

“Dignified Jobs at Decent Wages”: Reviving An Economic Equity Model of Employment Discrimination Law*

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“That crisis is born of the twin evils of racism and economic deprivation. They rob all people, Negro and white, of dignity, self-respect, and freedom.”¹

The original goal of equal employment opportunity laws – most importantly Title VII – was to increase economic opportunity for racial minorities by dismantling discriminatory barriers to attaining “dignified jobs at decent wages.” Over time, however, Title VII and equivalent state laws have come to be viewed simply as a penalty for unfair treatment of individuals in the workplace, unconnected to advancing economic opportunity more broadly. Fifty years of national equal employment opportunity law has led to some workplace desegregation, as well as important gains for many women and people of color in accessing professional and executive positions. Yet it has not resulted in a broad expansion of economic opportunity for people of color. The gap in median income between white, black, and Latino households has held steady since 1964, and workers of color remain significantly overrepresented among the unemployed and those earning poverty-level wages.

Not surprisingly, workers of color – from fast food workers to domestic workers – are leading a growing resistance to the substandard working

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1. MARCH ON WASHINGTON FOR JOBS AND FREEDOM, ORGANIZING MANUAL NO. 2 3 (1963), available at <http://www.crmvet.org/docs/moworg2.pdf>.

conditions of the low-wage economy. This article explores how employment discrimination law could once again become relevant to that struggle. It examines the history of equal employment opportunity advocacy from before the civil rights era through the early days of Title VII enforcement, and assesses how particular structural barriers facing today's low-wage workers of color are both similar and distinct from barriers people faced fifty years ago. It also explores how advocates can go beyond the structure of Title VII litigation to embrace new legal mechanisms designed to promote economic opportunity for all, with a focus on opportunity for people of color. In doing so, the article seeks to revive an economic equity model of employment discrimination law, spur a richer conversation around racial discrimination and inequity in the low-wage economy, and plant the seeds for a broader understanding of equal opportunity in employment that encompasses the right to a decent livelihood.

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INTRODUCTION

On the occasion of its fiftieth anniversary, many commentators have questioned whether Title VII of the Civil Rights Act of 1964² is still relevant or useful, particularly to address racial discrimination and racial disparities in the workplace. Yet in today's polarized economy, marked by growing income inequality and stagnating opportunity for a large number of workers, many of them workers of color, the motivating principles of Title VII are more relevant than ever. This Article advocates reviving a model for employment discrimination law based in economic equity, adapted to the current conditions facing low-wage workers.

Title VII was originally conceived as a way to expand economic opportunity and enable African-Americans and other marginalized groups to escape poverty. The 1963 March on Washington, a turning point in advocacy for the Civil Rights Act, called for federal legislation banning discrimination in employment alongside demands for public investment to create and place unemployed workers in "dignified jobs at decent wages," the expansion of the Fair Labor Standards Act (FLSA),³ and the establishment of a national minimum wage.⁴ Early Title VII enforcement measures by the Equal Employment Opportunity Commission (EEOC) focused on opening pathways to higher-paying jobs and creating economic mobility within industries for black workers long confined to the bottom rungs of the workforce.

Over time, however, courts, enforcement agencies, and the public have come to understand Title VII much more narrowly, simply as a penalty for unfair treatment of individuals in the workplace based on such categories as race, nationality or gender. Over the same period, labor market changes have eroded many of the pathways to economic opportunity the EEOC and other advocates sought to open to black workers in the 1960s and '70s, and job standards have decreased for workers of all races. Because of these concurrent trends, Title VII now seems like a weak or irrelevant tool to promote racial and economic equity for workers of color, who remain disproportionately stuck in the lowest-paying jobs in the workforce. For the law to remain relevant and for the economic mobility goals of Title VII to be realized, we need a better understanding of the mechanisms that create and reinforce racial disparities in accessing dignified jobs at decent wages, a shift in enforcement priorities toward addressing these disparities, and an expanded toolbox of racial and economic equity measures to complement Title VII litigation.

2. 42 U.S.C. § 2000e *et seq.* (2012).

3. 29 U.S.C. § 201 *et seq.* (2012).

4. MARCH ON WASHINGTON, *supra* note 1, at 4.

Equal opportunity to secure a low-wage, dead-end, exploitative job is a hollow promise. Advocates for equal employment opportunity legislation understood this over fifty years ago and fought for better economic policies, such as full employment and job creation, in addition to antidiscrimination mandates.⁵ Without those economic policies in place, the link between racial marginalization and poverty has persisted, and racial minorities have suffered disproportionately from the expansion of the low-wage economy in the United States. Despite fifty years of legislation protecting equal opportunity in employment, the large gap in median income between white, black, and Latino households has remained steady.⁶ Workers of color, particularly women of color, are significantly overrepresented among those living on poverty-level wages,⁷ and black unemployment remains at twice the level of white unemployment, just as it was in 1963.⁸ Recent immigrants working in a shadow economy suffer rampant exploitation, wage theft, and substandard working conditions.⁹ Long-standing patterns of labor market exclusion and segregation across and within industries remain the norm today, yet they are not widely viewed as the result or the mark of racial discrimination.

Not surprisingly, workers of color are leading the growing resistance to the substandard working conditions of the low-wage economy.¹⁰ These workers' movements, from the Justice for Janitors campaign in the 1990s to fast-food worker strikes and domestic worker organizing today, are

5. *See id.* (describing the demands of the 1963 March on Washington for Jobs and Freedom).

6. Brad Plumer, *Charts: The economic gap between blacks and whites hasn't budged for fifty years*, WASH. POST WONKBLOG (August 19, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/08/19/charts-the-economic-gap-between-blacks-and-whites-hasnt-budged-for-50-years/>.

7. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, A PROFILE OF THE WORKING POOR, 2012 2-4 (2014), available at <http://www.bls.gov/cps/cpswp2012.pdf>. For a recent study on gender and poverty, see generally MARIA SHRIVER, CTR. FOR AMERICAN PROGRESS, THE SHRIVER REPORT: A WOMAN'S NATION PUSHES BACK FROM THE BRINK (2014), available at <http://shrivereport.org/special-report/a-womans-nation-pushes-back-from-the-brink/>.

8. Zachary Goldfarb, *For Obama, 50 years after historic march, economic equality the path to racial justice*, WASH. POST, Aug. 17, 2013, http://www.washingtonpost.com/business/economy/for-obama-50-years-after-historic-march-economic-equality-the-path-to-racial-justice/2013/08/17/de89ee5e-0682-11e3-a07f-49ddc7417125_story.html?wprss=rss_politics.

9. *See* Annette Bernhardt et al., Nat'l Emp't Law Project, Broken Laws, Unprotected Workers: Violations of Labor and Employment Laws in America's Cities 14, 43, 45, 48 (2009), available at <http://www.nelp.org/page/-/brokenlaws/BrokenLawsReport2009.pdf?nocdn=1>.

10. For example, labor unions have begun to embrace immigrant workers as the hope for the continuation of the labor movement and the primary demographic for new organizing. *See* Dorian T. Warren and Cathy J. Cohen, *Organizing at the Intersection of Labor and Civil Rights: A Case Study of New Haven*, 2 U. Pa. J. Lab. & Emp. L. 629, 632-33 (2000). Additionally, low-wage service workers such as fast-food employees in metropolitan areas, who are predominantly people of color, are beginning to mobilize outside of the traditional labor movement to demand greater protections and livable wages. *See* Steven Greenhouse, *A Day's Strike Seeks to Raise Fast Food Pay*, N.Y. TIMES, July 31, 2013, at A1, available at http://www.nytimes.com/2013/08/01/business/strike-for-day-seeks-to-raise-fast-food-pay.html?ref=stevengreenhouse&_r=0.

engaging in the project that Lani Guinier and Gerald Torres envisioned in their book *The Miner's Canary*.¹¹ Guinier and Torres write that because racially marginalized groups often are the first to feel the sting of injustices that threaten all of us, “those who have been marginalized or left out could be well-positioned to lead a movement for social justice that others will want to follow if they can frame that movement to speak to conditions of injustice that disfigure our social institutions more generally.”¹² Ultimately, in accordance with Guinier and Torres’s proposition, an economic equity model to address the discrimination that today’s low-wage workers face should help improve equity in the workplace and create better opportunity for all workers.

This Article seeks to revive an economic equity model of employment discrimination law, spur a richer conversation around racial discrimination and inequity in the low-wage economy, and plant the seeds for a broader understanding of equal opportunity in employment that encompasses the right to a decent livelihood.¹³ It proceeds in three parts. Part I draws on the work of legal historians to illustrate the centrality of economic opportunity goals in early civil rights advocacy and the initial enforcement of Title VII. Part II connects this history with the present conditions of low-wage workers. Specifically, changes in the labor market and persistent racial discrimination have caused new patterns of segregation and exploitation of people of color in the workplace—problems that current employment discrimination laws are not fully equipped to address. Taking into account the history and current realities faced by workers, Part III describes a new approach to equal opportunity in employment that encompasses the right to a decent livelihood, by examining possible legal tools and strategies to help achieve that goal both within and beyond the Title VII framework. This approach will require making the current systems of discrimination visible and articulating legal reforms to change those systems.

I. THE CIVIL RIGHTS MOVEMENT AND ECONOMIC OPPORTUNITY

Increasing economic opportunity for African-Americans and other marginalized groups was a key element of the civil rights movement. The

11. LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 17 (2002).

12. *Id.*

13. Several scholars have devoted considerable attention to employment discrimination and low-wage work or economic justice, in particular Leticia Saucedo, whose work I cite widely throughout this Article. Many have explored the intersection of work, racial inequity and economic justice. See, e.g., Noah Zatz, *The Minimum Wage as a Civil Rights Protection: An Alternative to Antipoverty Arguments?*, 2009 U. CHI. LEGAL F. 1 (2009); Jennifer Gordon & R.A. Lenhardt, *Rethinking Work and Citizenship*, 55 UCLA L. REV. 1161 (2008); see generally Susan Sturm, *Reconnecting Labor & Civil Rights Advocacy*, 2 U. PA. J. LAB. & EMP. L. 617 (2000) and other articles in that symposium issue.

economic exploitation of black workers and their systematic exclusion from decent, living-wage jobs in the century after slavery ended made legal strategies to increase economic opportunity a priority for civil rights leaders, alongside voting rights and desegregation of public institutions and accommodations. Legal historians have documented the rich and complex ways in which civil rights activists developed legal strategies to increase economic opportunity for black workers, and negotiated the priorities for addressing labor, desegregation, voting rights, and other matters. These historians have demonstrated that labor and economic opportunity were key elements of the civil rights movement and legal advocacy, but that the movement's efforts to promote substantive economic equity never achieved the same success as its efforts to end formal segregation. Additionally, they show that scholars, advocates, and government enforcement agencies in the early years of equal employment opportunity laws defined discrimination broadly as a set of systemic barriers to the hiring, advancement, and improved earnings of people of color.

Civil rights history helps us understand the context in which Title VII came to be enacted, including the extent to which Title VII met or fell short of the goals of civil rights advocates. By showing how early advocates and agencies understood employment discrimination, civil rights history also challenges present definitions of employment discrimination. Finally, history expands our vision of how the law should, and could, help achieve broad economic and racial equity going forward.¹⁴

A. Labor and Economic Opportunity in Early Civil Rights Legal Strategy

Expanding economic opportunity for African-Americans was a central goal of civil rights activism during the New Deal and the postwar eras, despite limited legal avenues for achieving this goal. Given the exclusion from decently paid jobs and the resulting widespread poverty of racial minorities, civil rights activists unsurprisingly saw greater economic inclusion as a way to eradicate racial oppression. In the South, African-Americans experienced Jim Crow as a “system of *both* racial oppression *and* economic exploitation.”¹⁵ In the years following Reconstruction, sharecropping, peonage-labor, and convict-leasing systems quickly replicated slavery-like conditions for many former slaves and their

14. See Susan D. Carle, *How Myth-Busting About the Historical Goals of Civil Rights Activism Can Illuminate Future Paths*, 7 STAN. J. C.R. & C.L. 167 (2011) (discussing and correcting four key myths about the civil rights era to encourage more creative thinking regarding legal strategies to achieve racial and economic justice).

15. RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* 7 (2010) (emphasis added).

children.¹⁶ In the urban North, many white trade unionists enforced the economic exclusion of racial minorities by reserving the most desirable occupations for themselves.¹⁷ Yet activists and attorneys did not view the law as a tool to challenge race-based exclusion from the mainstream labor market in the years prior to the Great Depression, since the Supreme Court had held that private employment relationships were outside the reach of government.¹⁸ Instead, organizations and community leaders focused on increasing economic opportunity through building businesses within the black community, offering job training, and encouraging white employers to voluntarily expand hiring of black workers.¹⁹

16. See DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* 3-8, 120-33 (2009) (documenting in great detail the rise of convict-leasing systems by which black men convicted of petty crimes were forced into labor for agriculturalists, railroads, and large industrial companies).

17. Discrimination by white workers and unions seeking to keep the most desirable jobs for themselves was a key barrier to better employment opportunities for workers of color. See, e.g., Susan D. Carle, *A Social Movement History of Title VII Disparate Impact Analysis*, 63 FLA. L. REV. 251, 266, 272 (2011) (quoting activist William Lewis Bulkley's assessment in 1909 that it was not "prejudice that keeps Negroes out of the industrial fields" but rather "the native white man and the foreigner" who wanted to keep these more skilled jobs only for themselves). For other perspectives on labor and race in the urban North, see generally DAVID R. ROEDIGER, *THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS* (3d ed. 2007); DAVID E. BERNSTEIN, *ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS, AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL* (Neal Delvins ed., 2001); Rick Halpern, *Organized Labour, Black Workers, and the Twentieth-Century South: The Emerging Revision*, 19 SOC. HIST. 359 (1994) (discussing organized labor's mixed record on race in Southern states).

18. See *Lochner v. New York*, 198 U.S. 45 (1905). Some lawyers sought to use the freedom of contract doctrine to challenge restrictive practices by white workers and unions that kept African-Americans and others out of certain jobs. 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, 1442 (2005) (quoting civil rights and labor activist Pauli Murray's 1945 law review article, *The Right to Equal Opportunity in Employment*, 33 CALIF. L. REV. 388, 388 (1945), as stating that "[t]he interest in freedom from discrimination in employment is part of the broader interest in freely disposing of one's labor" and citing *Lochner* as grounds for constitutional protection of that interest). While advocates for white women and children were able to enact legislation restricting work hours and conditions, these measures passed muster in the courts only because women and children were deemed inferior groups who needed special legislative protection. See, e.g., *Muller v. Oregon*, 208 U.S. 412, 420-23 (1908). Because advocates were pushing for equal status for African-Americans, it did not make sense to argue for "special protection." See Carle, *Social Movement History*, *supra* note 17, at 269-70.

19. Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before Brown*, 115 YALE L.J. 256, 277 (2005); Carle, *Social Movement History*, *supra* note 17, at 270-74 (describing work of the National Urban League). At the start of the Great Depression, this self-help strain turned into collective action in widespread "Don't Buy Where You Can't Work" boycotts of businesses located in black neighborhoods that refused to hire black workers. Carle, *supra* note 17, at 274. Litigation defending the right to picket these businesses helped leading civil rights attorneys begin to articulate a right to equal employment opportunity regardless of race that could be enforced through collective pressure on private employers and upheld in court. See Mack, *supra*, at 320; see also Carle, *Social Movement History*, *supra* note 17, at 274-75. Mack explains that the boycotts also raised tensions about strategy, as those advocating for greater cross-racial organizing feared they might further establish segregated spheres of labor. Mack, *supra*, at 320.

The economic upheaval of the Great Depression and the Roosevelt administration's regulatory response to it motivated major changes in thinking about the relationship between business, government, and workers, opening new avenues to challenge discrimination and racial exclusion in the workplace. Sweeping new government regulation of industry and employment relationships ended the era of Supreme Court jurisprudence stating that employment relationships were beyond the reach of government. But nearly all New Deal-era regulation to protect workers and shore up employment excluded or disadvantaged black workers.²⁰ Industrial codes under the National Recovery Administration incorporated race-based historical differentials in wages for occupations traditionally held by African-Americans.²¹ The FLSA and the National Labor Relations Act (NLRA)²² completely exempted agricultural and domestic workers, the two sectors primarily comprised of black workers, which left their substandard working conditions largely unchanged.²³

Massive public works projects designed to create jobs, which funneled public dollars to private contractors, allowed civil rights activists to challenge discriminatory hiring practices by the contractors as public rather than private discrimination and thus within the reach of the law.²⁴ For example, at the Hoover Dam, where none of the 3,000 workers initially hired were black,²⁵ civil rights organizations exerted pressure on the Roosevelt administration and obtained a commitment from the contracting companies to hire black workers.²⁶ Activism to combat hiring discrimination by private companies using government funds during the Depression paved the way for a landmark employment discrimination measure nearly a decade later.²⁷ In 1941, President Roosevelt created the Fair Employment Practices Committee, which banned race discrimination by private defense contractors during World War II.²⁸

The wave of labor activism during the New Deal and the resulting formalization of labor relations inspired new legal challenges to workplace

20. See Mack, *supra* note 199, at 336 (noting that racial differentials also likely saved a number of jobs for black workers). In general, the New Deal programs largely excluded African-Americans. See IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE 22-23 (2005) (describing how Southern Democrats crafted New Deal legislation to exclude as many African Americans as possible).

21. Mack, *supra* note 19, at 336.

22. 29 U.S.C. § 151 *et seq.* (2012).

23. *Id.*

24. Mack, *supra* note 19, at 332.

25. *Id.* at 333.

26. *Id.* at 333-34.

27. *Id.* at 345.

28. *Id.* The leading civil rights lawyer Charles Houston was appointed to the Committee. *Id.* He and many others advocated for workers under the New Deal- and World War II-era labor market regulatory scheme. *Id.*

discrimination as well as spirited debates about litigation priorities among civil rights leaders. On the one hand, many civil rights activists saw collective bargaining as an effective way for black workers to improve their working conditions, particularly through the Congress of Industrial Organizations (CIO), which emphasized inclusion and cross-racial organizing.²⁹ On the other hand, labor unions frequently excluded African-Americans from employment by barring African-Americans altogether or by relegating them to separate bargaining units and lower-level positions.³⁰ The NLRA ultimately passed without including the nondiscrimination provision that civil rights activists had sought.³¹ Nevertheless, lawyers continued to challenge racial discrimination by unions under the newly-enacted labor law, bringing cases before the National Labor Relations Board (NLRB or “the Board”)³² and in state courts³³ challenging the right of unions to exclude black workers. Ultimately while neither the Board nor the courts went so far as to completely ban discrimination by unions, the California Supreme Court ruled that unions could not bar black workers both from joining the union and from obtaining employment in a closed shop that has agreed to only hire union members.³⁴ The NLRB issued several decisions with dicta to the same effect and also pledged that it would decertify unions that failed to provide fair representation to non-white members, although it defined fair representation extremely narrowly.³⁵

Litigation around labor rights and inclusion of black workers was a top priority for civil rights leaders such as the NAACP Legal Defense Fund

29. *Id.* at 351 (“New political alignments built around a labor worker organization . . . will be the dominant political factors that will hold the balance of power in American politics. The Negro will rise politically as this movement gains headway and will fall as it fails.”) (quoting Raymond Pace Alexander, *The Next Decade: A Philosophy of Life for the Negro College Student of Today*, Address Delivered at Youth Educational Rally, University of Pennsylvania 11 (May 7, 1938)); *see also*, William E. Forbath, *Civil Rights and Economic Citizenship: Notes on the Past and Future of the Civil Rights and Labor Movements*, 2 U. PA. J. LAB. & EMP. L. 697, 702-04 (2000).

30. *See* Goluboff, *Economic Equality*, *supra* note 18, at 1413–21 (discussing how instances of discrimination on the part of unions helped galvanize the NAACP in wartime years).

31. Mack, *supra* note 19, at 340.

32. *See* Goluboff, *Economic Equality*, *supra* note 188, at 1433; Carle, *Myth-Busting*, *supra* note 144, at 184; Sophia Z. Lee, *Hotspots in a Cold War: The NAACP’s Postwar Workplace Constitutionalism, 1948-1964*, 26 LAW & HIST. REV. 327 (2008).

33. Goluboff, *Economic Equality*, *supra* note 18, at 1433 (discussing *James v. Marinship Corp. v. International Brotherhood of Boilermakers*, 25 Cal. 2d 721 (1944)).

34. *See James*, 25 Cal. 2d at 745; *Williams v. International Brotherhood of Boilermakers Inc.*, 27 Cal. 2d 586, 590-92 (1946). The Supreme Court also upheld New York’s state legislation barring unions from discriminating on the basis of race during this period. *See Railway Mail Ass’n v. Corsi*, 326 U.S. 88, 93-94j (1945).

35. Sophia Z. Lee, *A Signal or a Silo? Title VII’s Unexpected Hegemony* 9-10 (University of Pennsylvania School of Law Faculty Scholarship, Paper 1261, 2014), *available at* http://scholarship.law.upenn.edu/faculty_scholarship/1261; *see, e.g.*, In re Larus & Bros. Co., 62 NLRB 1075, 1081 (1945); In re Bethlehem-Alameda Shipyard, 53 NLRB 999, 1016 (1943).

(LDF) from the 1930s through the mid-1940s. But priorities shifted by the early 1950s, especially within the LDF, which turned its focus in the courts to challenging legally-mandated segregation in schools and public accommodations. Civil rights lawyers would not focus on litigating labor issues or economic opportunity again until after the passage of Title VII twenty years later, when LDF and others sought to enforce the law in the strongest possible way. Multiple theories exist as to why civil rights lawyers moved away from challenging discrimination in employment in the courts in the late 1940s. Civil rights organizations may have become wary of challenging unions' discriminatory practices, because civil rights and labor organizations were increasingly forming strategic alliances in a newly hostile postwar political climate that put both groups on the defensive.³⁶ Or perhaps challenges to segregation in education aligned more closely with LDF's goal of overturning *Plessy v. Ferguson*, and challenges to state action rather than private discrimination appeared to have a better chance of victory in the courts.³⁷ Whatever the reasons, Risa Goluboff argues that the shift away from labor litigation toward desegregation efforts, resulting in the seminal case of *Brown v. Board of Education*,³⁸ had a lasting effect on civil rights law and the public understanding of discrimination.³⁹ In her account, this shift led to "a civil rights framework sapped of the power to redress material inequality as well as formal discrimination. As labor issues disappeared from the modern notion of civil rights, the distillation of racial classification as a harm in itself came to be expressed in terms of psychological injury."⁴⁰

B. A Broad Understanding of Equal Employment Opportunity Legislation

Despite the shift in litigation priorities toward ending formal segregation throughout the 1950s and '60s, many activists continued to put economic issues front and center, stressing that "racial equality could not be achieved without economic justice."⁴¹ During this era, activists saw the prospect of making national-level antidiscrimination legislation as a reality and mobilized for enactment of strong and far-reaching antidiscrimination measures. What is striking is the extent to which advocates incorporated economic opportunity into their proposals for such legislation and their visions of equal employment opportunity, reaching beyond an

36. Goluboff, *Economic Equality*, *supra* note 188, at 1459–68.

37. *Id.* at 1472–82.

38. 347 U.S. 483 (1954).

39. *Id.* at 1484–1485.

40. *Id.* at 1485.

41. William P. Jones, *The Unknown History of the March on Washington*, 7 LABOR: STUDS. WORKING-CLASS HIST. AMERICAS 33, 47 (2010).

antidiscrimination principle and encompassing a measure of substantive economic equality.

The 1963 March on Washington for Jobs and Freedom was arguably the most influential event linking racial equality and economic justice. A coalition of black labor activists, led by A. Philip Randolph and Bayard Rustin, joined forces with those leading the movement against segregation and oppression in the South, including John Lewis and Martin Luther King, Jr.⁴² Their demands included a federal Fair Employment Practices Act, a higher national minimum wage, a massive federal job-training and -creation program for the unemployed and an expansion of the FLSA to encompass previously excluded sectors.⁴³ These economic demands were spurred by the fact that, as Bayard Rustin noted, unemployment, low wages, and poverty were growing—particularly among African-Americans—during “the very decade which . . . witnessed the decline of Jim Crow.”⁴⁴ Even in the early 1960s, union leaders recognized the threat that rising automation in industry posed, particularly for black workers.⁴⁵ Rustin, testifying before Congress, stressed that the Civil Rights bill the legislature was considering could not simply “outlaw discrimination in employment when there are not enough [jobs] to go around.”⁴⁶ Civil rights, he explained, must be built on the “right to a decent livelihood.”⁴⁷

An alternate proposal for federal equal opportunity law, inspired by Rustin and introduced in 1963 by Senators Joseph Clark and Hubert Humphrey, included affirmative measures to increase job opportunity.⁴⁸ The Clark-Humphrey bill differed from other equal employment opportunity bills introduced at the time in that it sought to “operate simultaneously on two fronts”: it would “fight all forms of job discriminations and restrictions based on race” as well as “insure equal employment opportunity in an economic system where certain types of jobs are suddenly disappearing and other totally new categories of jobs are being created.”⁴⁹ Senator Humphrey recognized that a bill should address the fact

42. *Id.* at 41, 45. A number of women, whose names are not so well known today, were instrumental in organizing the March as well. *Id.* at 44. In the years afterward, feeling frustrated that their voices had been drowned out or disregarded by the men in the civil rights movement, a number of these women went on to help form the National Organization for Women. *Id.* at 50.

43. See MARCH ON WASHINGTON FOR JOBS AND FREEDOM, *supra* note 1, at 4.

44. Jones, *Unknown History*, *supra* note 41, at 33.

45. Jones, *Unknown History*, *supra* note 41, at 33, 41.

46. Forbath, *supra* note 29, at 708 (quoting draft of Congressional testimony, Fall 1963, from Papers of Bayard Rustin).

47. Forbath, *supra* note 29, at 708.

48. S. 1937, 88th Cong. (1963). At the time there were a number of equal employment opportunity bills in Congress. See Forbath, *supra* note 29, at 712.

49. Forbath, *supra* note 29, at 713 (quoting *U.S. Senate, Equal Employment Opportunity, Hearing Before the Subcomm. on Emp't and Manpower of the Comm. on Labor and Pub. Welfare*, 88th Cong. 142 (1963) (hereinafter *Hearing Before the Comm. on Labor*)).

that “willful discrimination is often commingled with many impersonal institutional processes which nevertheless determine the availability of jobs for nonwhite workers.”⁵⁰ The bill would create an Equal Employment Opportunity Administration within the Department of Labor, which would investigate and seek to remediate patterns of discrimination and exclusion. In addition, the bill would fund a range of new training and regional job creation efforts, the implementation of which would be closely coordinated with the new Equal Opportunity Administration.⁵¹ This expansive view of antidiscrimination in employment envisioned not simply equal opportunity, but also the dismantling of the exploitation and substandard job conditions that racial oppression facilitated, and thus a raised floor for all workers.⁵²

Ultimately the final version of the equal employment opportunity provision included in the Civil Rights Act of 1964 was a much stripped down version, most prominently lacking a powerful enforcement agency.⁵³ The unrealized goal of social investment in full employment as an avenue to racial equity, and the mechanisms proposed in the Clark-Humphrey bill to achieve that goal, provide a powerful counter-factual model as well as inspiration for future paths toward greater economic and racial equity. Regardless of what could have emerged under a more robust equal employment opportunity law, however, activists and regulators have sought to make the greatest impact with the tools at their disposal.

50. Forbath, *supra* note 29, at 713 (quoting *Hearing Before the Comm. on Labor* at 144-45 (statement of Sen. Humphrey)).

51. Forbath, *supra* note 29, at 713.

52. Although Title VII of the Civil Rights Act of 1964 failed to include any measures from Humphrey and Clark’s proposed second front, meant to increase economic opportunity in a changing economy, economic opportunity and eradication of poverty continued to be a core theme of the civil rights movement. Antipoverty agendas put forward in the following years were thought of as a part of or closely connected to the civil rights movement and struggles for racial justice. For example, in the mid-1960s, Martin Luther King, Jr. proposed a Freedom Budget as part of the Poor People’s Campaign, a “multi-billion dollar social investment to destroy the racial ghettos of American, decently house both the black and white poor, and to create full and fair employment in the process.” Forbath, *supra* note 29, at 709 (quoting Bayard Rustin, *Freedom Budget Article*, n.d., *microformed on Bayard Rustin Papers*, Reel 13 at 1). Civil rights activists emphasized the need for another New Deal grounded in a full employment policy, given that African-Americans had largely been excluded from the social investments of the Roosevelt era. Forbath, *supra* note 29, at 710 (citing LEON H. KEYSERLING, *PROGRESS OR POVERTY: THE U.S. AT THE CROSSROADS* 37 (1964) (Keyserling’s critiques of the New Deal. Keyserling was an economist who had crafted much of the New Deal legislation and who was enlisted to draft a “Freedom Budget” by Randolph and Martin Luther King, Jr.)). Lyndon Johnson’s Secretary of Labor, Willard Wirtz, also openly criticized the “partial and piecemeal social services/work counseling approach being adopted by the War on Poverty.” Forbath, *supra* note 29, at 713.

53. See Chuck Henson, *Title VII Works—That’s Why We Don’t Like It*, 2 U. MIAMI RACE & SOC. JUST. L. REV. 41, 73-74, 88-89 (2012) (describing how the House Judiciary Committee stripped the EEOC of proposed broad enforcement powers).

C. *A Focus on Structural Reforms in the Workplace to Enable Economic Mobility*

The early work of equal employment opportunity agencies, including state agencies in the years preceding the Civil Rights Act, focused in large part on increasing racial minorities' access to middle-wage jobs. Their work calls into question the prevalent assumption that in the past racial discrimination in employment was overwhelmingly overt, directed at specific employees or applicants, intentional, and based in racial animus. Instead, many of those who enacted, enforced, and advocated under equal employment opportunity laws in the early days operated from a much more nuanced understanding of the ways racial inequality in the workforce was perpetuated. Legal scholars at the time described inequality in the workplace as often resulting from structural barriers that might appear race-neutral to an outside observer, and which may not even have been intended to restrict opportunities for people of color.⁵⁴ The attempts of early equal opportunity agencies such as New York's to reform neutral employer practices that exacerbated effects of societal discrimination demonstrate a recognition that racial discrimination and structural inequality in society at large filtered into the workplace. Moreover, these agencies demonstrated an understanding of the nuance of institutional racism by focusing on economic mobility in their efforts to open up better job opportunities for low-wage and unemployed workers of color.⁵⁵

The first fair employment practices statute, the Ives Quinn Act, was enacted by the New York state legislature in 1945.⁵⁶ The Act declared that the "opportunity to obtain employment without discrimination because of race, creed, color or national origin" was a civil right, and established an agency, the New York State Commission Against Discrimination (SCAD), to conduct investigations and prosecute charges.⁵⁷ Although SCAD was established to take individual discrimination complaints, and investigate and either mediate or adjudicate claims (it had the power to impose civil or

54. See Henry Spitz, *Tailoring the Techniques to Eliminate and Prevent Employment Discrimination*, 14 BUFF. L. REV. 79, 81 (1964) ("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 to the rapid integration of excluded groups."); PAUL H. NORGREN & SAMUEL E. HILL, *TOWARD FAIR EMPLOYMENT* 27-28 (1964) (arguing that without a "conscious decision on the part of top management to move in the direction of an integrated work force" patterns of segregation would remain in place even without any intent to discriminate).

55. Scholars advocated for this approach as well. See Morroe Berger, *The New York State Law Against Discrimination: Operation and Administration*, 35 CORNELL L. Q. 747, 795 (1950) (arguing that "the most important matter is not the settlement of individual cases but the opening of new job opportunities for members of minority groups").

56. 1945 N.Y. Laws 458, §§ 125-127. Other states followed quickly, and by 1963 half the states had enacted fair employment practices laws. See ANTHONY S. CHEN, *THE FIFTH FREEDOM: JOBS, POLITICS, AND CIVIL RIGHTS IN THE UNITED STATES, 1941-72*, at 118, tbl.4.1 (2009).

57. 1945 N.Y. Laws 458, §§ 125-127.

criminal fines and up to one year's imprisonment), the agency's early leadership "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."⁵⁸

In practice, SCAD implemented its strategy of structural reform by engaging in long-term negotiations with particular companies and industries to coax them to change their recruitment, hiring, and promotion practices. For example, SCAD partnered with labor and community groups in a multi-year effort to encourage New York hotels to develop more white-collar jobs for the many African-Americans who worked in the industry's lowest-level positions.⁵⁹ SCAD persuaded employers to fund an industry-wide committee to enhance employment and promotional opportunities for black workers, and to implement in-house training programs that helped entry-level black workers prepare for and access white-collar jobs.⁶⁰ By 1950, five years after the passage of the Ives Quinn Act, African-American workers in New York had moved from extremely high concentrations in the domestic and personal service sector into higher-paying sales and clerical jobs (for women) and semi-skilled jobs (for men).⁶¹

State fair employment practices laws and enforcement mechanisms heavily influenced the development of federal employment discrimination law and enforcement.⁶² While it lacked the power to issue any binding orders itself and could not bring lawsuits prior to 1972,⁶³ the newly-created EEOC undertook many steps similar to SCAD in the early years after the passage of Title VII. When the EEOC realized it could not possibly fully investigate the flood of individual charges of discrimination it received, and because it also lacked the power to bring lawsuits, the agency sought to have the broadest impact by focusing on the negotiation of far-reaching agreements with large companies.⁶⁴ These agreements often required

58. Carle, *Social Movement History*, *supra* note 17, at 279. This focus apparently frustrated certain advocates, particularly lawyers at the NAACP, who wanted more high-profile prosecutions to establish case law and serve as examples to other employers. *Id.* at 280–81.

59. *Id.* at 282.

60. *Id.* at 279. In another example of SCAD's structural reform strategy, in a precursor to disparate impact cases, SCAD sought to open a building trades apprenticeship program to African-Americans and Puerto Ricans, and worked with New York University to develop a paper test for qualification to the program. *Id.* at 282. After the initial pass rate for African-Americans was very low, it asked the university to rewrite the test to avoid such a disparate impact. *Id.*

61. *Id.* at 280. It is hard to measure the exact impact of the law because World War II created strong demand for labor in new sectors, and because executive orders banning job discrimination for government contractors may have influenced hiring practices. *Id.* at 280 n.178 (citing Berger, *supra* note 55, at 792).

62. Carle, *Social Movement History*, *supra* note 177 at, 283, 288–89.

63. See Chen, *supra* note 56, at 171, 178–80, 209 (describing political battles around how Title VII would be enforced).

64. Carle, *Social Movement History*, *supra* note 17, at 289–90.

complex restructuring of companies' and unions' wage, recruitment, promotion, and seniority systems to increase opportunities for the hiring and promotion of black workers.⁶⁵ The EEOC also convened industry-wide initiatives, such as a forum for the southern textile industry and a "cooperative follow-up program" to broaden recruitment and hiring of workers of color.⁶⁶ As part of these industry initiatives, EEOC representatives assessed whether employers' hiring and promotion systems harmed black workers, and persuaded some plant managers to stop using certain hiring tests that were irrelevant to underlying job descriptions.⁶⁷ Ironically, the EEOC focused on jobs in large, unionized blue-collar workplaces with internal promotion ladders—jobs that rapidly disappeared in the coming decades, which eroded some of the gains made by low- and middle-skilled black workers in the 1960s and '70s as described below in Part II.A.

D. The Abandonment of Broad Economic Justice Goals

The early efforts of the EEOC to push for broad racial equity and greater economic opportunity ended by the 1980s, when the Reagan administration gutted EEOC enforcement, reduced staff, and left the agency to administratively process a growing number of individual claims.⁶⁸ Private Title VII litigation became the primary means of securing equal opportunity at work, but as the civil rights movement waned and the discourse around discrimination shifted, those seeking broader change had to fight against a narrowed definition of discrimination that included only overt and intentional exclusion or mistreatment. During this time, public, scholarly, and enforcement agency attention also began to shift away from economic opportunity for low-wage workers toward addressing the different types of barriers to advancement facing the white women and people of color who had begun to enter professional, higher-wage workplaces.

Tools like class actions and the disparate impact theory, key mechanisms for securing broader reforms in the workplace, have been less effective in the past several decades. While a small number of class action Title VII lawsuits in the 1970s had major effects on changing employer

65. *Id.* at 290 (discussing conciliation agreements with Newport News Shipbuilding and Drydock Company, and with Kaiser Aluminum and Chemical Corporation and its union. Both agreements focused on opening up promotion opportunities that had been hoarded by white workers via seniority or similar systems.).

66. *Id.* at 291.

67. *Id.*

68. See KEVIN STAINBACK & DONALD TOMASKOVIC-DEVEY, DOCUMENTING DESEGREGATION 157-59 (2012) (showing cuts to funding and staffing of the Office of Federal Contract Compliance Programs (OFCCP) and the EEOC from 1981 to about 1992, found on Figure 5.1).

practices, the large number of individual lawsuits after 1980⁶⁹ have had far less impact as the pace of desegregation in the workplace has slowed considerably.⁷⁰ Some scholars attribute this declining speed of desegregation to the eradication of the most egregious discriminatory practices in the early years of Title VII.⁷¹ Scholars have also noted that as litigation patterns under Title VII shifted toward more individual litigation regarding discriminatory firing rather than broad challenges to discriminatory hiring practices, employers had less incentive to adopt more inclusionary practices in hiring and promotion.⁷² Other scholars speculate that uncertainty about the law's meaning in the early years spurred big shifts in employer behavior, but once legal norms solidified, employers were more likely to do only what was necessary to stay within the letter of the law.⁷³ Indeed, a number of scholars convincingly argue that many human resources practices and policies are designed primarily to shield employers from liability in litigation rather than to improve hiring, discipline, promotion or firing procedures, or increase equal opportunity.⁷⁴

69. See STAINBACK & TOMASKOVIC-DEVEY, DOCUMENTING DESEGREGATION, *supra* note 68, at 157-59 (showing that class action lawsuits under Title VII fell from over 1,000 filed in 1975 to just fifty-one in 1989). Over 84,000 charges were filed at the EEOC in 2002 covering all types of employment discrimination. Laura Beth Nielsen & Robert L. Nelson, *Rights Realized?: An Empirical Analysis of Employment Discrimination Litigation as a Claiming System*, 2005 WIS. L. REV. 663, 689 (2005). Only a small fraction of federal employment discrimination lawsuits involve some form of collective legal mobilization, whether that means multiple plaintiffs, class claims, or representation by a public interest-affiliated law firm, despite the much higher likelihood of success of cases brought collectively. Laura Beth Nielsen et al., *Individual Justice or Collective Legal Mobilization—Employment Discrimination Litigation in the Post-Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUD. 175, 189 (2010). This figure was based on a random sample of federal court filings in several high-volume districts from 1988 to 2003. *Id.* at 176. Of the 152 cases the study coded as “collective legal mobilization,” 108 involved multiple plaintiffs (two or more), forty-six involved EEOC intervention as a party, eighteen were certified class actions and nine were represented by a public interest law firm. *Id.* at 189. An earlier study found that class actions were only 0.25% of all employment discrimination filings in 1990 and 0.35% of filings in 2001. Nielsen & Nelson, *supra* at 692. For more on the success of individual complaints versus class-action complaints, see C. Elizabeth Hirsh, *Settling for Less? Organizational Determinants of Discrimination-Charge Outcomes*, 42 LAW & SOC'Y REV. 239, 253 (2008) (noting that, to the extent that class filings lend evidentiary support to complainants, class-action plaintiffs are more likely to receive favorable outcomes than individual complainants).

70. See STAINBACK & TOMASKOVIC-DEVEY, DOCUMENTING DESEGREGATION, *supra* note 68, at xxiv.

71. John Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1027-28 (1991).

72. *Id.* at 1019, 1028.

73. STAINBACK & TOMASKOVIC-DEVEY, DOCUMENTING DESEGREGATION, *supra* note 68, at 10-11, 89-92.

74. See, e.g., Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531 (1992); Susan Bisom-Rapp, *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice*, 26 FLA. ST. U. L. REV. 959, 961-62, 988-1010 (1999) (describing how lawyers for employers help create policies that symbolically indicate compliance with the law and an evidentiary trail to use against employees in the event of a discrimination lawsuit).

Although the disparate impact theory under Title VII seemed to promise a way to enforce structural workplace reforms in the courts, most courts have proven unwilling to apply the theory broadly,⁷⁵ and relatively few cases have been brought and fewer won under the theory.⁷⁶ For early regulators and advocates, disparate impact theory was not a separate legal doctrine of discrimination but instead a central means of addressing it. The Supreme Court first recognized that facially neutral policies with disparate negative impacts on racial minorities could violate Title VII⁷⁷ in 1971, in *Griggs v. Duke Power Company*.⁷⁸ The Supreme Court ruled that a high school diploma requirement for the better-paid jobs at the Duke power plant violated Title VII because it had a discriminatory effect against African-Americans, who were far less likely to have a degree.⁷⁹ While *Griggs* is now thought of as having established disparate impact theory, at the time advocates and regulators saw challenges to the disparate impacts of neutral employment policies not as a separate legal doctrine of discrimination but instead as a central means of addressing it.⁸⁰ Courts—which are increasingly wary both of imposing liability where there is no intent to discriminate⁸¹ and of upsetting a social order widely viewed as natural

75. See Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 747-50 (2006) (explaining that courts have rejected many claims involving policies alleged to have a disparate impact on pregnant women and have limited the reach of the theory in the age discrimination context).

76. *Id.* at 738-40 (empirical analysis showing a plaintiff success rate of 19.2% in reported appellate cases in the years 1984-1985, 1994-1995, and 1999-2001, and 25.1% in reported district court cases in the years 1983, 1987, 1991, 1996, 1999, and 2002). Plaintiffs and attorneys lack a financial incentive to bring claims under disparate impact theory because no compensatory or punitive damages are available, as they have been for intentional discrimination claims since the Civil Rights Act of 1991. Elaine W. Shoben, *Disparate Impact in Employment Discrimination: What's Griggs Still Good For? What Not?*, 42 BRANDEIS L.J. 597, 598 (2004).

77. Some scholars posit that the first case to adopt a disparate impact analysis in its holding was *Johnson v. Ritz Hotels*, Case C12, 750-66 (N.Y. State Comm'n for Human Rights), under New York's Ives-Quinn Act in 1966. Carle, *Myth-Busting*, *supra* note 14, at 175 (citing George Cooper & Richard B. Sobol, *Seniority and Testing Under Fair Employment Laws*, 82 HARV. L. REV. 1598, 1601 (1969)). Mr. Johnson challenged the Ritz's requirement that applicants have five years' prior experience in an East Side hotel, when hotels on the East Side traditionally discriminated against African-Americans. Carle, *Myth-Busting*, *supra* note 14, at 175.

78. 401 U.S. 424 (1971).

79. *Id.* at 436.

80. Selmi, *supra* note 75, at 715-16, 723. As Robert Belton of the LDF, the lead counsel in *Griggs*, put it, "It was all discrimination." *Id.* at 723. The Court did not draw a clear line between disparate impact and disparate treatment theories until the case of *Washington v. Davis*, 426 U.S. 229 (1976), when the Court ruled that Constitutional equal protection principles did not prohibit the Washington, D.C. Police Department's use of a qualification test that had a disparate pass rate for black and white applicants where the Department had no discriminatory intent in administering the test. See Selmi, *supra* note 75, at 725-32.

81. Selmi, *supra* note 75, at 773-75. Selmi argues that courts have been reluctant to impose liability in many disparate impact cases because there is not a sufficient sense of moral blameworthiness on the part of the employer. *Id.* He contends that framing disparate impact as a separate theory of unintentional discrimination ultimately led to a much narrower understanding of discriminatory intent

rather than shaped by discrimination—have since limited the application of the disparate impact theory by insisting that plaintiffs identify the specific employment practices producing discriminatory effects⁸² and by ruling that actions largely dictated by “market forces” are not a specific employment practice.⁸³

Ultimately, the belief in our individualistic and “post-racial” society that discrimination is an aberration rather than a pervasive system⁸⁴ has likely limited the effectiveness of class action and disparate impact lawsuits as a tool to chip away at persistent racial disparities since judges, like many others, are less likely to view systemic disparities as the result of discrimination.⁸⁵ In *Wal-Mart Stores, Inc. v. Dukes*, an offhand sentence in Justice Scalia’s majority opinion showcases this view of discrimination as limited to individual instances (in this case in reference to sex-based discrimination).⁸⁶ In evaluating claims that the policy of leaving promotion decisions largely up to managers’ discretion had a disparate impact on the promotion of women, Scalia wrote that “[l]eft to their own devices most managers in any corporation. . . would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all.”⁸⁷

II. STRUCTURAL INEQUALITY AND TODAY’S LOW-WAGE WORKFORCE

Much has changed for low-wage workers since the passage of the Civil Rights Act of 1964. A number of labor market shifts have transformed the landscape of work and economic mobility in the United States, including (1) the arrival of large numbers of immigrants from Mexico, Central America, and elsewhere (many of whom lack legal authorization to work in

than what could have developed if *Griggs*-type situations had been included in our understanding of intentional discrimination. *Id.*

82. See *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 994 (1988).

83. See *Spaulding v. Univ. of Wash.*, 740 F.2d 686, 708 (9th Cir. 1984), *overruled on other grounds by Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477 (9th Cir. 1987).

84. See Sheryll Cashin, *Shall We Overcome? “Post-Racialism” and Inclusion in the 21st Century*, 1 ALA. C.R. & C.L. L. REV. 31, 36-41 (2011) (discussing how the belief of many whites that racism is no longer a big problem considerably constrains civil rights advocacy).

85. See, e.g., Lawrence D. Bobo and Camille Z. Charles, *Race in the American Mind: From the Moynihan Report to the Obama Candidacy*, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 243, 247 (2009) (white people are “increasingly less inclined to believe that blacks and other minorities face structural barriers to upward mobility”); Anne Lawton, *The Meritocracy Myth and the Illusion of Equal Employment Opportunity*, 85 MINN. L. REV. 587, 593-99 (2000) (discussing prevalent belief that individual merit rather than structural or pervasive discrimination causes differences in outcome).

86. 131 S. Ct. 2541, 2554 (2011).

87. *Id.*

the U.S.);⁸⁸ (2) the outsourcing of manufacturing jobs to other countries and their replacement in part with lower-paying service jobs;⁸⁹ (3) dwindling opportunities for advancement both within firms and within industries;⁹⁰ and (4) the erosion of union membership.⁹¹ These changes affect workers of color in complex ways and create new and different conditions in which racial discrimination may persist or even increase.⁹²

At the same time, much has stayed the same over the past fifty years, such as stubbornly persistent racial disparities in income, wealth, employment, and economic mobility, particularly between blacks and whites.⁹³ While the stark racial segregation in the workplace that was the norm fifty years ago has diminished, occupational segregation remains remarkably high and in fact has not diminished significantly since the 1980s.⁹⁴ Despite a body of legal scholarship about the changing nature of employment discrimination due to the less overt expression of bias and less hierarchical workplace arrangements,⁹⁵ many low-wage workers face

88. See Pia M. Orrenius and Madeline Zavodny, *Immigrants in the U.S. Labor Market* 1-4 (Fed. Reserve Bank of Dallas, Research Dep't, Working Paper 1306, 2013), available at <https://www.dallasfed.org/assets/documents/research/papers/2013/wp1306.pdf>.

89. See Joseph R. Meisenheimer II, *The Services Industry in the 'Good' Versus 'Bad' Jobs Debate*, 121 MONTHLY LAB. REV., Feb. 1998, at 22-23, 28.

90. See ANNETTE BERNHARDT ET AL., DIVERGENT PATHS: ECONOMIC MOBILITY IN THE NEW AMERICAN LABOR MARKET 126 (2001) (tracking increase in men's wages between the ages of sixteen and thirty-six for those entering the workforce in the 1970s compared to those entering the workforce in the 1980s); see also Erik Olin Wright & Rachel E. Dwyer, *The Patterns of Job Expansion in the USA: A Comparison of the 1960s and 1990s*, 1 SOCIO-ECON. REV. 289, 321-23 (2003) (pointing to slow growth in the bottom quintiles of job quality as a limit on economic mobility).

91. News Release, BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *Union Members 2013*, USDL-14-0095 (Jan. 24, 2014), available at <http://www.bls.gov/news.release/pdf/union2.pdf> (showing that in 2013, 11.3% of wage and salary workers were members of unions, compared to 20.1% in 1983).

92. See Devah Pager et al., *Employment Discrimination and the Changing Landscape of Low-Wage Labor Markets*, 2009 U CHI. LEGAL F. 317, 319-31 (2009).

93. See STAINBACK & TOMASKOVIC-DEVEY, DOCUMENTING DESEGREGATION, *supra* note 68, at xxiv; see also THOMAS SHAPIRO ET AL., INSTITUTE ON ASSETS AND SOCIAL POLICY, THE ROOTS OF THE WIDENING RACIAL WEALTH GAP: EXPLAINING THE BLACK-WHITE ECONOMIC DIVIDE (2013), available at <http://iasp.brandeis.edu/pdfs/Author/shapiro-thomas-m/racialwealthgapbrief.pdf> (discussing factors that have fueled the racial wealth gap); JULIA B. ISAACS, THE BROOKINGS INSTITUTION, ECONOMIC MOBILITY OF BLACK AND WHITE FAMILIES 1-2 (2007), available at http://www.brookings.edu/~media/research/files/papers/2007/11/blackwhite-isaacs/11_blackwhite_isaacs.pdf (finding persistent income gaps between black and white families as well as lower economic mobility of black children in comparison to white children).

94. STAINBACK & TOMASKOVIC-DEVEY, DOCUMENTING DESEGREGATION, *supra* note 68, at xxiv.

95. See, e.g., Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001); Katharine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519 (2001). Many such discussions focus on high-wage, professional workplaces, but some articles are explicit about that focus. See, e.g., Elizabeth Chambliss, *Organizational Determinants of Law Firm Integration*, 46 AM. U. L. REV. 669 (1997); David Chamy & G. Mitu Gulati, *Efficiency-Wages*,

remarkably old-fashioned discrimination, such as steering into certain positions, systematic barriers to promotion, and substandard work conditions. Nonetheless, many people do not believe that discrimination is the cause of racial disparities in employment, occupational segregation, or the substandard conditions experienced by workers of color; they either fail to perceive these persistent problems, or believe that they naturally result from labor market pressures, language barriers, lack of education, or the perceived incompetence, laziness, or preferences of workers of color.⁹⁶

Legal strategies to address racial disparities in employment, segregated workplaces, and the substandard conditions experienced by workers of color must begin with making these discriminatory systems visible. Discrimination operates differently within different industries and sectors, and the experiences of low-wage workers of color vary based on factors such as race, immigration status, gender, and region. Legal strategies should recognize such variations and nuances and not impose any one-size-fits-all solutions. This Part examines three key shifts in the economy—deindustrialization of U.S. cities, the growth of the service sector, and the rise of immigrant workers in the peripheral economy—with a focus on how racial discrimination and other factors limit opportunity and suppress wages and working conditions for workers of color. This Part also discusses challenges in addressing these issues under current employment discrimination law.

A. *Post-Industrial America and Structural Racial Inequality*

The jobs that the EEOC and others worked hard to open up to African-Americans in the early years of Title VII—blue-collar, semi-skilled, unionized jobs—have largely disappeared over the past fifty years, as Bayard Rustin and others predicted.⁹⁷ The de-industrialization of the

Tournaments, and Discrimination: A Theory of Employment Discrimination Law for “High-Level” Jobs, 33 HARV. C.R.-C.L. L. REV. 57 (1998).

96. See Lawton, *supra* note 85, at 593-99; see also James R. Kluegel, *Trends in Whites’ Explanations of the Black-White Gap in Socioeconomic Status, 1977-1989*, 55 AM. SOC. REV. 512, 517 tbl. 3 (1990) (finding that majority of whites attribute the socioeconomic gap between blacks and whites to individual characteristics); Steven A. Tuch & Michael Hughes, *Whites’ Racial Policy Attitudes in the Twenty-First Century: The Continuing Significance of Racial Resentment*, 634 ANNALS AM. ACAD. POL. & SOC. SCI. 134 (2011) (examining gap between white Americans’ support for racial equality in principle and their reluctance to support policies meant to increase racial equality). Not surprisingly, attitudes of blacks and whites about the existence of discrimination differ. In a 2013 Gallup Poll, only 39% of black respondents thought black and white applicants had equal chances of getting jobs for which they were qualified, compared to 68% of all respondents that believed both groups had equal chances. Jeffrey M. Jones, *As in 1963, Blacks Still Feel Disadvantaged in Getting Jobs* (Aug. 28, 2013), <http://www.gallup.com/poll/164153/1963-blacks-feel-disadvantaged-getting-jobs.aspx>. However, 40% of blacks thought that discrimination was the main reason for economic disparities between blacks and whites, whereas 57% of blacks believed other factors were at work. *Id.*

97. Jones, *Unknown History*, *supra* note 41, at 40-41.

economy and the demise of unions, along with the effects of deindustrialization on many cities, is an essential backdrop for understanding today's low-wage economy and persistent racial opportunity gaps. The combination of loss of manufacturing jobs in former industrial centers, flight of white and middle-class residents to more remote suburbs where African-Americans were largely barred from buying homes, and subsequent retreat of good job opportunities to the suburbs lead to a downward spiral of deindustrialization, disinvestment, blight, unemployment, and poverty that largely falls along racial lines.⁹⁸ Residential racial segregation is a high predictor for lack of economic mobility in a region.⁹⁹

One place where the new economy's high-wage jobs are flourishing alongside neighborhoods still struggling with the effects of deindustrialization is the city of New Haven, Connecticut, a former manufacturing town where a thriving university and hospital have created some economic revival after decades of deindustrialization beginning in the 1970s.¹⁰⁰ New Haven, which is highly residentially segregated, is a microcosm of the polarized economy and an extreme example of the racial divisions that often accompany this polarization. In the East Rock neighborhood, which is about 80% white, the median family income is more than double that of neighboring Newhallville, which is about 80% black.¹⁰¹ Unemployment in East Rock between 2005 and 2009 was only 1.6%, while in Newhallville it was 9.7% (which does not account for the large number of Newhallville residents who are underemployed or have dropped out of the labor force entirely).¹⁰² More than half the population of each neighborhood works in health care or education, but these fields are marked by a large earnings gap between the professional-level and service-level jobs within them.¹⁰³

98. See, e.g., THOMAS J. SUGRUE, *THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT* xv–xxx (2005).

99. Raj Chetty, Nathaniel Hendren, Patrick Kline and Emmanuel Saez, *Where Is the Land of Opportunity? The Geography of Intergenerational Mobility in the United States* 4, 33-36, Table VII (National Bureau of Economic Research Working Paper 19843, 2014), available at <http://nber.org/papers/w19843>; see also DOUGLAS MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993); PATRICK SHARKEY, *ECONOMIC MOBILITY PROJECT: AN INITIATIVE OF THE PEW CHARITABLE TRUSTS, NEIGHBORHOODS AND THE BLACK-WHITE MOBILITY GAP*, 2-3 (2009), available at http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/economic_mobility/PEWSHARKEYv12pdf.pdf.

100. Between 1870 and 1920, the manufacturing sector employed as many as 75% of the city's working population, both black and white, but by the mid-1970s nearly all factories had closed their doors leaving only 4% of the city's population employed in manufacturing. MANDI ISSACS JACKSON, *CONNECTICUT CTR. FOR A NEW ECONOMY, A RENAISSANCE FOR ALL OF US: BUILDING AN INCLUSIVE PROSPERITY FOR NEW HAVEN* 9-10 (2011), available at <http://www.ctneweconomy.org/wp-content/uploads/A-Renaissance-for-all-of-us.pdf>.

101. *Id.* at 9.

102. *Id.* Crime rates in the two neighborhoods display a similar disparity. *Id.* at 20.

103. *Id.* at 9.

What accounts for New Haven's stark racial differentials in access to employment and higher-wage jobs? The increasingly polarized job market and decline of unionized jobs have disproportionately harmed workers of color, particularly those with less education.¹⁰⁴ Education alone, however, cannot explain the entire gap.¹⁰⁵ African-Americans have made striking gains in educational achievement since 1979, but have not seen corresponding rises in income or occupational status.¹⁰⁶

In the post-industrial economy of places like New Haven or Detroit and its surrounding suburbs, the gap in economic opportunity by race is perhaps best understood through the lens of structural racism.¹⁰⁷ The term signifies a systems theory approach to understanding the cumulative effects of discrimination within multiple dynamic and interacting systems such as residential segregation and concomitant discrepancies in property values, bank lending practices, and design of transportation networks; racial disparities in educational investment and attainment; concentration of law enforcement in communities of color and disparate levels of incarceration; and other institutional and cultural systems that lead to racial disadvantage.¹⁰⁸ Scholars of structural racial inequality have worked to map these interacting systems in order to more fully understand the complex interaction of race, place, economy, and opportunity.¹⁰⁹ The concept of structural racism conflicts with the predominant

104. Despite the labor movement's well-documented history of racial exclusion, there is a greater wage premium for black and Hispanic workers in union jobs than there is for white workers. See LAWRENCE MISHEL, ECON. POL'Y INST., UNIONS, INEQUALITY, AND FALTERING MIDDLE-CLASS WAGES 3-4 (2012), available at <http://s2.epi.org/files/2012/ib342-unions-inequality-middle-class-wages.pdf>; see also JANELLE JONES & JOHN SCHMIDT, CTR. FOR ECON. AND POL'Y RESEARCH, UNION ADVANTAGE FOR BLACK WORKERS 1-3 (2014), available at <http://www.cepr.net/documents/black-union-2014-02.pdf>.

105. See Pedro Carneiro et al., *Labor Market Discrimination and Racial Differences in Pre-market Factors*, 48 J.L. & ECON. 1, 35 (2005) (concluding that the major sources of racial disparities in U.S. labor markets are deficits in cognitive and noncognitive abilities that develop and widen before minority children enter school).

106. JANELLE JONES & JOHN SCHMIDT, CTR. FOR ECON. AND POL'Y RES., HAS EDUCATION PAID OFF FOR BLACK WORKERS? 1 (2013), available at <http://www.cepr.net/documents/publications/black-good-jobs-2013-06.pdf>. While over 30% of African-Americans had not completed high school in 1979, only 5.3% lacked a high school degree in 2011, and over 60% of African-Americans had completed at least some college. See *id.* at 3. Educational gains have failed to translate into living-wage jobs with benefits in part because such jobs have diminished for all workers. See *id.* at 8. In fact, white men lost their share of good jobs more rapidly than black men, but white workers are still about 8% more likely to have a good job than black workers - the same disparity as in 1979. *Id.*

107. See John A. Powell, *Structural Racism: Building Upon the Insights of John Calmore*, 86 N.C. L. REV. 791, 794-800 (2007) (providing a framework that understands racism as active on individual, institutional, and inter-institutional levels).

108. *Id.* at 796-800; see also Rebecca M. Blank, *Tracing the Economic Effects of Cumulative Discrimination*, 95 AM. ECON. REV. 99, 99-101 (2005) (discussing the cumulative economic effects of racial discrimination).

109. See, e.g., Powell, *supra* note 107, at 808-09 (describing an opportunity index, or map, that could help government agencies reverse housing segregation in Baltimore).

antidiscrimination law framework because laws designed to address racial discrimination generally rely on linear causation, and consequently either ignore multiple causes of discriminatory outcomes or fail to recognize an outcome as actionable because there is no single or primary traceable cause.¹¹⁰ Additionally, because the mechanisms of structural racism are deeply embedded and tend to be difficult to recognize, the systems operating to create and maintain racial inequality tend to be invisible to the general public.¹¹¹

B. Stratified Service Jobs, Stereotypes and Unconscious Bias

The service jobs that have largely replaced manufacturing—particularly in retail, food service, and hospitality—are not only primarily low-wage jobs,¹¹² they are also often starkly stratified by race and gender, with women and people of color disproportionately concentrated in the lowest-paid service positions and occupations. Racial and gender stratification in the service sector is driven by several factors: an emphasis on appearance and “soft skills” that allows stereotypes and unconscious bias to influence hiring decisions, informal hiring practices relying on racial and ethnic-based social networks, and the absence of any internal promotion structures that would enable workers to move up the ladder over time. The racial and gender stratification in service jobs is so pervasive that it tends to go unremarked until an overt expression of bias makes it strikingly apparent.¹¹³ Yet these instances, when publicized, reinforce the common perception that discrimination is an exception to the rule, perpetrated by rogue individuals, rather than a pervasive and impersonal systemic force.

The restaurant industry provides a clear illustration of institutionalized racial stratification. For example, workers of color comprise almost 73% of

110. *Id.* at 798-99.

111. *Id.* at 792 (“[R]acism operates so effectively that we seldom distinguish serious racist harms from a variety of other harms that categorically run from ‘bad luck’ to ‘natural catastrophes.’”) (quoting John O. Calmore, *Race/ism Lost and Found: The Fair Housing Act at Thirty*, 52 U. MIAMI L. REV. 1067, 1073 (1998)).

112. In 2010, one in twelve private-sector workers was employed in a “food preparation and serving related” position, where the median hourly wage of \$9.02 was far below the national median hourly wage of \$16.26. See BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, *May 2010 National Occupational Employment and Wage Estimates, United States* (2010), available at http://www.bls.gov/oes/2010/may/oes_nat.htm.

113. For example, the EEOC took on a case against retailer Wet Seal after discovering email correspondence specifying the company’s desire for white salespeople with blonde hair and a statement from a manager saying “African-Americans dominate—huge issue.” Steven Greenhouse, *E.E.O.C. Finds Race Bias in Firing at Wet Seal Store*, N.Y. TIMES, Dec. 4, 2012, at B7, available at <http://www.nytimes.com/2012/12/04/business/eecoc-finds-race-bias-in-firing-at-wet-seal-store.html>.

New York City's restaurant workforce.¹¹⁴ Yet a 2007 study that canvassed forty-five fine-dining restaurants found that white workers held 84% of managerial front-of-the-house positions and 68% of non-managerial first-line positions such as server, bartender, and host.¹¹⁵ In contrast, workers of color held 76% of the lower-tier front-of-the-house positions, which involve little to no customer contact and include runner, busser, and bar-back.¹¹⁶ This pattern has been observed in other service-sector jobs. A New York-based matched-pair study of hiring in various low-wage sectors led by Devah Pager found that male, black, and Latino applicants for a variety of service jobs involving customer contact, primarily retail, were routinely steered into back-of-the-house, non-customer-facing positions, while white applicants were not.¹¹⁷

The emphasis in service jobs on "soft skills" such as personality, appearance, and ability to connect with customers rather than on experience or educational credentials more easily allows for discriminatory stereotypes to influence hiring and promotion decisions and tends to disadvantage people of color, particularly black men.¹¹⁸ The notion of the "right fit" or the "right look" for an establishment is often premised on race- and class-based assumptions.¹¹⁹ Such assumptions and their effects on hiring

114. RESTAURANT OPPORTUNITIES CTR. OF N.Y. & THE N.Y.C. RESTAURANT INDUSTRY COALITION, THE GREAT SERVICE DIVIDE: OCCUPATIONAL SEGREGATION & INEQUALITY IN THE NEW YORK CITY RESTAURANT INDUSTRY 15-16 (2009), available at http://rocunited.org/wp-content/uploads/2013/04/reports_great-service-divide.pdf (citing U.S. Census data from 2000 showing that African-Americans are 11.6% of NYC restaurant workers, Asians are 26.6%, Hispanics (of any race) are 34.9%).

115. *Id.* at 16-17.

116. *Id.* While it may be tempting to attribute this segregation to language ability, the study controlled for these factors in a matched-pair test of job applicants for restaurant server positions. In pairs with similar qualifications, manner, appearance and language ability or accent, white applicants were significantly more likely to be offered an interview and far more likely to be offered a position. *Id.* at 24-26. In a separate matched-pair test, the study found that white applicants with European accents actually had some advantage in hiring over white applicants without an accent, while there was no statistically significant difference in employment outcomes for applicants of color with or without accents. *Id.* at 29.

117. Pager et al., *supra* note 92, at 335-36. In retail, for example, employers steered black and Latino male applicants toward stockperson rather than salesperson jobs, while some employers actually encouraged white applicants to apply for positions at a higher level than those advertised. *Id.* at 336-38. Lower levels of discrimination in general were found in jobs involving manual labor. *Id.*

118. *Id.* at 320-21; see also PHILLIP MOSS & CHRIS TILLY, STORIES EMPLOYERS TELL: RACE, SKILL AND HIRING IN AMERICA 96-105 (2001) (discussing employer-held stereotypes of black workers); Changhwan Kim & Christopher R. Tamborini, *The Continuing Significance of Race in the Occupational Attainment of Whites and Blacks: A Segmented Labor Market Analysis*, 76 SOC. INQUIRY 23, 45 (2006); Warren & Cohen, *supra* note 10 (discussing fight to get hotel chain to commit to hiring New Haven residents of color in customer contact hotel positions rather than back-of-the-house positions).

119. In Pager's study, for example, an employer who had posted a job opening at an art gallery told the black tester that "he was 'looking for somebody that 'spoke his language,'" in other words, someone that fit the culture of the store," then told him to come in the next day for a trial period. When his white test partner came in shortly afterward, the employer looked at his resume and asked if he was

decisions are often unconscious,¹²⁰ although some employers openly express to researchers their concerns about black men's appearance, demeanor, and motivation on the job.¹²¹ And, while consideration of customer prejudice toward workers is not an acceptable excuse for discrimination under the law, employers nevertheless sometimes screen applicants based on assumptions about customer preferences.¹²²

The emphasis on soft skills in the service industry also limits opportunities for internal promotions, because acquired experience cannot provide the "look" or cultural fluency employers seek out for higher-level staff.¹²³ Informal hiring processes used by many restaurants, such as referrals from current staff, tend to reinforce occupational segregation due to homogeneous social networks.¹²⁴ Such practices, along with a widespread absence of policies facilitating promotion, such as internal job postings, training of incumbent workers, or any sort of human resources policies or professionals, tend to discourage workers of color from even applying for higher-level jobs.¹²⁵ Studies have found that where other more objective criteria exist for hiring, setting pay, or promotions, unconscious bias and assumptions are less likely to influence decisions.¹²⁶ For example,

ready to start right away. As he left, "he reported hearing the interviewer comment to another (white) employee, 'I like him. He makes a good impression.'" Pager et al., *supra* note 92, at 334.

120. A large body of scholarship has investigated the operation of unconscious bias and debated how the law should deal with it. See, e.g., Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. JUST. RES. 143 (2004); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969 (2006); R. Richard Banks et al., *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CALIF. L. REV. 1063 (2006).

121. Pager et al., *supra* note 92, at 321.

122. See THE GREAT SERVICE DIVIDE, *supra* note 114, at 28 (quoting an employer saying that "probably about once every two weeks or so, we'd get a rude comment from a customer [about a skilled Mexican back waiter who was promoted to a front waiter position], like 'Can't I get a real waiter on my table?' or 'Why do I have a busboy as a waiter?' and it really had nothing to do with his skills, just his skin color. . .").

123. For example, one fine dining restaurant recruited European staff with little restaurant experience, placed them in lower-level busser positions for a month or two to be trained, and then promoted them to server, while the non-white bussers who trained them had worked for years with little hope of a promotion. Kim Severson & Adam Ellick, *A Top Chef's Kitchen Is Far Too Hot, Some Workers Say*, N.Y. TIMES, Jan. 17, 2007, at F1, available at http://www.nytimes.com/2007/01/17/dining/17prom.html?pagewanted=all&_r=0.

124. See Nancy DiTomaso, THE AMERICAN NON-DILEMMA: RACIAL INEQUALITY WITHOUT RACISM 53-56 (2013); Kevin Stainback, *Social Contacts and Race/Ethnic Job Matching*, 87 SOC. FORCES 857, 879-80 (2008).

125. THE GREAT SERVICE DIVIDE, *supra* note 114, at 37-39.

126. STAINBACK & TOMASKOVIC-DEVEY, DOCUMENTING DESEGREGATION, *supra* note 68, at xxiii. Even using objective criteria, however, studies have shown that race may influence the way employers evaluate criteria such as work experience and criminal history. See Devah Pager, *The Mark*

in order to settle a vast class-action gender discrimination lawsuit against Home Depot in which the plaintiffs claimed that women were being steered into cashier positions rather than higher-paid floor sales positions, the parties crafted a new hiring and promotion system that relied on computer-based initial screenings.¹²⁷ First-round candidates were selected based on applicants' answers to a set of questions about their work experience and knowledge, and managers were required to interview at least three candidates for each position. Notably, hiring and promotions of women and of men of color improved under this process.¹²⁸

It is a violation of Title VII to "limit, segregate or classify" employees on the basis of membership in a protected class in a way that has adverse effects.¹²⁹ Courts, however, have generally refused to find a violation of the law simply based on a showing of segregation within a workplace, as it might be attributable to factors other than the employer's actions, such as employee preference.¹³⁰ Plaintiffs must show that the employer either intentionally segregated workers based on race or created some internal, identifiable barrier to hiring or advancement into certain positions.¹³¹ To find a violation of Title VII based solely on the demographics of the workplace, according to the Supreme Court in *Wards Cove Packing Company v. Atonio*, would effectively force employers to adopt racial quotas for each position in the workforce.¹³²

Challenges to racial stratification in the workplace based on claims that neutral practices such as lack of job postings or subjective hiring have a

of a Criminal Record, 108 AM. J. SOC. 937, 960 (2003) (finding that in matched pairs testing, "[b]lack nonoffenders fall behind even whites with prior felony convictions" in terms of consideration for employment).

127. See Sturm, *supra* note 95.

128. Home Depot reported an increase in hires of women and people of color into higher-level positions and promotions of women and people of color into management jobs in the years after implementing this policy. Sturm, *supra* note 95, at 518. But see STAINBACK & TOMASKOVIC-DEVEY, DOCUMENTING DESEGREGATION, *supra* note 68, at 290 (showing that some studies have found negligible effects of efforts to make subjective and discretionary hiring and promotion practices more meritocratic, by instituting internal job posting, employment tests, and internal promotion systems, much in the way Home Depot did).

129. It is an unlawful employment practice under Title VII to "limit, segregate or classify . . . employees in ways that would adversely affect any employee because of the employee's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(2).

130. Employees' lack of interest in certain positions is a common defense in gender discrimination claims. See Tracy E. Higgins, *Job Segregation, Gender Blindness, and Employee Agency*, 55 ME. L. REV. 241, 251-59 (2003); Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1815-39 (1990).

131. See *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 653 (1989) (holding modified by Congress on certain grounds in the Civil Rights Act of 1991).

132. *Wards Cove*, 490 U.S. at 652.

disparate impact on workers of color¹³³ will likely be more difficult going forward in light of the Supreme Court's recent decision in *Wal-Mart Stores, Inc. v. Dukes*.¹³⁴ In *Dukes*, the plaintiffs sought class certification of their claims that the massive retailer engaged in a pattern and practice of disparate treatment in its promotion and payment of female employees, and that its subjective, "tap on the shoulder" promotion policies had a disparate impact on women.¹³⁵ Despite statistically significant evidence of serious disparities in promotions of women from cashier or sales jobs to managerial positions and in salaries of female employees in comparison to men, the Court ruled that certification of a class was not appropriate because the plaintiffs could not demonstrate that the subjective exercise of personnel decisions affected them in a common manner.¹³⁶ Moreover, the Court held that company delegation of discretion in promotion and hiring to store-level managers was not a sufficiently "specific employment practice" necessary to state a claim of disparate impact.¹³⁷ The effect of *Dukes* is widely debated, and is likely to be minimized when smaller groups of plaintiffs bring claims or when there is a more centralized locus or process for hiring or promotion decisions.¹³⁸ Nevertheless, the case provides a strong incentive for employers to give managers broad discretion in promotion decisions, which as the success of the Home Depot settlement demonstrates, is exactly the opposite of a policy designed to reduce the influence of implicit bias.¹³⁹

133. Courts have warily accepted the claim that subjective decision-making criteria allow stereotypes or unconscious bias to pervade and influence employment decisions. See, e.g., *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 990-91 (1988); *Butler v. Home Depot, Inc.*, 984 F. Supp. 1257 (N.D. Cal. 1997); *Banks v. City of Albany*, 953 F. Supp. 28 (N.D.N.Y. 1997); *Jenkins v. Wal-Mart Stores, Inc.*, 910 F. Supp. 1399 (N.D. Iowa 1995).

134. 131 S. Ct. 2541 (2011).

135. *Id.* at 2547-48.

136. *Id.* at 2555.

137. *Id.* at 2555-56.

138. See, e.g., Deborah M. Weiss, *A Grudging Defense of Wal-Mart v. Dukes*, 24 *YALE J.L. & FEMINISM* 119, 136-46 (2012) (arguing that the decision leaves open a path for structural challenges to discretionary decision making under a negligence theory); Elizabeth Tippet, *Robbing a Barren Vault: The Implications of Dukes v. Wal-Mart for Cases Challenging Subjective Employment Practices*, 29 *HOFSTRA LAB. & EMP. L.J.* 433, 435 (2012) (arguing *Dukes* will have a limited effect because there were so few claims filed challenging subjective employment practices even before the decision); Suzette M. Malveaux, *The Power and Promise of Procedure: Examining the Class Action Landscape after Wal-Mart v. Dukes*, 62 *DEPAUL L. REV.* 659 (2013) (arguing that the decision will limit access to justice for employment discrimination plaintiffs seeking class certification).

139. Sturm, *supra* note 95, at 518.

C. *The Brown-Collar Workplace: Labor Market Forces and Substandard Jobs*

A number of workers, particularly recent immigrants, are employed in workplaces comprised almost entirely of others from the same racial or ethnic group. Many of these workers perform the lowest-paid and least desirable jobs in the U.S. economy, laboring in such sectors as agriculture, domestic work, service jobs including food preparation and custodial services, and machine operation.¹⁴⁰ Racial and ethnic minorities have long performed this type of “peripheral labor” in the United States.¹⁴¹ In recent decades, changing immigration patterns have shifted peripheral labor to new immigrants; the majority of these immigrants are from Mexico, with others arriving from Central America, Asia and the Caribbean, as well as South, East, and Southeast Asia.¹⁴² These workers, labeled the “brown-collar workforce,”¹⁴³ are often an invisible part of the economy: they work out of sight on farms or in isolated food processing factories, clean office buildings at night when only those white-collar workers staying late ever see them, or work in isolation from one another in private homes.

Concurrent with immigration trends, employers have increased reliance on peripheral labor by shifting work to a contingent workforce, subcontracting out segments of previously vertically-integrated businesses

140. RANDY CAPPS ET AL., THE URBAN INSTITUTE IMMIGRATION STUDIES PROGRAM, A PROFILE OF THE LOW-WAGE IMMIGRANT WORKFORCE 7 (2003), available at http://www.urban.org/UploadedPDF/310880_lowwage_immig_wkfc.pdf.

141. See Charlotte S. Alexander, *Explaining Peripheral Labor: A Poultry Industry Case Study*, 33 BERKELEY J. EMP. & LAB. L. 353, 354-58, 373-74 (2012); Carle, *Social Movement History*, supra note 17, at 266 (at the beginning of the twentieth century, the overwhelming majority of black wage earners in New York City worked in domestic or personal service).

142. SETH MOTTEL & EILEEN PATTEN, PEW RES. CTR., STATISTICAL PORTRAIT OF THE FOREIGN-BORN POPULATION IN THE UNITED STATES, 2011 tbl.3 (2013), available at <http://www.pewhispanic.org/2013/01/29/statistical-portrait-of-the-foreign-born-population-in-the-united-states-2011/#3>.

143. Lisa Catanzarite, *Dynamics of Segregation and Earnings in Brown-Collar Occupations*, 29 WORK AND OCCUPATIONS 300, 301 (2002); see also LISA CATANZARITE, UCLA CHICANO STUD. RES. CTR. WAGE PENALTIES IN BROWN-COLLAR OCCUPATIONS 1 (2003), available at http://www.chicano.ucla.edu/press/siteart/LPIB_08Sept2003.pdf; Lisa Catanzarite & Michael Bernab Aguilera, *Working with Co-Ethnics: Earnings Penalties for Latino Immigrants at Latino Jobsites*, 49 SOC. PROBS. 101, 103 (2002). The concentration of Latinos in low-status jobs increased between 1990 and 2000—a period of low unemployment and general economic growth in the U.S. as well as a decade that saw a large increase in immigration. MAUDE TOUSSAINT-COMEAU ET AL., PEW HISPANIC CTR., OCCUPATIONAL ATTAINMENT AND MOBILITY OF HISPANICS IN A CHANGING ECONOMY, at viii (2005), available at <http://pewhispanic.org/files/reports/59.1.pdf>. Over the same period, the proportion of Latinos in higher-status, professional, or managerial jobs decreased. Meanwhile, the percentage of white workers in professional jobs increased. *Id.* Nonetheless, Toussaint-Comeau’s report notes that “Hispanic” is a heterogeneous category and the level of segregation in lower-status positions varied by different groups. *Id.* For example, the occupational status of Cuban-Americans is similar to that of non-Hispanic whites, while Mexican-Americans and Puerto Ricans have the greatest gaps as compared to non-Hispanic whites. *Id.*

and fighting aggressively against unionization.¹⁴⁴ For example, the meat processing industry has experienced a rapid demographic shift toward immigrant labor, accompanied by lower wages and poorer work conditions.¹⁴⁵ Processing factories primarily employed black and often unionized workers until about ten to twenty years ago, when employers began to hire Latino immigrants in large numbers.¹⁴⁶ At the same time, companies failed to provide sufficient training, increased line speeds, and reduced safety protections—increasing the worker injury rate, productivity, and corporate profits.¹⁴⁷ Another “bonus” for employers was the potential for workforces to be divided along racial lines on issues such as unionization votes.¹⁴⁸

The public, media, and many courts generally view low pay and substandard work conditions for recent immigrants as naturally occurring, or at least driven entirely by global market forces and thus out of the control of employers.¹⁴⁹ Leticia Saucedo’s scholarship pokes a hole in this theory by showing how employers manipulate conditions to target disadvantaged immigrant groups and take advantage of their cheap labor and perceived subservience.¹⁵⁰ Employer stereotypes of immigrant workers and eagerness to exploit them can be blunt: in a study by Roger Waldinger and Michael Lichter, one employer stated, “I think immigrants are very hardworking, they are responsible, and more importantly are willing to receive meager salaries for the work they put in.”¹⁵¹ Employers can make a workplace less

144. Pager et al., *supra* note 92, at 322-24; KATHARINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 262-63 (2004).

145. Gordon & Lenhardt, *supra* note 13, at 1178-79.

146. Alexander, *supra* note 141, at 361-62.

147. See LANCE COMPA, HUM. RTS. WATCH, BLOOD, SWEAT, AND FEAR: WORKERS’ RIGHTS IN U.S. MEAT AND POULTRY PLANTS 12-13, 31-32, 37-38, 43-47 (2005), available at <http://www.hrw.org/sites/default/files/reports/usa0105.pdf>.

148. See Guinier & Torres, *supra* note 11, at 75-79 (discussing occupational segregation by race and its effect on workplace solidarity and union organizing drive at a Smithfield meat processing plant in North Carolina). Dividing workforces is possible in part because, as Robin Lenhardt and Jennifer Gordon have discussed, low pay and poor work conditions have different meanings for workers who come from different backgrounds. Gordon & Lenhardt, *supra* note 13, at 1221-22. To African-Americans who have watched conditions and pay decline over time, the erosion in labor standards is a threat to their livelihoods, an insult to their dignity, and a symbol of the continued disenfranchisement of African-Americans in the United States. *Id.* To immigrant workers coming from impoverished countries where it is difficult to find any job that can support their families, the U.S. minimum wage represents a powerfully increased earning potential, for which they may view temporary endurance of terrible work conditions as a worthwhile sacrifice. *Id.* at 1220.

149. See Jennifer Gordon, *Tensions in Rhetoric and Reality at the Intersection of Work and Immigration*, 2 U.C. IRVINE L. REV. 125, 136 (2012).

150. Leticia M. Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 OHIO ST. L. J. 961 (2006).

151. Gordon & Lenhardt, *supra* note 13, at 1175 (citing ROGER WALDINGER & MICHAEL LICHTER, HOW THE OTHER HALF WORKS: IMMIGRATION AND THE SOCIAL ORGANIZATION OF LABOR (2003)).

attractive to native-born workers and recruit immigrant workers who are likely undocumented by taking certain measures, such as lowering wages and work conditions, paying workers off the books, and recruiting new hires primarily through referrals from existing immigrant workers.¹⁵²

The failure of employment discrimination law to incorporate any substantive economic equity standards, as discussed in the prior Part, poses challenges to members of the brown-collar workforce. Despite the economic justice underpinnings of employment discrimination law, “the equality and anti-discrimination principle does not necessarily encompass the right to be free from substandard working conditions.”¹⁵³ Fundamentally, employment discrimination law focuses on “breaking down barriers to entry or opportunity” and on remedying exclusion from a job, rather than on remedying adverse conditions for members of protected groups upon inclusion in the workforce.¹⁵⁴ On a practical level, courts generally look to similarly situated or similarly qualified individuals outside the protected group when evaluating claims of disparate treatment or impact.¹⁵⁵ When no such individuals are present as a comparison, courts may struggle to find that an immigrant worker was treated less favorably than anyone else on the basis of race or national origin.

Saucedo proposes a new framework in which an inference of discrimination would arise when nearly 100% of a workforce is composed of non-white workers, similar to the inference of discrimination that arises when there is a complete absence of members of a protected group in a segment of the workforce.¹⁵⁶ She argues that courts should be able to invoke their broad remedial powers to order improved working conditions in the segregated workforce if there is a finding that the employer has no legitimate explanation for the segregation.¹⁵⁷ This proposal is a creative attempt to reach two conditions low-wage immigrant workers of color face that current employment discrimination law doctrine fails to recognize as violations: segregation and substandard working conditions.

152. Saucedo, *supra* note 150, at 973.

153. Leticia M. Saucedo, *Addressing Segregation in the Brown Collar Workplace: Toward a Solution for the Inexorable 100%*, 41 U. MICH. J. L. REFORM 447, 453 (2008).

154. *Id.* at 449; *see also* Devon Carbado et al., *After Inclusion*, 4 ANN. REV. LAW SOC. SCI. 83 (2008).

155. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-05 (1973) (establishing shifting burdens of proof in disparate treatment claims).

156. Saucedo, *Addressing Segregation*, *supra* note 153, at 449.

157. *Id.* at 502-03.

III. AN EQUITY MODEL: TOWARD DIGNIFIED JOBS AT DECENT WAGES FOR ALL

To realize the vision of civil rights advocates who brought about the passage of Title VII—a vision of an economy that provides decent livelihoods and equal opportunities for workplace advancement to people of all races and ethnicities—a shift in thinking about the scope and applicability of employment discrimination law is needed. The proposals here embrace an equity model and reject a pure affirmative action model, because the latter shifts a relatively small number of people of color into the ranks of the privileged while leaving intact the inequitable social structures that prevent greater economic equity for most people of color.¹⁵⁸ As the past fifty years have shown, without changing the underlying structure of the labor market and employment in the United States, the most disadvantaged members of society, who are often racial or ethnic minorities, will continue to suffer economic exploitation in substandard and low-paying jobs that deprive them of economic well-being, personal dignity, and full economic citizenship. At the same time, efforts to improve job standards without any attention to racial discrimination are likely to leave in place existing racial hierarchies. In an equity model of employment discrimination law, economic justice and improved job standards are tied to racial equity and expanded opportunities for workers of color. By highlighting racial inequality in the workplace and targeting the structures that maintain and perpetuate that inequality, we can hopefully create new legal strategies, policies and models for workplace inclusion that will make the workplace fairer for all workers.

In light of the changed labor market conditions for low-wage workers, the narrowed conception of discrimination in the public mind, and the limiting of Title VII legal doctrine in the courts, advocates must engage in a two-step process. First, it is important to describe and make visible the discrimination experienced by low-wage workers of color, to highlight the systems and structures that perpetuate that discrimination, and to define the racial disparities in the workplace as discriminatory. Second, advocates must articulate legal remedies that are responsive to current realities and that link economic justice and racial equity in the workplace. Some remedies will be available under existing Title VII theories, while others may require more creative tools within or outside the Title VII framework. As others have argued, Title VII remains a powerful tool to combat racial discrimination, including within the low-wage workforce,¹⁵⁹ and its strong

158. See Guinier & Torres, *supra* note 11.

159. Olatunde C. Johnson, *Leveraging Antidiscrimination*, (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Grp., Working Paper No. 14-378, 2014) at 2, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2409090.

history as a tool to increase economic opportunity should remind us of that power. But tools for combating discrimination in the workplace need not be limited to Title VII. Reforms to state and local laws, as well as agency regulations throughout various levels of government, and other innovative strategies can all be marshaled to support an equity agenda.

A. Making Systemic Discrimination in the Low-Wage Workforce Visible

The current tendency to view discrimination as an aberrant behavior rather than a systemic condition makes it difficult for courts to recognize systemic and pervasive racial disparities as actionable under the law. Advocates must work to highlight the existence of racial inequity and disparities in the low-wage workforce, illustrate clearly the mechanisms and policies that help create these disparities and frame them squarely as discriminatory. As discussed in Part I, advocates in the 1960s and '70s sought to make the greatest impact by targeting widespread employer practices that combined with structural racial inequality to limit employment opportunities for workers of color. Although the specific interventions required are different now, creative advocates can engage in the same overall strategy of focusing litigation on sectors where structural racial inequality and pervasive employer practices intersect. In addition, agencies can engage with employers and worker organizations more broadly to highlight the mechanisms leading to racial stratification in the workplace and collaboratively develop less discriminatory alternatives.

An initial step might be greater mandatory public transparency of workplace demographics.¹⁶⁰ The potential for public scrutiny and pressure based on release of this data could provide an incentive for employers to examine the effects of hiring and promotion practices. Companies with over 100 employees are already required to report demographic information to the EEOC annually through forms known as EEO-1, but the information reported is not available to the public in any form that identifies the reporting companies.¹⁶¹ Such information could be an important organizing tool both internally, with existing employees, as well as externally, by rallying community support for fairer hiring and promotion practices. In higher-wage industries like technology, there is increasing public scrutiny of the pervasive lack of racial or gender diversity. Google recently released the demographic data of its tech employees voluntarily, presumably to stay

160. See, e.g., Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 STAN. L. REV. 351, 364-67, 369 (2011) (proposing workplace transparency more generally, encompassing race and gender information as well as pay, benefits, and other issues).

161. 42 U.S.C. §§ 2000e-8(c), (e); 29 C.F.R. §§ 1602.7-1602.14 (2012).

a step ahead of criticism and public pressure.¹⁶² Its actions put pressure on other similar companies—many of which previously fought requests from media outlets to release such data—to follow suit.¹⁶³ In addition to shaming companies with poor records of employing or promoting workers of color into higher-paying positions, transparency could provide a positive incentive for companies to improve their employment practices. Employers with strong records or that have implemented a range of effective bias-reducing practices¹⁶⁴ such as blind applicant review, internal job postings and hiring priority, voluntary diversity or implicit bias training for managers, and designating a manager to be accountable for reviewing equal opportunity progress, could receive a form of certification—either from a government or independent agency—as a non-discriminatory employer.¹⁶⁵

Demographic data alone is not enough; advocates must also be able to explain and identify as discriminatory the mechanisms that create racial or gender disparities within a workplace. Because of the general lack of understanding of pervasive implicit bias among courts and juries, Tanya Hernandez has proposed the introduction of evidence about the existence of implicit bias at trial in employment discrimination cases, in the same way that lawyers in the past have sought to use social framework evidence to help courts and juries understand the context in which harassment or discrimination may be experienced.¹⁶⁶

In addition to explaining implicit bias, advocates can revive the disparate impact theory by identifying points where current structural racial inequalities in society at large intersect with specific employer practices in ways that demonstrably limit opportunity or have an adverse effect on people of color. For example, the EEOC and private attorneys have done extensive work to address the effect of criminal records on hiring of black

162. Elisabeth Weise, *Google Discloses its (Lack of) Diversity*, USA TODAY, August 15, 2014, <http://www.usatoday.com/story/tech/2014/05/28/google-releases-employee-diversity-figures/9697049/>.

163. Tina Amirtha, *Why Don't Big Tech Companies Release More Diversity Data?*, FAST COMPANY (June 20, 2014), <http://www.fastcolabs.com/3032200/why-dont-big-tech-companies-release-more-diversity-data>.

164. Social scientists have conducted a wealth of research to determine whether certain practices help increase opportunity for women and people of color. For example, blind applicant review procedures like those implemented in the Home Depot settlement are likely to reduce or eliminate discriminatory practices such as steering black applicants for restaurant and retail jobs into “back of the house” positions. Prominent posting of open positions, hiring priority for internal applicants, or a required minimum number of interviews can reduce the social networks disadvantages that people of color often face when hiring is based on word-of-mouth or informal supervisor discretion. Workplace structures that emphasize working in teams, particularly teams without strictly hierarchical job levels, are associated with improved access of women and people of color to higher-level jobs, likely due to the increased informal networking that occurs. See STAINBACK & TOMASKOVIC-DEVEY, DOCUMENTING DESEGREGATION, *supra* note 68, at 290-91.

165. See Carbado et al., *supra* note 154, at 91.

166. Tanya Kateri Hernandez, *One Path for “Post-Racial” Employment Discrimination Cases—The Implicit Association Test as Social Framework Evidence*, 32 J.L. & INEQUALITY 307 (2014).

and Latino applicants, who are far more likely than whites to have a criminal history. In 2012, the EEOC published a guidance document on the use of arrest and conviction records stating that a neutral policy of excluding applicants based on prior criminal conduct may violate Title VII because of its disparate racial and national origin impact.¹⁶⁷ Shortly after issuing the guidance, the EEOC brought highly publicized cases against two large companies, Dollar General and BMW, alleging that their policies of rejecting applicants with criminal records had disparate impact on African-Americans and Latinos in violation of Title VII.¹⁶⁸ Additionally, Pepsi settled disparate impact charges with the EEOC in 2012, and changed its policies that had excluded applicants who had been arrested but not yet convicted, as well as those with convictions for certain minor crimes.¹⁶⁹

Challenges to these hiring policies based on the disparate racial impact of screening out job applicants with criminal records may succeed in large part because of growing public skepticism of over-incarceration and increasing belief that the overwhelming racial disparities in the criminal justice system are unjust.¹⁷⁰ Advocates are exploring other similar intervention points. For example, the EEOC has had mixed success in several cases challenging the use of credit history in hiring decisions on the grounds that it has a disparate impact on people of color, who are disproportionately targeted for predatory lending practices or are unable to access mainstream credit markets.¹⁷¹ A range of other practices more particular to certain industries or communities—such as locating workplaces in certain communities or far from public transit, methods of recruiting new employees, patterns of promoting people from certain job

167. EEOC ENFORCEMENT GUIDANCE 915.002 (2012). The guidance also states that treating criminal histories of applicants differently based on the race of the applicant constitutes disparate treatment discrimination. *Id.* Devah Pager has documented that many employers are willing to overlook white applicants' criminal histories more frequently than those of black applicants. Pager et al., *supra* note 92, at 329-336.

168. Complaint, *EEOC v. Dolgencorp LLC*, No. 1:13-cv-04307, at 2 (N.D. Ill. June 11, 2013), 2013 WL 3010490; *see also* Complaint, *EEOC v. BMW Mfg. Co., LLC*, No. 7:13-cv-05183-HMH-JDA, at 1 (D.S.C. June 11, 2013).

169. Press Release, EEOC, *Pepsi to Pay \$3.13 Million and Made Major Policy Changes to Resolve EEOC Finding of Nationwide Hiring Discrimination Against African Americans* (Nov. 11, 2012), available at <http://www.eeoc.gov/eeoc/newsroom/release/1-11-12a.cfm>.

170. THE OPPORTUNITY AGENDA, PUBLIC OPINION MONTHLY (Sep. 2013), available at http://opportunityagenda.org/pom_sept_2013 (citing various public opinion polls showing shift away from preference for harsh sentencing for non-violent drug crimes, as well as perception among blacks (61%) and whites (31%) that the criminal justice system is unfairly biased against black Americans).

171. *See, e.g.*, *EEOC v. Freeman*, 961 F. Supp. 2d 783 (D. Md. 2013) (awarding summary judgment to employer based on assessment that the EEOC's statistical analysis was deeply flawed and that EEOC failed to identify specific employment practice that caused disparate impact); *see also* AMY TRAUB, DEMOS, DISCREDITED: HOW EMPLOYMENT CREDIT CHECKS KEEP QUALIFIED WORKERS OUT OF A JOB 8-9 (2013), available at <http://www.demos.org/discredited-how-employment-credit-checks-keep-qualified-workers-out-job>.

categories but not others, or unnecessary language requirements—could all be the basis of creative disparate impact claims that in some way incorporate and acknowledge structural racism. Cases will face an uphill battle in the courts, however, as long as the racial disparities at issue in a workplace can be viewed as a “natural” outcome of the existing social order rather than as the result of artificial and unnecessary restraints on opportunity established by the employer.¹⁷²

Through the use of “soft power,” the EEOC and state-level agencies can help spur a broader public dialogue about racial disparities in the low-wage workforce, and why such disparities are artificial rather than natural. By emulating early efforts by SCAD in New York’s hotel sector or the EEOC’s textile initiative in the South, as described in Part I, agencies could conduct industry-wide investigations and spearhead initiatives to better understand and possibly dismantle the mechanisms that contribute to inequality in the workplace. At the very least, public hearings held by the EEOC can shed light on the racial stratification of workplaces.¹⁷³ Employers in many low-wage industries like restaurants and retail probably do not see racial stratification within their workforces as discriminatory but rather accept it unthinkingly as the status quo. Bringing racial disparities to light and alerting employers to discrimination within their workplaces could be an important step. Convening prominent companies within an industry and getting commitments from several to make changes could influence other industry actors to follow suit. Finally, agencies could conduct or fund matched-pair testing to help understand and document discrimination in hiring, an important but rarely practiced method of gathering empirical data

172. See *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 653 (1989) (holding modified by Congress on certain grounds in the Civil Rights Act of 1991); Amos N. Jones & D. Alexander Ewing, *The Ghost of Wards Cove: The Supreme Court, the Bush Administration, and the Ideology Undermining Title VII*, 21 HARV. BLACKLETTER L.J. 163, 164-65, 168-72 (2005). Many contend that courts were far more willing to disrupt the status quo in the 1960s and ‘70s because social movements during that era led to widespread recognition that social orders and workplace hierarchies previously widely thought of as natural were in fact unfairly restrictive for African-Americans and for women. STAINBACK & TOMASKOVIC-DEVEY, DOCUMENTING DESEGREGATION, *supra* note 68, at 11, 121-130, 175-77.

173. The EEOC has enough basic documentation of racial hiring, promotion, and stratification in workplaces to make a reasoned rather than random decision of what industries to target based on the EEO-1 demographic data it collects annually from large employers. The agency formed a “systemic discrimination task force” specifically to use this data to identify systemic patterns of discrimination so that it could better target its resources. The task force issued a comprehensive report in 2006, and under the Obama administration a program to continue the work of the task force was created, called E-RACE, which stands for Eradicating Racism and Colorism from Employment. This initiative seeks to identify key issues that contribute to continued race and color discrimination and develop new strategies to combat it. Among other goals, from 2007 to 2013, the initiative sought to increase cooperation with other federal agencies, educate the public about continued and new forms of racial discrimination in employment through meetings, increase engagement with small and mid-sized businesses, increase media attention, and promote voluntary compliance through engagement with employers and advocates. THE E-RACE INITIATIVE, <http://www.eeoc.gov/eeoc/initiatives/e-race/> (last visited Nov. 4, 2014).

by controlling for differences in human capital among groups and individual personal characteristics.¹⁷⁴

Coordination between government agencies and worker groups is essential as well. In the years immediately following the passage of Title VII, for example, the EEOC and the LDF coordinated closely, often taking a good cop/bad cop approach to employer compliance with new antidiscrimination provisions, with the LDF ready to bring a lawsuit against any employer unwilling to engage in negotiations with the EEOC.¹⁷⁵ Workers of color understand the internal dynamics of their workplaces, have experienced first-hand the ways in which they are excluded from opportunities such as promotions, and have a sense of the type of changes that would be feasible to implement. Thus, facilitated by unions, worker centers, and organizing initiatives, or simply in informal groups, workers of color should be at the center of efforts to make existing discrimination visible. Particularly at the state and local level, equal employment opportunity agencies can establish partnerships with worker groups to better understand the realities that workers face, gather the necessary facts to take enforcement measures, and help monitor compliance with settlements. A model can be found in the New York State Department of Labor's (NYSDOL) Wage Watch initiative, which formalized partnerships between the NYSDOL's wage and hour enforcement division and community groups that work with people at high risk for pay violations.¹⁷⁶ Community groups participating in the program undertake outreach with workers and employers in a designated region, and have points of contact within the Department to refer wage violation cases directly for investigation and enforcement.¹⁷⁷

B. Legal Strategies Linking Economic and Racial Equity

The above strategies are important to highlight and frame the issue of racial disparities as one that can be addressed by employment discrimination law. But actual theories to obtain relief in court or measures to increase opportunity outside the courts that explicitly link economic justice and racial equity remain elusive. The following are early proposals of strategies for use both in court, under Title VII, and outside of court, through innovative local policy, drawing on an economic equity model of employment discrimination law. These proposals and theories must be

174. Pager et al., *supra* note 92, at 331.

175. See Carle, *Social Movement History*, *supra* note 17, at 288-90.

176. See Press Release, N.Y. Dep't of Labor, *Labor Department Initiative Empowers Ordinary People to Join the Fight Against Wage Theft: New York Wage Watch, the Only One of its Kind in the Nation, to Roll Out in New York City and Long Island* (Jan. 26, 2009), available at http://www.labor.ny.gov/pressreleases/2009/Jan26_2009.htm.

177. *Id.*

more fully developed through future scholarship and experiments in practice, but are based on efforts that are being tested on the ground.

1. *Litigating Substandard Pay and Work Conditions as Discriminatory*

As discussed above in Part II, Leticia Saucedo has argued that courts should recognize that segregated workplaces are, in themselves, discriminatory in a way that violates Title VII. More broadly, could courts recognize particularly poor job conditions for workers of color, such as below-minimum wage pay, as a form of employment discrimination? Such claims would go a long way toward establishing an explicit link between racial discrimination and economic exploitation.

Claims of failure to pay minimum wage and overtime under the FLSA have multiplied in the courts.¹⁷⁸ Wage theft is extremely prevalent, especially among immigrant workers.¹⁷⁹ Not only are such cases relatively easy to prove (especially compared with employment discrimination cases), but they also carry attorneys' fees, making them attractive to private counsel even when the plaintiffs are low-income. In some circumstances, plaintiffs in wage cases represent a particular segment of the workforce. In a hypothetical example, African immigrant delivery workers from a grocery chain sue for unpaid minimum wages and overtime, but others in the workplace, such as the white cashiers and managers, did not suffer from any violations of wage laws. In addition to unpaid wage claims, the plaintiffs could claim that failure to pay minimum wages and overtime constituted disparate treatment under Title VII on the basis of race and national origin. In addition to highlighting racial occupational segregation and the connection of substandard working conditions to the race or ethnicity of the employee, the inclusion of an employment discrimination claim would allow plaintiffs to seek punitive damages under Title VII and thus further penalize the employer.¹⁸⁰ An employment discrimination claim could also help facilitate creative non-monetary remedies either in a settlement or court order, such as changes to workplace practices designed to decrease segregation and promote more equitable treatment.

A recent case involving extreme circumstances, including labor trafficking and quasi-slavery conditions of immigrant workers, opens the door for such a possibility. In 2011, the EEOC filed a complaint alleging that Signal International, LLC, a company that builds and repairs off-shore

178. *FLSA Lawsuits Hit Record High in 2012, Continuing Recent Trend of Sharp Growth*, BLOOMBERG BNA HUMAN RESOURCES REPORT (Aug. 6, 2012), available at <http://www.bna.com/flsa-lawsuits-hit-n12884911026/>.

179. See BERNHARDT, *BROKEN LAWS*, *supra* note 9, at 41.

180. 42 U.S.C. § 1981(a)(1) (2012).

oil rigs, violated Title VII by subjecting hundreds of workers from India that it had recruited and hired via H-2B non-immigrant work visas to horrifying work and living conditions.¹⁸¹ The conditions the workers suffered were not run-of-the-mill long work hours and low pay: they were housed in fenced-off, guarded, cramped trailers known as “man camps,” fed subpar meals, and charged exorbitant sums for room and board through paycheck deductions.¹⁸² The company referred to the employees by identification numbers rather than by their names.¹⁸³ And when a group of employees complained about the conditions, they were subjected to an aggressive campaign of threats and intimidation.¹⁸⁴

Because of the segregated housing and the direct recruiting of a large labor force from another country, it is easy to see in this case how the workers were subjected to these deplorable conditions, at least in part, *because of* their national origin. The EEOC put forward two theories of discrimination under Title VII in addition to retaliation claims: first, that the workers were subjected to a hostile work environment based on derogatory comments made by supervisors and staff,¹⁸⁵ and second, that the workers were subjected to terms and conditions of employment that were less favorable than those enjoyed by “their non-Indian counterparts.”¹⁸⁶ The complaint says little about who these “non-Indian counterparts” were or what type of work they performed, aside from the allegation that Indian employees were assigned the most undesirable work.¹⁸⁷

Because the workers were not claiming they were denied employment or promotions, there is no discussion of whether they would be interested in or qualified for higher-level positions, what the qualified labor pool in the area looks like, or what specific employment practices are effectively preventing their promotions. Instead, the poor conditions of their employment are what are alleged to be discriminatory, because only this group of immigrant workers was subjected to such conditions. While these claims are based in disparate treatment, a series of similar cases could establish sufficient precedent documenting depression of wages for workers of color in certain industries to revive the line of “comparable worth” cases that sought to bring pay scales for work typically done by women more in

181. Complaint and Request for Jury Trial, EEOC v. Signal Int’l, LLC, No. 11-cv-00179 (LG) (S.D. Miss. April 20, 2011). The employees had previously filed a class action case against Signal alleging trafficking, racketeering, fraud, and civil rights violations. *See* Complaint, David et al. v. Signal International LLC et al., 2:08-cv-01220 (E.D. La. March 10, 2008).

182. Complaint, EEOC v. Signal Int’l, LLC, No. 11-cv-00179, at ¶¶ 12-24.

183. *Id.* at ¶ 16.

184. *Id.* at ¶¶ 29-38.

185. *Id.* at ¶¶ 41-48.

186. *Id.* at ¶ 51.

187. *Id.* at ¶¶ 40, 52.

line with what men were paid for similar jobs.¹⁸⁸ Such claims would have the greatest chance of success under the disparate treatment framework, which requires intentional discrimination, where plaintiffs could show that an employer intentionally depressed wages for a segment of its workforce where a racial or ethnic group predominates and which performs similar work to other, higher paid segments of the workforce. One example would be an employer that hires temporary or subcontracted workers to do the same work as regular employees.

2. Institutional Support for Better Access to Good Jobs

Lawsuits are a key source of leverage for low-wage workers of color to bring employers to the table, but they may not provide the best remedy in all circumstances. Some of the structural forces shaping the lack of opportunity for low-wage workers of color today are legitimately resistant to court-based solutions. For example, no measure of creative litigation can increase promotions for people of color where no higher-level positions exist. There is much that municipalities and agencies beyond the EEOC can do to promote greater mobility and economic opportunity for low-wage workers of color. Such measures—enacted through local legislation, regulation, public-private partnerships, or otherwise—would complement rather than replace the existing discrimination law framework.¹⁸⁹ Legal strategies other than rule enforcement play a key role in norm-setting that is often overlooked by legal scholars and practitioners. Local legislation

188. Cases under the comparable worth theory had limited success in the 1980s. See ROBERT L. NELSON & WILLIAM P. BRIDGES, *LEGALIZING GENDER INEQUALITY: COURTS, MARKETS, AND UNEQUAL PAY FOR WOMEN IN AMERICA*, 12-13, 40-50 (1999). The Supreme Court found that an employer intentionally setting a lower pay rate for female jail wardens than for male jail wardens who performed almost exactly the same job could be a violation of Title VII, although it distinguished these facts from the concept of comparable worth. *Cnty. of Washington v. Gunther*, 452 U.S. 161, 166, 181 (1981). In a number of other cases, however, employers convinced the courts that market forces, rather than the employer itself, set lower pay rates for female-dominated jobs and thus liability was inappropriate. See *Spaulding v. Univ. of Wash.*, 740 F.2d 686, 708 (9th Cir. 1984), *overruled on other grounds by Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477 (9th Cir. 1987); *American Federation of State, County & Municipal Employees (AFSCME) v. Cnty. of Nassau*, 799 F. Supp. 1370 (E.D.N.Y. 1992); *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America v. State*, 673 F. Supp. 893 (E.D. Mich. 1987), *aff'd*, 886 F.2d 766 (6th Cir. 1989); *EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264 (N.D. Ill. 1986).

189. There are benefits to local experimental approaches. They can help measure what works and what does not, demonstrate what kind of unintended effects result from new policies, and provide a foundation for broader adoption of new measures. See R.A. Lenhardt, *Localities as Equality Innovators*, 7 *STAN. J. C.R. & C.L.* 265, 273-75 (2011) (also noting that cities and municipalities also have the most direct experience with how race is lived on a day-to-day basis). For a foundational discussion of the concept of “democratic experimentalism,” which advocates for decentralization of the administrative state’s regulatory power and a shift to a system in which regulators set goals or standards but allow local units of government, with citizen and firm participation, to fashion the means of meeting them, see generally Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 *COLUM. L. REV.* 267 (1998).

providing incentives to use less discriminatory recruiting, hiring, and promotion practices can help demonstrate that better outcomes are possible—or, conversely, can show how difficult it may be to overcome deeply ingrained biases and social disadvantages. Either way, incentives encourage experiments that will help us understand better what types of workplace reforms can cut through implicit bias. If some businesses are able to successfully implement reforms, they will help create new norms for what a truly racially equitable workplace looks like. This can in turn put pressure on other companies to do better and set a higher industry standard for racial inclusion and equal opportunity. Such standards are influential in litigation and settlement agreements as well.¹⁹⁰

Legal scholars have begun to explore holistic measures by which municipalities and government agencies can better track and seek to ameliorate racial disparities in other arenas beyond employment, such as education, policing, and criminal justice.¹⁹¹ Several cities across the country have implemented or are contemplating comprehensive frameworks or tools to document existing racial disparities in key areas of public life, assess the impact of policies on racial minorities, and set goals for reducing racial disparities.¹⁹² The Haas Institute for a Fair and Inclusive Society at the University of California, Berkeley, led by John A. Powell, is spearheading the Local and Regional Government Alliance on Race and Equity to bring together cities undertaking comprehensive racial equity efforts.¹⁹³ While it is too early to assess the success of these efforts overall, the city of Seattle reports that efforts under its Race and Social Justice Initiative tripled the amount of its public contracting dollars going to minority and women-owned businesses by dividing large bids (which

190. STAINBACK & TOMASKOVIC-DEVEY, DOCUMENTING DESEGREGATION, *supra* note 68, at 267-96 (discussing study of supermarkets' reactions to a series of class-action gender discrimination lawsuits by Sheryl Skaggs). Stainback & Tomaskovic-Devey note that the opportunity to change an industry standard is important because "[a] common practice in discrimination lawsuits is to compare the demographic distribution of the company that is being sued to that of other companies in the industry. Companies at or above the industry average in terms of workplace demography will claim that there is no shortfall and that what appears to be low racial minority or female employment rates simply mirrors labor supply." *Id.* at 269.

191. See, e.g., Lenhardt, *supra* note 189, at 279-84; R.A. Lenhardt, *Race Audits*, 62 *Hastings L.J.* 1527, 1549-57 (2011); Olatunde Johnson, *Disparity Rules*, 101 *COLUM. L. REV.* 374, 401-21 (2007) (examining Congressional requirement that states receiving juvenile justice funding reduce racial disparities in juvenile arrest and confinement rates and exploring possibility of similar efforts in other areas).

192. Seattle is a leading example. See RACE AND SOCIAL JUSTICE INITIATIVE, <http://www.seattle.gov/rsji> (last visited Nov. 4, 2014). The initiative has set goals for greater racial equity in city operations, city services and public engagement, and city work with the broader community. RACE AND SOCIAL JUSTICE INITIATIVE GOALS, http://www.seattle.gov/Documents/Departments/RSJI/RSJI_Goals.pdf.

193. See LOCAL AND REGIONAL GOVERNMENT ALLIANCE ON RACE & EQUITY, <http://www.racialequityalliance.org> (last visited Oct. 20, 2014).

disadvantaged small businesses) into smaller contracts, improving outreach, and implementing concrete accountability measures across departments.¹⁹⁴

There is a long-established precedent for applying higher equal opportunity standards to companies that contract with the government, as well as for establishing goals for the government to contract with minority and women-owned businesses.¹⁹⁵ Studies have shown that these standards, including proactive affirmative action requirements, can be quite effective as long as they are adequately enforced.¹⁹⁶ Some agencies have more targeted standards. For example, certain projects funded by the U.S. Department of Housing and Urban Development, such as public housing improvement and Community Development Block Grant funds, require recipients to provide job training and to hire public housing residents or low-income individuals from the local area, although the jobs are often short-term and frequently do not offer the opportunity for stable employment.¹⁹⁷ Some cities are moving beyond existing public contracting standards and goals, for example by establishing local hire requirements for work on private development projects that receive funding from city government. In 2008, the Los Angeles Community Redevelopment Agency adopted a Construction Careers and Green Jobs Policy that guarantees 30% of the workforce on private development projects that receive funding through the Agency will come from low-income communities or communities that are directly affected by the project, and that 10% of the workforce will be disadvantaged individuals such as those who have criminal convictions or lack a high school diploma.¹⁹⁸ Because people of

194. See RACE AND SOCIAL JUSTICE INITIATIVE GOALS, http://www.seattle.gov/Documents/Departments/RSJI/RSJI_Goals.pdf.

195. Exec. Order No. 11246, 30 Fed. Reg. 12319-12325 (Sept. 24, 1965) (prohibiting discrimination in employment by federal contractors and imposing certain affirmative action requirements by contract).

196. See Alexandra Kalev & Frank Dobbin, *Enforcement of Civil Rights Law in Private Workplaces: The Effects of Compliance Reviews and Lawsuits Over Time*, 31 LAW & SOC. INQUIRY 855, 857, 883-90 (2006) (finding that OFCCP compliance reviews tended to have longer-lasting effects than lawsuits on hiring and promotion of protected groups but only when the administration signaled a strong regulatory environment and emphasis on enforcement).

197. Rachel Unruh & Kira Dahlk, *Building Pathways to Employment in America's Cities through Integrated Workforce and Community Development*, NATIONAL SKILLS COALITION 3 (2012), http://www.nationalskillscoalition.org/resources/publications/file/BuildingPathwaysWeb_sm.pdf. Often these measures are not adequately monitored or enforced. For example, a recent audit of the New York City Housing Authority found that the agency failed to monitor compliance with requirements to hire residents of public housing on certain capital improvement projects and failed to penalize contractors that did not comply with the requirements. See N.Y.C. OFFICE OF THE COMPTROLLER, AUDIT REPORT ON THE NEW YORK CITY HOUSING AUTHORITY'S SECTION 3 AND RESIDENT EMPLOYMENT PROGRAMS 7-12 (2014), available at https://comptroller.nyc.gov/wp-content/uploads/documents/MG13_061A.pdf.

198. THE CMTY. REDEVELOPMENT AGENCY OF THE CITY OF L.A., APPROVAL OF CONSTRUCTION CAREERS AND PROJECT STABILIZATION POLICY 4, 7 (2008), available at http://clkrep.lacity.org/online/docs/2008/08-0499_rpt_cra_2-21-08.pdf.

color are far more likely than white people to live in low-income communities,¹⁹⁹ the measure works to increase access to quality jobs for people of color. The program is supported by community-led “pipeline” efforts to help bridge the gap between these individuals and work opportunities.²⁰⁰ The Construction Careers policy has since been adopted by numerous other agencies, including the Los Angeles Metro Board, which applied the policy to a \$6 billion investment in transit jobs that required Federal Transit Administration approval.²⁰¹

In addition to helping people of color access higher-paid middle class jobs in industries such as construction, which has been notoriously dominated by white trade unions and resistant to inclusion of workers of color and women,²⁰² cities can invest resources in helping incumbent workers in low-wage jobs move up the ladder into the better-paid positions within those industries. Union-led training and job upgrading programs provide a model. We may not think of these programs as anti-discrimination or equal opportunity measures today, but in fact one of the first labor-management training funds, started by Service Employees International Union (SEIU) Local 1199 in 1969, explicitly grew out of the civil rights movement.²⁰³ At the time, the largely African-American and Latino membership of the healthcare workers union saw that discriminatory barriers to higher-paid positions in health care were slowly breaking down, but many lacked the credentials and training to qualify for those

199. See Sharkey, *supra* note 99, at 9-10.

200. See L.A. ALLIANCE FOR A NEW ECONOMY, CONSTRUCTION CAREERS PROJECT BACKGROUND, <http://www.laane.org/what-we-do/projects/construction-careers/construction-project-background/#more-4311> (last visited Nov. 21, 2014).

201. *Id.*

202. See Roger Waldinger & Thomas Bailey, *The Continuing Significance of Race: Racial Conflict and Racial Discrimination in Construction*, 19 POL. AND SOC'Y 3 (1991).

203. Sally Klingel & David Lipsky, *Joint Labor-Management Training Programs for Healthcare Worker Advancement and Retention*, CORNELL UNIV., INDUS. AND LABOR RELATIONS SCH., SCHEINMAN INST. ON CONFLICT RESOLUTION 15 (2010), available at <http://digitalcommons.ilr.cornell.edu/reports/43>. Many other private workforce development initiatives primarily serve people of color and must confront racial barriers as well as lack of skills or access to job opportunities. MAUREEN CONWAY ET AL., THE ASPEN INST., SECTORAL STRATEGIES FOR LOW-INCOME WORKERS: LESSONS FROM THE FIELD 26 (2007), available at <https://www.aspeninstitute.org/sites/default/files/content/docs/07-014.PDF> (stating that more than 90% of participants in a study of workforce development organizations, representing organizations' constituencies, were people of color). Racial discrimination, and in particular the barriers faced by low-income African-Americans in finding employment, are often an “elephant in the room” for workforce development organizations. *Id.* at 15. Some have addressed race directly. For example, the Greater Flint Health Coalition, which manages a training, employment and advancement initiative in the local healthcare industry called Flint Healthcare Employment Opportunities, regularly holds Undoing Racism workshops with the healthcare employers in the suburbs where many of the group's constituents, mostly low-income women of color, get jobs. *Id.* at 25. This helps ease the transition for the new employees and head off issues of discrimination that could arise in these largely white workplaces. *Id.*

positions.²⁰⁴ They created the 1199 Training and Upgrading Fund as “a means to demonstrate how collective action can overcome poverty and discrimination.”²⁰⁵ Within the healthcare field in particular, where people of color are concentrated in the lowest-paid jobs like nursing assistants and janitorial staff, there are many mid-level positions that pay middle-class wages but often require education and credentials; the fund helps finance education and create appropriate and accessible training programs.

A similar model exists in the Culinary Academy of Las Vegas, a labor-management trust operated by the city’s very strong restaurant and hospitality union and booming casino industry. The Academy is open to the public as well as unionized workers at the hotels and casinos, and provides a pool of trained graduates for employers to hire.²⁰⁶ The Academy’s students are primarily people of color seeking to advance into higher-skilled, better-paying jobs at hotels, restaurants, and casinos.²⁰⁷ Given the rapid decline of union density, this type of initiative needs broader public support to be successful beyond heavily unionized enclaves such as Las Vegas. Mechanisms for replicating the success of the Institute could include funds based on business licensing or other fees to support industry-wide training programs run in partnership with community colleges and business.

Public policy can also support innovative efforts to spur private employers to scrutinize and reform their hiring and promotion policies. For example, in a recent article Susan Sturm discusses at length a pilot project by the National Science Foundation (NSF), which awarded grants to participating universities to increase hiring and retention of female research faculty in science, technology, engineering, and math departments.²⁰⁸ These grants were meant to be used toward “institutional transformation” efforts, including detecting barriers for women in their recruitment, hiring, and tenure evaluation processes and restructuring those processes to

204. Klingel & Lipsky, *supra* note 203, at 15.

205. *Id.* at 15. Today, over 300 employers pay into the Fund, which covers nearly 400,000 healthcare workers, at a rate of 0.5% of wages. *Id.* at 20. The fund is what is known as a Taft-Hartley Fund. The Fund provides tuition assistance to members to train for higher-level healthcare jobs, and has developed educational programs tailored to the needs of current workers as well as to the needs of the healthcare industry. *Id.* at 17-19. However, participating employers have no enforceable obligation to hire newly trained workers into appropriate jobs, aside from their own interest in filling positions and getting a return on their investment in the training. *Id.* at 25 (quoting Janett Hunter, training manager at Montefiore Medical Center, as saying, “If we train 100 people and don’t soon after place 25% of them in appropriate jobs, we’re not getting a full return on our investment.”).

206. CULINARY ACADEMY OF LAS VEGAS, <http://www.theculinaryacademy.org/> (last visited Nov. 4, 2014).

207. *Id.*

208. Susan Sturm, *The Architecture of Inclusion: Advancing Workplace Equality in Higher Education*, 29 HARV. J. L. & GENDER 247, 251-53 (2006).

improve prospects for women's advancement and retention.²⁰⁹ The NSF specifically funded high-level staff to take a leadership role in the process and foster a sense of accountability and buy-in for decision-makers within the various science departments.²¹⁰ As a result, the universities began to reform longstanding practices that presented invisible barriers to the recruitment and retention of female faculty and also began to embrace gender equity as a core institutional value.²¹¹ While this example arises out of a very different setting from the low-wage workforce, and universities have unique institutional interests in improving diversity, it is possible to envision such a program working within a coalition of high-road employers in a particular industry that want to improve their hiring and promotion of workers of color, but lack time and resources to examine and reform their practices.²¹²

Helping move people up the ladder only works in industries where there is an existing career ladder, and will still only help the fraction of workers who are able to take advantage of promotion opportunities. What hope does a home health aide or a child-care worker have for a promotion? Many will say that their best hope is to find a new industry, but these are two of the fields projected to have the largest job growth in coming years.²¹³ Both entail undervalued care work, pay among the lowest wages in the economy, and are staffed almost entirely by women and largely by women

209. *Id.* at 277-80.

210. *Id.* at 287-90. Another key feature of the focus on structural and institutional changes by NSF grant recipients is that very little, if any, backlash was reported. In fact, many male faculty members reported that proposed changes to increase female faculty would also benefit them by increasing their quality of life and bringing in more qualified candidates than before. *Id.* at 307-10. Numerous studies conclude that often the most effective means of ensuring equal opportunity in a workplace is to assign responsibility to an individual and hold that person accountable for achieving results. STAINBACK & TOMASKOVIC-DEVEY, DOCUMENTING DESEGREGATION, *supra* note 68, at 287, 290 (describing study showing that where employers created a formal structure to make sure company promoted women and people of color, for example by hiring a "diversity manager" or forming a committee, more managers were women and people of color than in companies that did not have such a structure; also describing study showing that class-action settlements that created accountability structures resulted in more managerial diversity).

211. Sturm, *Architecture of Inclusion*, *supra* note 208, at 322-23.

212. For example, worker organizations have convened coalitions of high-road employers that publicly support campaigns and policies to improve work standards, but more importantly illustrate that businesses can succeed while also treating workers well. For example, the Restaurant Opportunities Centers-United has convened a group called RAISE (Restaurants Advancing Industry Standards in Employment). See Restaurant Opportunities Centers-United, *Alternative Restaurant Association, RAISE, Announced Today!*, April 17, 2013, at <http://rocunited.org/alternative-restaurant-association-raise-announced-today/>. The National Domestic Workers Alliance works with an organization of domestic employers called Hand in Hand. See HAND IN HAND, <http://domesticemployers.org/> (last visited December 22, 2014).

213. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *Occupations with the Most Job Growth* (Last modified Dec. 19, 2013), available at http://www.bls.gov/emp/ep_table_104.htm (showing occupations with the most job growth in 2012 and most projected job growth for 2022).

of color.²¹⁴ Public policy can do more to improve the quality and pay of these jobs as well, with a focus on improving racial and economic equity.

Workers' advocacy organizations and unions are engaged in long-term, visionary efforts to transform the work of home health aides into a respected profession with decent pay and internal career ladders so that workers can increase their skills and earnings over time. In Washington state, SEIU Local 775, which represents home care aides who are disproportionately women of color, has developed an innovative training program that involves peer mentors and aims to professionalize the home care industry, develop career ladders, and help workers to move up those ladders over time.²¹⁵ Because the industry is highly regulated and the majority of home care costs are paid for by Medicare or Medicaid,²¹⁶ there is potential to engage policymakers and consumers in improving the training and quality of the workforce. However, this improvement will also require a tremendous public investment to increase wages for more highly trained and professional home care workers.

CONCLUSION

At a time of growing income inequality, when low-wage worker movements led by workers of color are beginning to demand living wage jobs more loudly, it is important to reinvigorate the connection between economic justice and racial equality that was so central to the civil rights movement's vision for equal employment opportunity. The question of whether we should prioritize race or class is a false question, as the two are inextricably linked, and have been throughout American history. Civil rights leaders and even certain lawmakers a half-century ago understood this, but the legal system has been incredibly resistant to recognizing any hint of a right to economic equity. In the years since the passage of Title VII, the absence of economic opportunity measures in law and policy, in

214. See EILEEN APPELBAUM & CARRIE LEANA, CTR. FOR ECON. AND POL'Y RESEARCH, IMPROVING JOB QUALITY: DIRECT CARE WORKERS IN THE US 1 (Sept. 2011), available at <http://www.cepr.net/documents/publications/care-work-09-2011.pdf> (using data from BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY tbl.11 (2014), available at <http://www.bls.gov/cps/cpsaat11.htm>). The history of exclusion of domestic and care work from basic labor protections is highly racialized and gendered; only in 2013 did the Department of Labor change regulations so that domestic care workers would be entitled to overtime pay under the FLSA. See U.S. Dep't of Labor, Application of the Fair Labor Standards to Domestic Service (2013), available at http://www.dol.gov/whd/homecare/final_rule.pdf (regulation effective January 1, 2015).

215. See *Training Partnership Mission*, SEIU HEALTHCARE NW BENEFITS, <http://www.myseiubenefits.org/about/vision-mission-and-values> (last visited Oct. 23, 2014).

216. KAISER COMMISSION ON MEDICAID AND THE UNINSURED, *Medicaid and Long-Term Care Services and Supports* (June 2012), available at <http://kaiserfamilyfoundation.files.wordpress.com/2013/01/2186-09.pdf>.

combination with major labor market shifts that have largely harmed low-wage workers, has undermined progress toward the economic opportunity and mobility goals of Title VII. To move toward the full integration of people of color into an economy that provides decent livelihoods and opportunities for advancement to all workers, we must revive an economic equity model of employment discrimination law. The ideas outlined here are one step toward such a model.