission decided to concentrate on the southern textile industry, with the goal of steering the EEOC into a "broader" or "'wholesale' approach of industry-wide antidiscrimination programs" as opposed to "case-by-case 'retail' handling of complaints by individuals."[236] EEOC officials, including Blumrosen, planned an event, which they decided to call a "forum" rather than a hearing to make it less legalistic, over a two-day period in Charlotte, North Carolina, and then initiated a "cooperative follow-up program" with "representatives of the Carolinas' textile industry" to search for ways to "open new job opportunities for minority members."[237] These efforts produced multiple "changes in employment patterns" that reportedly led to measurable increases in jobs for African Americans in the mills.[238]

Another aspect of this program involved EEOC representatives' visits to mills "to review hiring, promotion, and job classification" systems.[239] The EEOC helped coordinate recruitment drives that produced new applicants, and "pointed out subtle forms of discrimination on the lower supervisory levels which management was not aware existed."[240] It sought changes based squarely on disparate impact analysis, as in the following situation:

> In one city, the president of a textile firm organized a meeting between seven of his plant managers and Commission representatives to discuss screening methods for applicants and existing testing procedures *to determine if they were job-related and validated or simply a matter of custom. As a result . . . plant managers decided to discard the tests and to develop new ones with greater relevance to job openings*.[241]

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234. *Id.* at 122–23 (emphasis added). The issue of bona fide seniority systems' effects in perpetuating former discrimination is an important topic in its own right, but I do not focus on it here in order to avoid further complicating my narrative about the development of disparate impact doctrine. For a good discussion of this issue from the 1960s, see Cooper & Sobol, *supra* note 189, at 1601–31; *see also* Belton, *supra* note 224, at 242–43 (noting that decisions considering the discriminatory effects of seniority systems contributed to the development of disparate impact doctrine).

235. Administrative History, *supra* note 225, at 130.

236. *Id.* at 137.

237. *Id.* at 137–38, 144.

238. *Id.* (noting that, over the time period, new African American hires in the mills represented 41% of all new hires).

239. *Id.*

240. *Id.* at 144–45.

241. *Id.* (emphasis added). Another aspect of the Commission's early work involved thinking through the meaning and significance of the Tower amendment and the Mansfield-Dirksen compromise package's inclusion of an amendment to § 706(g) that added the term "intentionally" to the statute's relief provisions. *Id.* at 249. The Commission saw little concern with the Tower

The Commission undertook a similar initiative in another major southern employment sector, the private utilities industry, where EEOC data showed that "minority participation rates were lowest of any" in the nation's major industries.[242] The Commission subsequently undertook an initiative patterned after its success in the Carolinas' textile industry, planning to visit twenty southern cities to encourage voluntary self-analysis and development of steps to increase minority hiring and advancement.[243] It was from a recalcitrant employer in this industrial sector that the *Griggs* litigation arose.

3. Developing the Case Theory in *Griggs*

The facts in *Griggs* involved a southern private utility that was unwilling to play ball with the EEOC. Duke Power decided to introduce intelligence testing and a high school diploma requirement for unskilled jobs at the eve of Title VII's effective date, thus raising the distinct possibility that its actions were motivated by invidious intent. The facts were probably not strong enough to support a verdict on this theory in a southern court, however. Duke Power argued that it had acted in good faith and pointed to facts such as its willingness to pay for employee education programs to support its position.[244] The NAACP and LDF therefore filed a class action complaint on behalf of thirteen named plaintiffs on a disparate impact theory in 1966,[245] though the case would not reach the U.S. Supreme Court until half a decade later.

The *Griggs* plaintiffs lost before the district court,[246] but *Griggs* was not the only case of its kind litigated in the immediate aftermath of Title

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amendment, explaining that "[v]ery early in its history" it had "found reason to believe" that some ability and aptitude tests were contributing to the "maintenance of racially discriminatory employment patterns." *Id.* at 232. After study, it had promulgated guidelines in 1966 calling for "objective standards for selection screening and promotion of workers," with a "special emphasis on job analysis, recruitment, screening and interviewing related to job requirements, and test selection on the basis of job-related criteria." *Id*. at 234. The Commission further explained that it had concluded that it was an unlawful practice to fail to hire or limit employees "on criteria which prove to have a demonstrable racial effect without clear and convincing business motive." *Id.* at 248. It acknowledged that this reading of the statute could not easily be squared with the Mansfield-Dirksen § 706(g) amendment and that a further working out of the issue among the courts, Congress, and the Commission would be required. *Id.* at 249. Close inspection thus does not support Graham's assertion that the EEOC simply sought to rewrite or ignore the legislative history of the Act. *See* GRAHAM, *supra* note 17, at 250 (citing the EEOC's internally authored administrative history to support the proposition that "the agency was prepared to defy Title VII's restrictions").

242. Administrative History, *supra* note 225, at 164–65. More specifically, only 3.7% of employees at these utility companies were African American, and almost half of these companies employed no African Americans at all. *Id*. at 168.

243. *Id*. at 169.

244. *See* Griggs v. Duke Power Co., 401 U.S. 424, 427–28, 432 (emphasizing absence of a dispute by the courts in the case about the employer's absence of bad intent).

245. *See* Griggs v. Duke Power Co., 292 F. Supp. 243, 243–44 (M.D.N.C. 1968).

246. *Id.* at 244.

VII's enactment. Several cases on disparate impact or effects theory were in the litigation pipeline before *Griggs* reached the U.S. Supreme Court. A case filed in California alleged that an employer's policy against hiring applicants with records of minor arrests but no convictions violated Title VII on the grounds that African Americans were far more likely to face arrests for minor alleged transgressions.[247] The district court upheld the plaintiffs' theory, finding that their evidence of disparate impact was "overwhelming and utterly convincing" and that the employer had failed to show any business necessity for its policy.[248] The court concluded that the employer's policy constituted unlawful discrimination "even though such a policy is objectively and fairly applied as between applicants of various races" because it caused "substantial and disproportionate[]" exclusion of African Americans from employment opportunities.[249]

In another case, which arose out of Louisiana with NAACP counsel representation, the district court accepted a similar theory in a challenge to a paper plant operator that had instituted new I.Q. testing requirements between 1963 and 1964 to determine job eligibility and transfers for unskilled employment positions.[250] The court found the employer's action illegal where the evidence showed that it had adopted the tests with no professional study and no attention to their relevance in measuring actual job requirements.[251]

In another complex "pattern and practice" case pursued by the Justice Department, an Ohio federal district court found that a union's administration of a competency exam for electricians was unlawful where forty-one of forty-four presently employed members had failed it and these dismal passage rates could be expected to "chill" African American applications for union membership.[252]

Courts in other cases from Massachusetts,[253] California,[254] Missouri[255]

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247. Gregory v. Litton Sys., Inc., 316 F. Supp. 401, 403 (C.D. Cal. 1970).

248. *Id.*

249. *Id.*

250. Hicks v. Crown Zellerback Corp., 319 F. Supp. 314, 316, 319 (E.D. La. 1970). These counsel were George Cooper and Richard Sobol, authors of a key article articulating the disparate impact theory of discrimination, Cooper & Sobol, *supra* note 189, who assisted LDF on employment cases for many years. *See* GREENBERG, *supra* note 46, at 418–19.

251. *Hicks*, 319 F. Supp. at 319.

252. Dobbins v. Int'l Bhd. of Elec. Workers, 292 F. Supp. 413, 433 (S.D. Ohio 1968), *modified on other grounds*, 1969 WL 120 (S.D. Ohio 1969).

253. Arrington v. Mass. Bay Transp. Auth., 306 F. Supp. 1355, 1359 (D. Mass. 1969) (finding that plaintiffs likely would succeed on the merits in a challenge to general aptitude tests for transit authority drivers and collectors where the employer offered no evidence of the tests' relevance to job duties).

254. Penn v. Stumpf, 308 F. Supp. 1238, 1246 (N.D. Cal. 1970) (rejecting a motion to dismiss a class action that challenged a police department's use of written tests that had not been validated).

255. United States v. Sheet Metal Workers Int'l Ass'n, 416 F.2d 123, 135–36 (8th Cir. 1969) (ordering local union to revise its journeymen's entrance exam to ensure that it was designed to test job ability).

and Oklahoma[256] reached similar results, as did the EEOC at the administrative level.[257] Thus, when *Griggs* reached the U.S. Supreme Court, it was presented with an issue about which there had been robust debate in the courts, within the EEOC, and for many years prior to that, in state FEP agencies and the civil rights movement generally as well.

IV. THE LESSONS OF A SOCIAL MOVEMENT ANALYSIS

The preceding analysis locating the origins of disparate impact analysis in experimentalist approaches aimed at remedying the structural causes of racial employment subordination leaves for further discussion the relevance of this history to debates about disparate impact analysis today. A supplementary and intertwined question is what this analysis offers to the ongoing development of social movement methodology in legal scholarship.

As already noted, my claim is not that the history I uncover here compels the retention of disparate impact doctrine; instead, my point is a softer but no less important one—namely, that misconceptions about the historical pedigree of legal ideas, such as those espoused about the origins of disparate impact analysis in the work of Hugh Graham and others,[258] can influence the perceived legitimacy of those ideas. Disparate impact analysis has been criticized as a last-minute, ill-conceived afterthought of the EEOC, improvidently adopted by the Court in *Griggs*,[259] but a social movement analysis shows that the doctrine was the product of decades of lower-profile development among several generations of civil rights activists and sympathetic regulators. To be sure, the concepts underlying disparate impact analysis were not highly visible outside these circles of expert antidiscrimination advocates prior to the Court's decision in *Griggs*, but this is part of the lesson of this narrative: The development and transmission of ideas about legal reform generated by social movements may not always be visible through traditional legal research techniques that focus on major case law developments. Attention to micro-level analysis of social movement activists' incubation of reform ideas in lower-profile settings, such as at the state level and in work outside the realm of law, can

256. Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 249–50 (10th Cir. 1970) (holding that an employer's purportedly neutral policy of prohibiting transfers between two categories of driver jobs, which had discriminatory effects on minority employees, was not sufficiently justified by business necessity).

257. *See* ALFRED W. BLUMROSEN, BLACK EMPLOYMENT AND THE LAW 32 (1971) (citing a 1966 EEOC administrative opinion involving a southern food processing company, which stated that, "[W]here, as here, the educational and testing criteria have the effect of discriminating and are not related to job performance, there is reasonable cause to believe that respondent, by utilizing such devices, thereby violates Title VII."); *id.* at 33 n.51 (citing 1967 EEOC chair's statement that, "[T]he true situation today is that discrimination is often not a specific incident, but . . . . the result of a system" and nondiscrimination "means the difficult process" of "challenging the system, of undoing its discriminatory effects . . . .").

258. *See generally* sources cited, *supra* note 17.

259. *See* GRAHAM, *supra* note 17, at 383–89.

contribute to a fuller understanding of legal reform ideas.

To recap my findings: Prototypical disparate impact ideas appear by the 1940s and 1950s in the work of New York's SCAD, as an extension of a voluntarist tradition pursued by the NUL as early as the 1910s. Experimentalist activists-turned-regulators such as Republican NUL editor Elmer Anderson Carter, along with New York State Governor Dewey and the moderate Republican legislators who actively supported Ives Quinn's passage, held pro-business, anti-big government political views. They wished to end race discrimination in employment but not through heavy-handed compulsion. Carter believed that appeals to employers to reassess their traditional employment practices to find ways to increase opportunities for racial outsiders was the most fitting method of accomplishing the dual goals of ending structural racial exclusion in employment while also avoiding an unduly restrictive regulatory regime.

The experimentalist roots of disparate impact concepts thus contravene a common stereotype about disparate impact doctrine: Its origins do not lie in the demands of militant civil rights organizers, but instead in a pro-business, regulatory-partnership model embraced by moderate civil rights leaders. Activists like Carter envisioned using law to engineer social change, not primarily by resorting to the courts, but rather by encouraging employers to reflect on and take action suited to their situations. Carter wanted to soft-pedal change, approaching the Ives Quinn Act's antidiscrimination mandate with expectations of employers' good faith behavior, but also carrying the "stick" of potential lawsuits to command employers' attention.

In contrast, the push to enforce antidiscrimination mandates primarily through lawsuits in court came from lawyers and law-centric organizations such as the NAACP. These lawyer-activists and organizations distrusted flexible and voluntary approaches relying on employers' good faith compliance efforts. This litigation-focused perspective necessarily makes disparate impact analysis a close cousin to disparate treatment, since litigation inherently involves accusing the defendant of doing something wrong or illegal.

The tension between experimentalist and litigation-centric views of disparate impact concepts was a perennial one. It was present in the early years of SCAD's enforcement of the Ives Quinn Act, when Carter, newly transferred to SCAD from his post as NUL editor, argued for the efficacy of voluntarist approaches, while the NAACP held news conferences and conducted litigation based on its conviction that SCAD was spending too little of its effort litigating in court. It was likewise present in the early enforcement days of Title VII, when the EEOC pursued carefully targeted, industry-wide campaigns to encourage employers to identify and voluntarily eliminate neutral practices that blocked minority employment advancement, while the NAACP sought to pressure the EEOC to process more complaints. The two organizations' negotiation of a more cooperative relationship led to the pursuit of *Griggs* as a test case against a recalcitrant employer that resisted the EEOC's campaign to induce voluntary reform in a targeted southern industry.

Not only was this tension perennial, but it was also productive despite the conflicts it sometimes engendered. The voluntarist approaches of the NUL avoided alienating the business community, while the more militant demands of the NAACP prodded employers to think more seriously about race reform. Staying out of court allowed early SCAD regulators to experiment with disparate impact concepts without the risk of having these ideas judicially annulled, while the threat of being hauled into court helped motivate employers to cooperate with SCAD's suggestions to assess and overhaul traditional employment practices. After Title VII's passage, the EEOC could follow SCAD's example by adopting the "soft cop" approach of meeting with employers to encourage voluntary efforts to scrutinize and reform traditional employment practices, while it at the same time coordinated with the NAACP's "tough cop" approach of aggressive and sophisticated litigation against recalcitrant employers such as the Duke Power Company, the defendant in *Griggs*.

In short, a social movement history of disparate impact analysis shows that experimentalist and litigation-centric approaches to disparate impact concepts existed in competition and cooperation with each other. Experimentalism allowed for flexible, compliance-motivating approaches, while litigation offered the threat of accusatory, litigation-centric alternatives. Experimentalism in the 1940s and 1950s allowed SCAD to develop disparate impact precepts without the disciplining and potentially constraining supervision of the courts, while the litigation expertise of the NAACP and LDF later gave the EEOC the enforcement teeth knocked out during the legislative compromises leading to Title VII's passage.

At the same time, this narrative reveals the problems engendered when important ideas about law developed within social movements do not obtain high-visibility expression in popular culture. Part of the legitimacy crisis facing disparate impact analysis today surely stems from the fact that this doctrine is relatively technical and complex. Non-experts in the field often confuse it, sometimes naively and sometimes with more cynically calculated rhetorical motives, with bugbears such as quotas, strong race-conscious mandates, and harsh forms of affirmative action. Supporters of disparate impact analysis are currently undertaking the task of articulating the policy benefits to all employees that flow from disparate impact standards. It may help this project to highlight as a primary policy justification for this doctrine its importance as an incentive-creating mechanism. Ideally, disparate impact doctrine encourages employers to use selection devices suited to measuring the performance characteristics required in particular jobs, without litigation.

Just as activists have not sufficiently succeeded in convincing the public of the virtues of disparate impact analysis, even expert legal scholars have not sufficiently appreciated that the force of disparate impact law ultimately lies, not merely in litigation victories, but also in shaping employers' incentives. This blind spot in employment scholars' assessments stems from the litigation-centric perspective common in legal scholarship generally, which similarly manifests itself in social movement

legal scholarship, as others have pointed out.[260]

Legal social movement scholars' focus on courts has led to two other biases that deserve mention. One involves methodology, in legal scholars' misguided tendency to look for the sources of law predominantly in the actions and ideologies of lawyers. In the case of disparate impact concepts, a focus on the attitudes of civil rights movement lawyers serves only to perpetuate a litigation-centric perspective on disparate impact doctrine: Because lawyers focus on litigation, legal scholars assume that disparate impact law was primarily intended as a route to litigation success. Opening the scope of inquiry to include the work of *non-lawyers* working in organizations focused on matters other than litigation, such as the NUL, reveals the existence of ideas about using law for purposes other than merely the creation of a cause of action enforceable through the courts.

Second, as I have also shown, a litigation-centric view of the purposes and history of disparate impact law produces distorted, presentist notions of the importance of the concept of intent in the development of employment antidiscrimination principles. Today, intent plays a key role as the lynchpin of the disparate treatment paradigm,[261] but that is because *Washington v. Davis* cleaved apart antidiscrimination tests based on intent versus effects. A presentist perspective ignores the fact that effects-based ideas were present at early stages of the development of employment discrimination law. From a very early period, civil rights activists were centrally concerned with the problem of pervasive, institution-based, structural employment subordination that had entrenched itself beyond particular employers' prejudice, and it follows that their strategies would be addressed at combating this structural employment subordination built into institutional traditions, rather solely focusing on the invidious bad acts captured through a focus on intent.

Finally, the social movement perspective offered here sheds new light on the interplay between Congress and the Court in the succession of cases from *Grigg*s, through *Wards Cove*, to the 1991 Civil Rights Act amendments and, most recently, *Ricci*. Congress and the Court have been engaged in a dialogue about where to set the balance between protecting employers from undue liability exposure, on the one hand, and preserving the possibility of plaintiffs' success in mounting disparate impact litigation challenges to employers' selection practices, on the other. At this point, even without taking *Ricc*i into account, this balance skews strongly against plaintiffs' chances of prevailing, as shown both by the difficult burdens of proof at the prima facie stage of disparate impact analysis and by empirical

260. *See generally* Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436 (2005) (criticizing legal social movement scholarship for tending to pivot around judges and their opinions); Edward L. Rubin, *Passing Through the Door: Social Movement Literature and Legal Scholarship*, 150 U. PA. L. REV. 1 (2001) (criticizing social movement legal scholarship for its tendency to focus on prescriptive arguments).

261. *See, e.g.*, Reeves v. Sanderson Plumbing Prods, Inc., 530 U.S. 133, 134–35, 153 (2000) ("The ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination.").

evidence showing plaintiffs' low chances of litigation success. At the same time, even after *Ricci*, lawyers for employers profess a continuing commitment to advising clients to conform to professionally accepted test validation practices.[262] Thus, if the Court does not go so far in the future as to invalidate disparate impact analysis on constitutional grounds, *Ricci* may not pose as great a threat to the key policy objectives of disparate impact law as civil rights supporters fear.

V. CONCLUSION

My analysis of the social movement history of disparate impact analysis offers new insights for participants on all sides of the post-*Ricci* debate about the future of disparate impact law. For those who bemoan the lack of plaintiff victories under this doctrine today, my analysis suggests that litigation victories were not the only goal of the activists who developed disparate impact doctrine. Instead, the criteria for judging the value of this doctrine should involve a more complex valuation embracing the expressive and incentive-producing aspects of this legal rule. Disparate impact doctrine may be doing important legal work even without substantial numbers of litigation victories because its purpose was and is to encourage employers to reflect on the possible benefits of choosing employment selection processes that better measure the elements of job performance needed for particular positions. To the critique that courts do not deal well with matters of structural discrimination,[263] the perspective uncovered here responds that while this may well be true, the history of disparate impact law indicates that its underlying concepts were not intended solely for the use of courts. In this post-New Deal era,[264] the regulatory style of our times may resonate with the experimentalist sensibilities of the moderate, pro-business civil rights activists of the NUL, who saw the threat of litigation and court enforcement as a useful persuasive backdrop to motivate employer compliance rather than as the enforcement mechanism of first resort.

To supporters of disparate impact law, the analysis offered above may tentatively suggest the continuing beneficial effects of disparate impact law despite the Court's attempts to shift this doctrine in a more pro-defendant direction—a goal that it seems bent on accomplishing, as shown by its succession of cases from *Wards Cove* through *Ricci*. The backdrop of disparate impact standards now codified by statute still presents a very real

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262. *See* Symposium on "*Ricci v. DeStefano*: The Future of Title VII Disparate Impact Litigation After the New Haven Fire Department Case," Oct. 28, 2009, American University Washington College of Law, at 22:54–29:40 [hereinafter *Ricci* Symposium] (Comments of Grace Speights, Managing Partner at the leading employer-side law firm of Morgan, Lewis & Bockius LLP) (stating that nothing about *Ricci* changes the advice she will give her clients to comply with disparate impact test validation requirements) (recording on file with author).

263. *See, e.g.*, Bagenstos, *supra* note 15, at 2–3.

264. *See* Dorf & Sabel, *supra* note 19, at 270–72 (connecting the increasing reliance on experimentalist regulatory techniques with the decline of the New Deal state and its associated bureaucracies).

threat of lawsuits from sophisticated plaintiffs' lawyers in easy cases—namely, those in which employers have failed even to attempt to design a test that conforms to professionally accepted validation norms for ensuring the fit between job performance and test design. The statutory articulation of disparate impact law is thus doing important legal work by providing leverage civil rights activists can use to advance civil rights goals in employment. It may be, in light of the new "substantial burden on innocent third parties" defense apparently created in *Ricci*, that plaintiffs' counsel should seek to be more proactive in working with employers in the initial design of selection devices, *before* employers administer high-stakes tests. This is a suggestion to which some leading plaintiffs' antidiscrimination counsel have expressed resistance,[265] but may be a consequence of the *Ricci* decision that should not be overlooked.

My reading of *Ricci* further suggests a new way of thinking about the dynamic of Court and Congressional dialogue on disparate impact standards. In *Ricci*, as in the Court's earlier attempt to lower employers' disparate impact liability risks under *Wards Cove*,[266] the Court has appeared willing (at least for now) to leave the basic idea of disparate impact analysis intact, while lowering the liability threat to employers emanating from it. To some degree, the Court's approach is consistent with early civil rights activists' experimentalist views about the proper scope of employment antidiscrimination regulation—namely, that law should offer standards and guidance about good civil rights practices, along with fairly low probabilities of liability. This would lead employers to take some steps to lower liability concerns, such as test validation and use of professional test designers, but not to take unduly drastic measures, such as so-called "quota" hiring, to insulate themselves from a litigation threat set too high. It is possible to read the *Ricci* majority's concerns in this way,[267] even though the Court does not explicitly articulate such a framework. Supporters of disparate impact doctrine may correctly be troubled that *Ricci* disturbs the proper balance of liability incentives by increasing the chances of "reverse discrimination" disparate treatment claims while at the same time lowering the threat of disparate impact liability after a test's administration; but at least *Ricci* does not appear to allow employers to disregard the need for proper design of selection processes *ab initio*.

Finally, my analysis offers an important perspective should the Court follow Justice Scalia's prediction that it must soon consider the

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265. *See Ricci* Symposium, *supra* note 262, at 1:15:46 (comments of Joseph M. Sellers, partner at a plaintiffs' civil rights firm, Cohen Milstein Sellers & Toll PLLC) ("Plaintiffs are going to be, counsel at least, are going to be waiting to see how the tests are administered . . . . For one thing, there would be no violation of the law, as far as I read it, where there's been no denial of some kind of employment opportunity.").

266. *See* 490 U.S. 642, 654–57 (1989).

267. *See, e.g.*, *Ricci v. DeStefano*, 129 S. Ct. 2658, 2682 (2009) (Scalia, J., concurring) (expressing concern that Title VII's disparate impact provisions will require employers "to make decisions based on (because of) . . . racial outcomes"). My thanks to Sharon Rabin-Margaliot for her incisive presentation at the Fifth Annual Labor and Employment Law Colloquium and a subsequent informal conversation that clarified this reading of *Ricci* for me.

constitutionality of the disparate impact doctrine. Justice Scalia characterizes disparate impact law as a race-conscious measure and, to some extent as already discussed, this is true, in the sense that it requires employers to take note of race-related statistics arising from their hiring and promotion practices. But this is a "soft" form of race consciousness, because it mandates no action on the basis of race per se, in the same way that the Court has previously upheld "soft" forms of race consciousness in voluntary affirmative action programs.[268] What an experimentalist perspective on disparate impact law adds is the idea that assessment of the constitutionality of race-consciousness regulation should recognize the difference between "soft" versus "hard" regulatory approaches. Litigation-centric approaches aimed at proving that employers engaged in illegal "bad acts" are a "hard" regulatory form, but more voluntarist approaches that call on employers to scrutinize their traditional practices and consider the adoption of alternatives that are both better suited to select employees based on job performance requirements *and* produce less severe disparate impact constitute a soft form of regulation, historically anchored in moderate, pro-business civil rights ideologies. Such approaches should pass constitutional muster as a legitimate means of balancing civil rights and pro-business policy considerations through means that preserve employer discretion. Otherwise the entire onus of civil rights law rests on the blame game of disparate treatment analysis.

At the very least, it would be unfortunate to not recognize the voluntarist and experimentalist origins of disparate impact analysis when assessing its constitutional permissibility as part of long-standing goals of America's flagship social movement for racial justice.

268. *See* Primus, *supra* note 14, at 501, 585 (pointing to the Court's recent opinions in affirmative action cases such as *Grutter v. Bollinger*, 539 U.S. 306 (2003), upholding a flexible, carefully designed race-conscious law school affirmative-action admissions plan).