THE LOST ORIGINS OF AMERICAN FAIR EMPLOYMENT LAW: REGULATORY CHOICE AND THE MAKING OF MODERN CIVIL RIGHTS, 1943-1972

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By the time Congress enacted Title VII of the Civil Rights Act of 1964, roughly two dozen states had already passed fully enforceable employment discrimination laws and engaged in nearly two decades worth of enforcement efforts. But this early state-level scheme was very different from what most lawyers know as Title VII. Title VII vests primary enforcement authority in the federal courts. By contrast, beginning in the mid-1940s, civil rights groups championed, and states enacted, employment discrimination laws that vested exclusive enforcement authority in administrative agencies. In this Article, I ask why civil rights groups in the 1940s preferred an administrative approach to regulating job discrimination over available (and potentially more effective) court- and litigation-centered approaches. Drawing on extensive original archival research, I trace the agency choice to a series of strategic conflicts among civil rights groups about how best to attack job discrimination as well as a troubled but necessary alliance with organized labor. Understanding the social movement and coalition dynamics at work in the early drive for fair employment, I argue, has important implications for how we think about the legal strategies civil rights groups pursued before and after Brown v. Board of Education*, the form Title VII ultimately took, the subsequent emergence of "affirmative action" policies, and the broader postwar move away from administrative regulation and toward private litigation as a regulatory tool.*

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INTRODUCTION

In March 1943, Charles Diggs, an African American Democrat from Detroit, and Murl DeFoe, a white Republican from Lansing, advanced a piece of legislation, titled "A Bill Concerning Discrimination," in the Michigan state legislature. The bill prohibited discrimination in hiring, firing, or training employees on the basis of race, creed, sex, color, or national origin.[1] It also provided for a strikingly wide array of enforcement mechanisms. Section 3 made job discrimination a criminal misdemeanor and provided for fines up to $500 and imprisonment up to six months.[2] Section 4 created a private right of action for damages based on lost earnings, and it further authorized class action lawsuits on behalf of "any 1 or more persons . . . similarly situated."[3] The remaining sections outlined a third mode of enforcement, empowering the state Department of Labor and Industry to hold public hearings and order that a respondent cease and desist from discriminatory conduct or take any "affirma-

1. *See* S.B. 226, 62d Leg., Reg. Sess. (Mich. 1943).
2. *See id.*
3. *Id.*

tive action including the hiring, re-hiring or training of employees discriminated against."[4]

Though the bill would ultimately fail to win passage,[5] this was a watershed moment in the history of American law. Diggs-DeFoe was the first fully enforceable law prohibiting job discrimination ever proposed in any legislature in the United States. Indeed, the measure went well beyond President Roosevelt's wartime Committee on Fair Employment Practice (COFEP), created by executive order two years earlier in 1941.[6] COFEP's jurisdiction extended only to publicly financed war production, and it lacked any enforcement authority beyond the ability to hold public hearings, informally conciliate disputes, and enter purely advisory orders that employers and unions could, and often did, ignore. And while a patchwork of federal and state laws already prohibited discrimination in public employment,[7] Diggs-DeFoe applied to *private* acts of discrimination—an unthinkable intrusion into the principle of liberty of contract that had prevailed during the *Lochner* era just one decade earlier. In each of these respects, Diggs-DeFoe was a bold new effort to regulate private conduct in the delicate area of race relations.

The episode also marks the beginning of a remarkable and largely unexamined opening chapter in the history of American employment discrimination law. In the months and years following Diggs-DeFoe's failure, bills outlawing job discrimination flooded Congress and state legislatures.[8] When federal legislative efforts stalled, it was New York that passed the first such law in 1945, and many other states soon followed.[9] Indeed, by the time Congress passed Title VII to the Civil Rights Act of 1964, nearly two dozen states had already enacted laws mandating equal treatment in employment and engaged in nearly two decades' worth of enforcement efforts.[10]

Yet this early state-level scheme was strikingly different from what most lawyers today know as Title VII, and it was also quite a departure from Diggs-DeFoe's wide array of enforcement options. Title VII vests primary enforcement authority in the federal courts; Diggs-DeFoe, among its trio of enforcement options, likewise authorized individual and even class action lawsuits. By contrast, the civil rights and other groups that waged successful campaigns to enact job discrimination laws in the immediate postwar period quickly coa-

4. *Id.*

5. *See* H.R. 56, 62d Leg., Reg. Sess., at 1145, 1157 (Mich. 1943) (returning bill to the Committee on State Affairs).

6. Exec. Order No. 8802, 6 Fed. Reg. 3109 (June 27, 1941).

7. *See* Pauli Murray, *The Right to Equal Opportunity in Employment*, 33 CALIF. L. REV. 388, 417-18 (1945) (listing state measures barring employment discrimination by state contractors, the civil service, and public schools).

8. *See* ANTHONY S. CHEN, THE FIFTH FREEDOM: JOBS, POLITICS, AND CIVIL RIGHTS IN THE UNITED STATES, 1941-1972, at 116-19 (2009).

9. *See id.* at 99, 113.

10. *See id.* at 118 tbl.4.1, 119.

lesced around the idea of an administrative agency as the *exclusive* means of enforcement. The centerpiece of this approach was a fair employment practices commission, or FEPC, with the authority to mediate disputes and, where necessary, order that a defendant cease and desist from discriminatory practices. Every major state that enacted a fair employment law in the immediate postwar period adopted the FEPC approach.

Why did FEPC come to dominate over available court- and litigation-centered approaches? In some ways, FEPC's ascendance is puzzling. As I show, some within the civil rights community expressed skepticism about FEPC's likely efficacy, and their concerns were arguably borne out: many state FEPCs proved to be timid implementers and failed to move significant numbers of African Americans into labor markets.[11] And indeed, it was not FEPC, but rather class action lawsuits, damages and attorney's fees, and a judge-made disparate impact evidentiary standard under Title VII that would prove successful at breaking down the structures of job discrimination, particularly within labor unions, in the late 1960s and the 1970s.[12] Even so, the few existing accounts of early American employment discrimination law speculate that FEPC won out because job discrimination was seen as a complicated problem requiring agency expertise and because of concern about litigation costs and the threat of bigoted judges or juries.[13] On this view, an administrative approach prevailed because it was likely to be *more* effective than alternatives.

This Article, however, recovers a far more complicated past. Drawing on extensive original archival research, I argue that FEPC's rise cannot be explained solely by reference to judgments about the likely efficacy of competing

11. *See, e.g.*, William J. Collins, *The Labor Market Impact of State-Level Anti-Discrimination Laws, 1940-1960*, 56 INDUS. & LAB. REL. REV. 244, 266 (2003) (finding small overall labor market effects). Several older studies offer qualitative and roughly contemporaneous assessments. *See* MORROE BERGER, EQUALITY BY STATUTE: THE REVOLUTION IN CIVIL RIGHTS 183-84 (rev. ed. 1967); DUANE LOCKARD, TOWARD EQUAL OPPORTUNITY: A STUDY OF STATE AND LOCAL ANTIDISCRIMINATION LAWS 83-87 (1968); PAUL H. NORGREN & SAMUEL E. HILL, TOWARD FAIR EMPLOYMENT 143-48 (1964); MICHAEL I. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 40-48 (1966); Herbert Hill, *Twenty Years of State Fair Employment Practice Commissions: A Critical Analysis with Recommendations*, 14 BUFF. L. REV. 22, 22-24 (1964); Arnold H. Sutin, *The Experience of State Fair Employment Commissions: A Comparative Study*, 18 VAND. L. REV. 965, 1043 (1965).

12. *See* PAUL FRYMER, BLACK AND BLUE: AFRICAN AMERICANS, THE LABOR MOVEMENT, AND THE DECLINE OF THE DEMOCRATIC PARTY 88-94 (2008). For studies addressing the efficacy of litigation and also Labor Department contract-compliance reviews, see John J. Donohue III & James Heckman, *Continuous Versus Episodic Change: The Impact of Civil Rights Policy on the Economic Status of Blacks*, 29 J. ECON. LITERATURE 1603, 1636 (1991); and 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, 890-92 (2006).

13. *See, e.g.*, ALFRED W. BLUMROSEN, BLACK EMPLOYMENT AND THE LAW 9-12 (1971); CHEN, *supra* note 8, at 103; SOVERN, *supra* note 11, at 19-20; Arthur Earl Bonfield, *The Origin and Development of American Fair Employment Legislation*, 52 IOWA L. REV. 1043, 1048-51, 1069-70 (1967).

approaches. Rather, I trace the FEPC choice to the peculiar midcentury political economy of civil rights and, in particular, strategic conflict among civil rights groups about how best to attack job discrimination as well as a troubled but necessary alliance with organized labor. Mainline civil rights groups like the NAACP and Urban League and their union allies preferred FEPC because it entrenched a gradualist, individualized, and negotiation-based approach that fit better with the organizational imperatives and strategic goals of both groups. The evidence further suggests that FEPC's exclusive enforcement approach helped mainline civil rights groups manage internal conflict across a range of issues—including the propriety of damages as a civil rights remedy and quota-based hiring—while denying more militant and increasingly litigious local protest networks an entrée into the courts. In short, FEPC prevailed because it offered a measure of control over the pace and substance of racial change.

My recovery of the FEPC choice in the immediate postwar years thus offers a glimpse of the complex clash of institutional choices, social movement dynamics, and midcentury debate about the shape and meaning of civil rights. In particular, my account complicates recent scholarship arguing that the road to *Brown v. Board of Education* represented a critical break by civil rights groups from mobilization efforts around industrial and economic issues in favor of a legal attack on social segregation.[14] To the contrary, the story of FEPC shows that the campaign to integrate American industry continued through 1954 and beyond, but it turned away from asserting constitutional rights and toward what was in many ways a far more difficult task of creating statutory ones, and it moved out of the courts and into the New Deal administrative state.[15] Expanding the historical frame beyond *Brown* and its court-centered antecedents reveals that civil rights groups did not entirely forsake workplace rights. And yet, those groups guided the movement toward institutional choices that reflected the cautious gradualism of the civil rights mainstream and the coalitional constraints of the New Deal bloc.

A clearer understanding of the intramovement dynamics that channeled the FEPC choice also helps illuminate the postwar evolution of American employment discrimination law. Most notable is the turn to more pattern-centered and even race-conscious affirmative action approaches to job discrimination beginning in the late 1960s and the 1970s. The dominant account explains that shift as an effort by embattled bureaucrats and judges to respond to a growing urban

14. *See* FRYMER, *supra* note 12, at 58-59; RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS 12 (2007); Risa L. Goluboff, *"We Live's in a Free House Such as It Is": Class and the Creation of Modern Civil Rights*, 151 U. PA. L. REV. 1977, 1978-79 (2003). For another account rejecting the "critical break" theory, see Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before* Brown, 115 YALE L.J. 256, 352-54 (2005).

15. For a similar effort to recover postwar challenges to job discrimination focused on constitutional claims before the NLRB, see Sophia Z. Lee, *Hotspots in a Cold War: The NAACP's Postwar Workplace Constitutionalism, 1948-1964*, 26 LAW & HIST. REV. 327, 328-29 (2008).

crisis and fill the regulatory vacuum left by Republican opposition to fair employment regulation.[16] On this view, the history of employment discrimination law is shot through with irony, for it was obstructionist Republicans who set the stage for affirmative action by helping to stymie a robust administrative solution and then later, in 1964, by handing implementation of Title VII to federal judges who proved willing to interpret the law in strong ways.[17] My account deepens that irony, for the FEPC choice, and thus any regulatory vacuum on the jobs issue, came as much from inside as outside the early civil rights movement. More importantly, the liberal coalition's adherence to FEPC crowded out other surprisingly innovative regulatory approaches at critical junctures prior to Title VII's passage in 1964. The FEPC choice is thus essential to explaining the path that American employment discrimination law—and antidiscrimination law more broadly—ultimately took.

Finally, my account of the FEPC choice lends critical insight to an emerging narrative that links the evolution of American employment discrimination law to the broader postwar shift away from administrative regulation and toward private litigation as a regulatory tool.[18] Many theories have been offered for that wider trend: an American taste for "adversarial legalism"; a legislative desire to end-run the executive during divided government; or the rise of rent-seeking plaintiffs' lawyers and public interest groups distrustful of bureaucracy.[19] The story of FEPC stands as a useful counterexample because, beginning in the 1940s, civil rights groups chose bureaucratic over judicial power and then stuck to it despite growing evidence that courts and litigation might offer the better course. They did so at least in part, my story suggests, because the centralized FEPC approach conferred a critical measure of control over implementation seen as essential to the movement's continued success. Thus, in civil

16. *See* CHEN, *supra* note 8, at 6-7; FRYMER, *supra* note 12, at 6-7; JOHN DAVID SKRENTNY, THE IRONIES OF AFFIRMATIVE ACTION 223 (1996). For other analyses of affirmative action's origins, see, for example, HUGH DAVIS GRAHAM, THE CIVIL RIGHTS ERA 28, 33-35 (1990); PAUL D. MORENO, FROM DIRECT ACTION TO AFFIRMATIVE ACTION: FAIR EMPLOYMENT LAW AND POLICY IN AMERICA, 1933-1972 (1997); ROBERT J. WEISS, "WE WANT JOBS": A HISTORY OF AFFIRMATIVE ACTION (1997); Nicholas Pedriana, *The Historical Foundations of Affirmative Action 1961-1971*, 17 RES. SOC. STRATIFICATION & MOBILITY 3, 26-27 (1999); and Thomas J. Sugrue, *Affirmative Action from Below: Civil Rights, the Building Trades, and the Politics of Racial Equality in the Urban North, 1945-1969*, 91 J. AM. HIST. 145, 145-47, 173 (2004).

17. *See supra* note 16. On expansive judicial interpretations of Title VII, see Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417, 1428-29 (2003).

18. *See* THOMAS F. BURKE, LAWYERS, LAWSUITS, AND LEGAL RIGHTS 6-13 (2002); ROBERT A. KAGAN, ADVERSARIAL LEGALISM 36 (2001). *See generally* SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. (2010) (charting rise of "private enforcement regimes" in the postwar American regulatory state).

19. For an overview, see Sean Farhang, *Public Regulation and Private Lawsuits in the American Separation of Powers System*, 52 AM. J. POL. SCI. 821, 823-28 (2008).

rights, and perhaps in other policy areas as well, an important precondition of court-centered, private enforcement is that the chief regulatory beneficiaries must be willing to relinquish control to a combination of ideologically diverse judges, unpredictable juries, and litigants and counsel seeking private advantage.[20]

This Article proceeds in four steps. Part I identifies the mix of economic, political, and legal forces that moved fair employment to the top of the domestic political agenda in the 1940s. I show that the immediate postwar period was a contingent moment when American fair employment law might have taken any number of regulatory forms. Yet an emerging coalition of civil rights, labor, and other liberal groups quickly coalesced around the FEPC model.

Parts II and III seek to understand why the liberal fair employment coalition seized on the FEPC approach. Part II assesses and mostly rejects the view that FEPC came to dominate because administrative enforcement in general, and the FEPC model in particular, promised to be more effective than court-centered alternatives. I focus in particular on a rising tide of aggressive and surprisingly successful litigation efforts brought during the 1930s and 1940s by militant local civil rights groups challenging black exclusion from places of public accommodation. Such efforts suggest that the FEPC choice cannot be explained solely by reference to concern about litigation costs or fear of unsympathetic judges or juries. Rather, and as I argue in Part III, mainline civil rights and labor groups preferred FEPC because it entrenched a more gradualist approach to ending job discrimination and because it offered a degree of control over implementation not possible with a court- and litigation-centered approach.

Part IV applies Part III's insights and recounts how, at a crucial juncture in 1946, the liberal fair employment coalition rejected a surprising overture from conservative Republican Senator Robert Taft setting forth an aggressive, mostly court-centered, and explicitly quota-based approach to remedying job discrimination. The Taft episode thus offers a final illustration of a key point: early opposition to the regulatory approaches that would arguably do the most in later years to move African Americans into labor markets came at least in part from within the nascent civil rights movement itself. In a brief concluding section, I offer some further observations on how that core insight provides the beginnings of a fresh interpretation of the institutional, ideological, and doctrinal forces that have shaped the postwar evolution of American employment discrimination law and legal mobilizations around civil rights more generally.

20. *Cf.* Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1036, 1045-46 (2006).

I. THE RISE OF FEPC

A. *Fair Employment's Emergence*

What had begun as a trickle in Michigan in 1943 soon became a deluge: in 1945, more than twenty state legislatures considered bills prohibiting discrimination in private employment, and Congress alone saw more than a dozen separate bills.[21] Yet in retrospect, at least, the force and suddenness of fair employment's emergence should not have come as a surprise. By war's end, several factors had converged to place fair employment at the very top of the American domestic political agenda. First, a spate of racial violence in northern cities in the late 1930s and early 1940s and deepening black poverty juxtaposed against black contributions to the war effort gave civil rights issues a growing moral and political urgency.[22] Second, the migration of more than three million African Americans from the South during the interwar and war years fundamentally altered the electoral landscape and granted them a powerful position as swing voters in a number of closely contested states in the industrial North.[23] Third, the Supreme Court's 1937 decisions in *West Coast Hotel Co. v. Parrish*[24] and *NLRB v. Jones & Laughlin Steel Corp.*[25] signaled an end to strict judicial scrutiny of a wide range of social and economic regulation and opened up vast new legislative vistas. Finally, fair employment's rise reflected a downgrading of New Dealers' ambitions in the face of waning public support and judicial invalidation of more aggressive, earlier New Deal efforts to remake the American economic order.[26] As liberals lowered their sights in the 1940s, a less ambitious commitment to using state fiscal powers to stimulate growth and then distributing the resulting economic abundance more equally yielded a decidedly racial turn in American liberalism—to the "racial liberalism" that some say came to dominate in the immediate postwar years.[27]

21. *See* LOUIS COLERIDGE KESSELMAN, THE SOCIAL POLITICS OF FEPC, at x (1948); Murray, *supra* note 7, at 420-22.

22. *See* HARVARD SITKOFF, 1 A NEW DEAL FOR BLACKS: THE EMERGENCE OF CIVIL RIGHTS AS A NATIONAL ISSUE 53-54 (1978); PATRICIA SULLIVAN, DAYS OF HOPE: RACE AND DEMOCRACY IN THE NEW DEAL ERA 115-17, 134-37 (1996). On civil rights as foreign policy imperative, see MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS (2000).

23. *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 100, 174 (2004); HENRY LEE MOON, BALANCE OF POWER: THE NEGRO VOTE 198 (1948).

24. 300 U.S. 379 (1937).

25. 301 U.S. 1 (1937).

26. *See generally* ALAN BRINKLEY, THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR (1995) (recounting how economic- and class-based "reform liberalism" gave way during the later New Deal to more moderate consumption- and rights-based liberalism).

27. *See* MATTHEW J. COUNTRYMAN, UP SOUTH: CIVIL RIGHTS AND BLACK POWER IN PHILADELPHIA 14-17 (2006); Sugrue, *supra* note 16, at 147-48; Mark Robert Brilliant, Color Lines: Civil Rights Struggles on America's "Racial Frontier," 1945-1975, ch. 1 (Aug. 2002)

B. *Early Legislative Struggles*

While postwar political and legal trends created fertile conditions for fair employment's emergence, success in the earliest legislative campaigns was far from certain. The early drive for fair employment was marked by a series of high-profile failures in Congress. Scores of fair employment bills issued from both sides of the aisle beginning in 1944 in an effort to make permanent President Roosevelt's wartime COFEP. But the hopes of civil rights groups were repeatedly dashed by an awkward coalition of southern Democrats and more conservative Republicans, both of whom saw COFEP as a dangerous expansion of federal authority.[28]

When federal efforts stalled, it was in state legislatures, not Congress, that civil rights groups first tasted success. In 1945, New York enacted the nation's first fully enforceable fair employment law, and over the next four years a half dozen states followed.[29] In a number of other states, by contrast, enactment did not come so easily. A coalition of conservative Republicans and business interests mounted a furious defense, and the resulting legislative struggles are a primer in parliamentary procedure. Dozens of bills never made it out of committee.[30] In Ohio alone, thirty fair employment bills were introduced across eight biennial legislative sessions until victory was finally achieved in 1959.[31] Ultimately, however, the hard-fought legislative campaigns paid off. By the time Congress enacted Title VII of the Civil Rights Act of 1964, nearly two dozen nonsouthern states that were home to more than ninety percent of African Americans outside the South had already enacted legislation mandating equal treatment in employment.[32]

(unpublished Ph.D. dissertation, Stanford University) (on file with author); Peter Siskind, Struggling for Fair Employment: The Ideology of Racial Liberalism in Pennsylvania in the Early Postwar Era (Aug. 28, 1997) (unpublished manuscript) (on file with author).

28. *See* CHEN, *supra* note 8, at 52-55.

29. *See id.*, at 88-89. States enacting fully enforceable FEPC laws prior to 1964 included: New York (1945), New Jersey (1945), Massachusetts (1946), Connecticut (1947), New Mexico (1949), Oregon (1949), Rhode Island (1949), Washington (1949), Alaska (1953), Michigan (1955), Minnesota (1955), Pennsylvania (1955), Wisconsin (1957), Colorado (1957), California (1959), Ohio (1959), Illinois (1961), Kansas (1961), Missouri (1961), Hawaii (1963), Indiana (1963). *See id.* at 118.

30. *See* UNIV. OF CHI. COMM. ON EDUC., TRAINING & RESEARCH IN RACE RELATIONS ET AL., THE DYNAMICS OF STATE CAMPAIGNS FOR FAIR EMPLOYMENT PRACTICES LEGISLATION 10 (1950).

31. *See* John Hemphill Bowman, Fair Employment Practice Legislation: An Evaluation of the Ohio Experience, 1959-1964, at 72-73 (1965) (unpublished M.A. thesis, Ohio State University) (on file with author).

32. *See supra* note 29.

C. *Regulatory Alternatives*

Determined political opposition delayed enactment of FEPC laws in some states, but it was also unclear during the earliest legislative campaigns what form the new fair employment scheme would take. Certain features of the fair employment bills advanced in Congress and state legislatures were universal, or nearly so. Early fair employment bills typically prohibited discrimination on the basis of race, national origin, and religion and applied to hiring, discharge, and terms of employment by public or private employers and labor unions. The similarities stopped there, however, particularly when it came to enforcement provisions. Indeed, early legislative campaigns quickly resolved into a consistent pattern of partisan political coalitions supporting specific remedial approaches.

For instance, conservative Republicans and business interests either opposed fair employment laws outright or advanced proposals that lacked any enforcement provisions, endowing an administrative body with only advisory powers similar to President Roosevelt's wartime COFEP.[33] Under this scheme, a firm's decision to cease challenged practices would be purely voluntary—the result of that firm being "educated" and shown that nondiscrimination was in its own self-interest.[34]

Proposals with enforcement provisions—or "teeth," as civil rights groups put it—took one of two broad forms. First, some Republican legislators proposed vesting implementation authority in courts. Clare Hoffman, a Republican congressman from Michigan, advanced bills in Congress in 1945 and 1946 providing for a civil cause of action against job discrimination in either federal or state court and even providing for recovery of attorney's fees by a prevailing plaintiff.[35] Similar proposals also appeared at the state level.[36] A second common court-centered remedial option resembled what would ultimately come in-

33. *See* CHEN, *supra* note 8, at 20-21, 71-72, 76, 133-36, 149; *see also* KESSELMAN, *supra* note 21, at 171 n.9 (noting consistent opposition to fair employment regulation by chambers of commerce, real estate boards, and manufacturing associations from New York to Illinois).

34. *See* CHEN, *supra* note 8, at 71-72, 76, 149.

35. *See Federal Fair Employment Practice Act: Hearings Before a Special Subcomm. of the H. Comm. on Educ. & Labor on H.R. 4453*, 81st Cong. 12-28 (1949) (statement of Rep. Clare E. Hoffman).

36. *See, e.g.*, H.B. 230, 67th Leg., Reg. Sess. (Mich. 1954) (granting right to "sue in the public courts for damages not to exceed 6 months' salary"); H.F. 675, 58th Leg., Reg. Sess. (Minn. 1953) (providing for a private right of action "for damages not exceeding $500"); A.B., 100th Gen. Assemb., Reg. Sess. (Ohio 1953) (on file with the Western Reserve Historical Society (WRHS), Cleveland, Ohio, Manuscript Collection 4045, Folder 25); Carl Rudow, *FEPC Bill Is Killed by House Republicans*, DET. NEWS, Mar. 20, 1952, at 1 (detailing narrow rejection of Republican-sponsored amendment empowering courts as sole implementers). The possibility of a private right of action was also occasionally raised at the NAACP branch level. *See, e.g.*, Minutes of the Exec. Comm., Cleveland Branch NAACP (June 5, 1945) (on file with the WRHS, Manuscript Collection 3520, Folder 9).

to being with Title VII of the Civil Rights Act of 1964. This approach proposed creation of a "toothless" commission that would screen complaints and attempt to settle disputes but then empowered the commission (or, in some bills, a claimant) to obtain enforcement only by filing a civil action for injunctive relief in court.[37] A final court-centered option made discrimination a criminal offense, delegating enforcement authority to local or state prosecutors and subjecting convicted discriminators to criminal fines or imprisonment.[38]

In contrast, the second and most prominent remedial approach by far—and the approach successfully pressed by a Democratic coalition of civil rights, labor, and other liberal groups—vested enforcement authority in an administrative agency. The centerpiece of the so-called FEPC model was a multimember, fair employment practices commission with the power to receive complaints, hold hearings, and enter cease-and-desist or prohibitory orders, backed by judicial review. To be sure, not every FEPC bill was the same. In enacting FEPC laws, legislators furiously debated key design provisions such as the number of employees required in order to be subject to the law's nondiscrimination mandates, whether FEPCs could initiate their own complaints or instead would play a more passive adjudicatory role, and whether courts would review administrative action deferentially or de novo.[39]

For all their differences, however, FEPC laws shared four features that are critical to understanding the choices early regulatory architects faced. First, FEPC laws typically foreclosed private enforcement efforts and, moreover,

37. *See, e.g.*, *To Prohibit Discrimination in Employment Because of Race, Creed, Color, National Origin or Ancestry: Hearing on H.R. 2232 Before the H. Comm. on Rules*, 79th Cong. 24 (1945) [hereinafter *Rules Committee Hearing*] (colloquy between Rep. Norton and Rep. Halleck discussing proposal akin to FDA whereby commission enforces by filing civil action for injunctive relief); *Conciliation FEPC Plan to Be Urged*, MINNEAPOLIS STAR, Feb. 3, 1953, at 14 (outlining proposal that would give commission only conciliation power and requiring the commission to refer cases "to the district court in the county in which the dispute arises" where conciliation efforts failed); *Two New FEPC Bills Backed by Senators*, PHILA. TRIB., Apr. 12, 1949, at 1-2 (outlining Republican bills requiring commission to file injunctive action); Nat'l Council for a Permanent F.E.P.C., A Comparison of the New F.E.P.C. Bill with Earlier Bills (Mar. 27, 1947) (on file with the McLaurin Papers, Schomburg Center, N.Y.C., N.Y., Box 7) (detailing proposal from Senator Wayne Morse (R-OR) calling for an investigatory commission but "relying for enforcement exclusively upon injunction in the Federal Equity Courts").

38. A handful of states, including Idaho and Vermont, would ultimately adopt this penal approach. *See* Fair Employment Practices Act, No. 217, § 3, 1961 Idaho Sess. Laws 573, 574; Act to Provide Freedom from Discrimination in Employment, No. 196, § 3, 1963 Vt. Acts & Resolves 209, 210; Minutes of a Meeting of the Legal Committee of the National Council for a Permanent F.E.P.C. (Nov. 26, 1946) (on file with the McLaurin Papers, Box 7).

39. *See, e.g.*, David Freeman Engstrom, The Lost Origins of American Fair Employment Law: State Fair Employment Practices Bureaus and the Politics of Regulatory Design, 1943-1964, at 183-221 (Dec. 2005) (unpublished Ph.D. dissertation, Yale University) (on file with author); *see also* Bonfield, *supra* note 13, at 1075.

granted complainants few procedural rights once a complaint was filed.[40] Thus, the FEPC approach was a stark choice among regulatory means, leaving no alternative remedy where the administrative process bogged down or a commission fell into hostile hands.[41] Second, FEPC laws authorized the commission to award only injunctive relief, typically in the form of a cease-and-desist order requiring the respondent to cease the discriminatory conduct and take any "affirmative action," including hiring, rehiring, or promotion of a particular complainant. While some FEPC laws authorized the commission to include back pay as part of its injunctive order, no other damages could be awarded. Third, FEPC laws were highly individualized, authorizing the commission to enter a remedial order only in response to a formal complaint and only as to a particular claimant.[42] To that extent, some have described the FEPC model as a "retail" mode of adjudication, as it specifically ruled out class actions and other aggregated modes of adjudication and relief.[43] Finally, FEPC laws emphasized a noncoercive approach to dispute resolution, typically mandating that the agency engage in informal "conciliation" of disputes prior to deploying harder-edged legal powers.[44]

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40. FEPC laws foreclosed private rights of action either expressly or under doctrine holding that legislative specification of particular remedies made those remedies exclusive. *See* Richard B. Stewart & Cass Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1208-09 (1982); *see also* Pompey v. Gen. Motors Corp., 189 N.W.2d 243, 250 (Mich. 1971) (invoking rule in FEPC context); Draper v. Clark Dairy, 17 Conn. Supp. 93, 96 (Super. Ct. 1950) (same). On the lack of procedural rights, see, for example, *id.* (holding that, upon filing complaint, complainant is "afforded no part in its subsequent operation and is given no recourse to the courts to assert his claims"). The New York, New Jersey, and Massachusetts laws provided the most procedural rights, leaving it up to the commission whether a complainant could intervene and participate in hearings. *See* MILTON R. KONVITZ, THE CONSTITUTION AND CIVIL RIGHTS app. §§ 5-7 (1947) (reproducing all three laws).

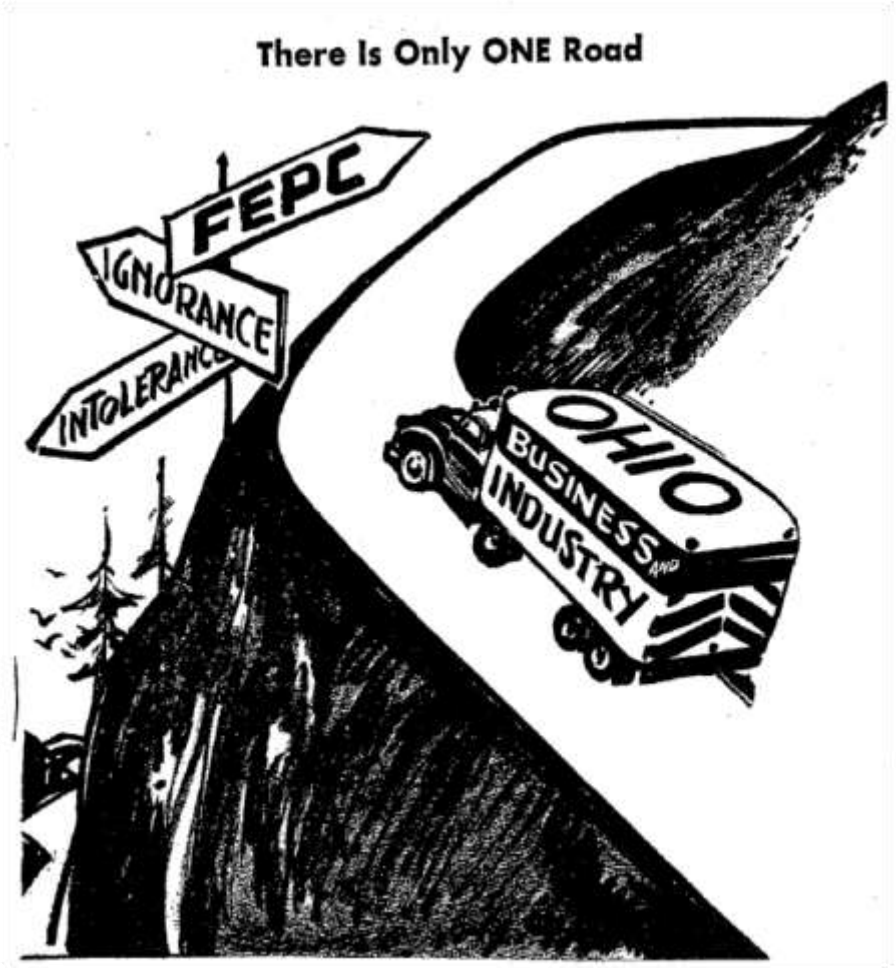
41. *See* MORENO, *supra* note 16, at 110.

42. *See, e.g.*, *Fair Employment Practices Act: Hearings Before a Subcomm. of the S. Comm. on Educ. & Labor*, 78th Cong. 80 (1944) (statement of Kermit Eby, Assistant Director of Research and Education, Congress of Industrial Organizations) (noting "strict construction" to be placed on the individualized adjudication of complaints).

43. *See* CHEN, *supra* note 8, at 52; GRAHAM, *supra* note 16, at 189, 235; THOMAS J. SUGRUE, SWEET LAND OF LIBERTY: THE FORGOTTEN STRUGGLE FOR CIVIL RIGHTS IN THE NORTH 119-20 (2008).

44. SUGRUE, *supra* note 43, at 120.

FIGURE 1[45]



A political cartoon published in an Ohio newspaper in 1953 shows the extent to which FEPC had, by the early 1950s, become virtually synonymous with the very idea of regulating job discrimination.

In sum, the earliest legislative campaigns saw a diverse array of regulatory proposals. But it was the individualized, gradualist FEPC model that would quickly become both a movement-wide slogan and rallying cry among civil rights groups. Indeed, civil rights groups pressed for FEPC bills year after year in states like Pennsylvania, Michigan, and Ohio even where Republicans made clear they would support only a court-centered scheme. As a result, few non-FEPC bills advanced to a vote, and none earned the support of civil rights

45. The cartoon was published in the *Cleveland Press* on March 16, 1953 (on file with the NAACP Papers, Library of Congress, Part II, Box A261).

groups.[46] Of the twenty-three states that enacted fully enforceable fair employment laws in the period prior to 1964, only lily-white Iowa, Idaho, and Vermont did not create FEPCs to enforce them.[47]

II. THE PUZZLE OF FEPC

Why did civil rights groups push FEPC over available court- and litigation-centered alternatives? One possible explanation is that FEPC's rise resulted from the political and policy legacies of the National Labor Relations Board (NLRB), which the FEPC model resembled, or from President Roosevelt's wartime COFEP. And indeed, histories of the period recount how a new coalition of civil rights, labor, and religious and civic groups gathered around President Roosevelt's COFEP, at first to aid in its implementation efforts and later to defend it from critics and attempt, unsuccessfully, to make it permanent at war's end.[48] One might also speculate that the FEPC consensus was the result of later states following the comparatively safe path of first-mover states like New York.[49] On these accounts, the FEPC consensus may simply be a case of later policy choices feeding back into the politics from which they originated.[50]

Such explanations are fully persuasive, however, only if administrative enforcement was not seen as substantially less effective at removing employment barriers than available regulatory alternatives. And here, the case is decidedly mixed. To be sure, the problem of job discrimination at midcentury was a formidable one. A complex mix of racial ideology, labor market segmentation, and internal firm dynamics combined to relegate African Americans to mostly unskilled positions and casual labor markets within the American industrial order—the "meanest and dirtiest jobs."[51] Unions were key enablers as well: many discriminated against African Americans, whether by constitution or by law, by secret ritual, or by shunting black members into "auxiliaries" where they en-

46. The exception is the so-called "Home Rule" approach that Ohio civil rights groups reluctantly agreed to support during legislative campaigns in the early 1950s. That approach created a state-level administrator as complaint-screener, with complaints then referred to local commissions for conciliation efforts and to local prosecutors. *See, e.g.*, Ohio Comm. for Fair Emp't Practices Legislation, Analysis of the 1953 Campaign for FEPC in Ohio 6-7 (on file with the NAACP Papers, Part II, Box A261).

47. *See* SUGRUE, *supra* note 43, at 120.

48. *See* CHEN, *supra* note 8, at 33, 41; MERL E. REED, SEEDTIME FOR THE MODERN CIVIL RIGHTS MOVEMENT: THE PRESIDENT'S COMMITTEE ON FAIR EMPLOYMENT PRACTICE, 1941-46, at 2-9 (1991); LOUIS RUCHAMES, RACE, JOBS, AND POLITICS: THE STORY OF FEPC 165 (1953).

49. *See generally* Craig Volden, Michael M. Ting & Daniel P. Carpenter, *A Formal Model of Learning and Policy Diffusion*, 102 AM. POL. SCI. REV. 319 (2008) (reviewing theories of policy diffusion across governments).

50. *See generally* PAUL PIERSON, POLITICS IN TIME (2004) (advancing theory of temporal dimensions of political processes, including path dependency and feedback effects).

51. THOMAS J. SUGRUE, THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT 91-123 (1996); *see also* WEISS, *supra* note 16, at 5-8.

joyed something less than full privileges.[52] Yet, even from the perspective of contemporaries, it was not obvious that administrative enforcement in general, or the FEPC model in particular, was the optimal mode of breaking down these structures. Indeed, careful examination of the historical record and the political and regulatory landscape as the drive for fair employment got underway reveals a far more complex and ambiguous story.

A. *The Ambiguities of Administrative Enforcement*

1. *New Deal religion and the virtues of FEPC*

Among the possible reasons for the FEPC model's ascendance in the mid-1940s is the seismic shift in American conceptions of governance that accompanied the New Deal a decade earlier. With new administrative bodies sprouting all around, an outpouring of reverence for administrative process followed.[53] In one of many paeans to administrative governance, James Landis, the architect of the U.S. Securities and Exchange Commission and later dean of Harvard Law School, noted the "inadequacies" of judicial procedures to "meet the new claims" and then breathlessly announced that "protection against unfair discrimination in employment," among others, was one of the "new liberties which make up the right of today's common man to the pursuit of happiness, and these liberties for their protection today seek the administrative and not the judicial process."[54]

FEPC's champions were also quick to assert what they saw as the practical advantages of administrative enforcement. Howard Law Dean William Hastie, part of a long line of influential black lawyers nurtured at Harvard Law School by progressive-realist legal thinkers like Landis himself, explained in congressional testimony in 1945 that "administrative procedure has a flexibility and an informality which a lawsuit lacks."[55] Similarly, a pamphlet titled *Answer the Critics of F.E.P.C.* that appeared in federal- and state-level campaigns asserted that "[a]n administrative agency provides the most speedy, effective, and inex-

52. Edwin Timbers, Labor Unions and Fair Employment Legislation, at ch. 2 (1953) (unpublished Ph.D. dissertation, Princeton University) (on file with author). For excellent overviews, see FRYMER, *supra* note 12, at 51; HERBERT R. NORTHRUP, ORGANIZED LABOR AND THE NEGRO 1-16 (1944).

53. *See* Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 406 (2007).

54. James Landis, Address Before the Swarthmore Club of Philadelphia: The Development of the Administrative Commission (Feb. 27, 1937), *in* WALTER GELLHORN, ADMINISTRATIVE LAW: CASES AND COMMENTS 11, 18 (1940).

55. *Fair Employment Practice Act: Hearings Before a Subcomm. of the Comm. on Educ. & Labor on S. 101 and S. 459*, 79th Cong. 171 (1945) [hereinafter *Fair Employment Practice Act Hearings*] (statement of William H. Hastie, Dean, Howard University Law School; Chairman, Legal Committee, NAACP). On progressive realism as a frame for leading civil rights lawyers, see Mack, *supra* note 14, at 310-11.

pensive means of redress for both worker and employer."[56] By contrast, judicial enforcement was likely to be "haphazard, complicated, time-consuming, costly, and hardly uniform."[57] There was undeniable truth here: aggrieved individuals could set the FEPC process into motion merely by showing up at the agency's doorstep and dictating a complaint to intake staff, and they had to hire an attorney only if they wanted to seek leave to intervene in a subsequent formal hearing.[58]

Lastly, administrative enforcement fit with an inchoate but rapidly evolving set of beliefs at midcentury about the origins of discrimination and the relationship of law and social change. Theorizing about discrimination has become a crowded field in recent years,[59] but in the mid-1940s many believed discrimination to be the simple "fruit of ignorance"[60] and an outward manifestation of purely irrational prejudice.[61] The necessary and proper aim of regulatory interventions, it followed for some, was education, not legal coercion.[62] Viewed in this light, the choice of administrative enforcement—and, in particular, the go-slow, individualized, conciliation-centered, injunctive FEPC approach—may have reflected prevailing views about law's expressive power and the nature

56. NAT'L COUNCIL FOR A PERMANENT F.E.P.C., ANSWER THE CRITICS OF F.E.P.C. 14 (on file with the McLaurin Papers, Box 7).

57. *Id.* For near-verbatim state-level versions of *Answer the Critics*, see, for example, OHIO COMM. FOR FAIR EMP'T PRACTICES LEGISLATION, THIRTEEN QUESTIONS AND ANSWERS ON FAIR EMPLOYMENT PRACTICES LEGISLATION AND AMENDED SENATE BILL 10 (on file with the WRHS, Manuscript Collection 4045, Folder 49).

58. *See* Note, *The Right to Equal Treatment: Administrative Enforcement of Antidiscrimination Legislation*, 74 HARV. L. REV. 526, 552 (1960).

59. *See, e.g.*, Mark Kelman, *Market Discrimination and Groups*, 53 STAN. L. REV. 833 (2001); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1005 (1995); Rachel F. Moran, *The Elusive Nature of Discrimination*, 55 STAN. L. REV. 2365 (2003).

60. REPORT OF THE NEW YORK STATE TEMPORARY COMMISSION AGAINST DISCRIMINATION 48 (1945) [hereinafter TCAD REPORT].

61. *See* John Hope II, *Minority Utilization Practices—Rational or Sentimental?*, 18 SOC. RES. 152, 170 (1951). One particularly influential line of thinking along these lines came from Swedish sociologist Gunnar Myrdal. *See* GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY (1944). For Myrdal, northern racial views were neither deeply held nor stable but rather existed in a shallow "indifferent equilibrium" characterized by distraction, ambivalence, and inertia. *Id.* at 392. Consequently, an external event could quickly shift that equilibrium and eliminate prejudice at its root or, just as easily, make things worse. *See id.* at 392-93; *see also* R.M. MACIVER, THE MORE PERFECT UNION: A PROGRAM FOR THE CONTROL OF INTER-GROUP DISCRIMINATION IN THE UNITED STATES 58-59 (1948) (discussing Myrdal's views).

62. *See* CHEN, *supra* note 8, at 71-72, 76, 149; Sugrue, *supra* note 16, at 149. For contemporaneous views, see Will Maslow, *Prejudice, Discrimination, and the Law*, 275 ANNALS AM. ACAD. POL. & SOC. SCI. 9, 16 (1951); Will Maslow & Joseph B. Robison, *Legislating Against Discrimination*, 15 SOC. ACTION 1, 15 (1949).

and shape of the problem that the new fair employment laws purported to solve.[63]

2. *The problem of regulatory capture*

Yet any effort to ascribe the fair employment coalition's embrace of FEPC to simple faith in administrative governance, various practical advantages, or certain midcentury views on discrimination also faces serious difficulties. Indeed, though administrative governance enjoyed a certain newness in the political imagination, the immediate postwar period also saw a gathering critique of many of its core precepts. By the late 1930s and early 1940s, commentators had begun to advance a stinging assessment of independent commissions in particular. The American Bar Association's Special Committee on Administrative Law declared in 1938, under the chairmanship of outgoing Harvard Law Dean Roscoe Pound, that the supposed independence and expertness of independent commissions had "no correspondence with reality."[64] Similarly, Yale political scientist James Fesler wrote in 1942 that the very idea of independence was "more myth than reality," and that "the freeing of a policy-determining agency from intimate contact with the politicians in the governor's mansion and in the legislative halls often throws the agency into the hands of the special interests it is supposed to regulate."[65] Here, then, was the theory of regulatory "capture" that had animated legislative debates as far back as the creation of the Interstate Commerce Commission in 1887 and has remained a signal feature of theories of administrative law and politics ever since.[66]

Nor was it hard to find concrete examples in the fledgling administrative state. During the war, liberals looked on with dismay as civilian wartime agencies fell under the sway of producer groups, leaving many to wonder "whether traditional forms of regulation were workable at all."[67] Worse, one of the most

63. *See* JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES 110, 115-19 (1984) (noting process of "problem definition"). On expressive theories, see Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000). For a contemporaneous example, see *Antidiscrimination in Employment: Hearings on S. 984 Before a Subcomm. of the S. Comm. on Labor & Pub. Welfare*, 80th Cong. 510 (1947) [hereinafter *Antidiscrimination in Employment Hearings*] (statement of Irving Salert, Field Director, Jewish Labor Committee) ("I am sure we will have few cases because of the strength that that law would have on the thinking of individuals.").

64. *Report of the Special Committee on Administrative Law*, 63 ANN. REP. A.B.A. 331, 359 (1938).

65. JAMES W. FESLER, THE INDEPENDENCE OF STATE REGULATORY AGENCIES 61, 65 (1942).

66. *See* STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT 17-18 (2008).

67. Alan Brinkley, *The New Deal and the Idea of the State*, *in* THE RISE AND FALL OF THE NEW DEAL ORDER, 1930-1980, at 85, 103 (Steve Fraser & Gary Gerstle eds., 1989); *see also* Reuel E. Schiller, *Reining in the Administrative State: World War II and the Decline of*

troubling examples was FEPC's most direct analogue: President Roosevelt's wartime COFEP. Commentators both then and now have concluded that the work of the toothless Committee was largely symbolic or, worse, a "dismal failure."[68] More importantly, the Committee's turbulent life was a case study in political control of bureaucracy. Many within the black press repeatedly conveyed concern that the appointment of labor leaders such as William Green of the American Federation of Labor (AFL) was intended to smother investigations, particularly when it came to union discrimination.[69] The Committee also proved vulnerable to outside meddling whenever its regulatory efforts became too aggressive.[70] After the Committee subjected some of the nation's largest defense contractors to public hearings during its first year of operation, President Roosevelt suddenly moved the Committee from the Office of Production Management to the War Manpower Commission (WMC), where it lost the protection against legislative opponents that came with direct White House oversight and unrestricted wartime funding.[71] Soon after, when the Committee cancelled all planned public hearings, the black press quipped that the Committee had been placed in "cold storage,"[72] while *The New Republic* saw in the transfer to WMC the "surreptitious hand" of "[n]orthern industrial interests and 'lily-white' trade unions."[73] The political logic was painfully clear to all con-

Expert Administration, *in* TOTAL WAR AND THE LAW: THE AMERICAN HOME FRONT IN WORLD WAR II 185, 191 (Daniel R. Ernst & Victor Jew eds., 2002) (arguing that the operation of wartime agencies like the War Production Board and Office of Price Administration "undermined the faith that many liberals had in expert administration"). For an argument that, among liberals who were otherwise sympathetic to New Deal state building, concern about "capture" predated the war, see Anne Mira Kornhauser, Saving Liberalism: Political Imagination in the American Century 42-43, 101 (2004) (unpublished Ph.D. dissertation, Columbia University) (on file with author).

68. STEPHAN THERNSTROM & ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE 72 (1997). For literature reviews regarding the Committee's efficacy, see William J. Collins, *Race, Roosevelt, and Wartime Production: Fair Employment in World War II Labor Markets*, 91 AM. ECON. REV. 272, 284 (2001). For a contemporaneous assessment, see Louis Kesselman, *The Fair Employment Practice Commission Movement in Perspective*, 31 J. NEGRO HIST. 30 (1946).

69. *See* REED, *supra* note 48, at 23, 150, 353; *see also The OPM Committee Appointments*, PITT. COURIER, July 26, 1941, at 6 ("Negroes can feel no enthusiasm over the choice of William Green . . . who has on every occasion ducked and evaded the issue of color discrimination in the organization he heads . . . .").

70. *See, e.g.*, KESSELMAN, *supra* note 21, at 22; DANIEL KRYDER, DIVIDED ARSENAL: RACE AND THE AMERICAN STATE DURING WORLD WAR II 97 (2000); REED, *supra* note 48, at 106, 112; ROBERT C. WEAVER, NEGRO LABOR: A NATIONAL PROBLEM 141 (1946).

71. *See* REED, *supra* note 48, at 46, 71-72; RUCHAMES, *supra* note 48, at 55.

72. *Negro Labor During 1942*, CLEV. CALL & POST, Jan. 9, 1943, at 14.

73. John Beecher, *8802 Blues*, 108 NEW REPUBLIC 248, 250 (1943). *See generally* REED, *supra* note 48, at 75 (noting that transfer was made "to control and weaken" the COFEP); *id.* at 99 (citing internal White House memo about need to "immobilize the Committee").

cerned.[74] As former Committee head Malcolm Ross colorfully put it in his 1948 memoir, "[O]nce a powerful congressional group indicated that it would come to the aid of anyone charged with discrimination by [the Committee], the jig was up."[75]

If the Committee's troubled life offered a cautionary tale, it also led some to wonder whether it was even a fair comparison. The enhanced power of the executive branch during wartime, tight wartime labor markets that rendered industry more dependent on residual pools of black labor, and the Committee's lack of remedial teeth made it a "sketchy textbook," as one observer put it, for regulatory architects designing the new fair employment scheme.[76] Indeed, it was the prewar experience of agencies like the NLRB, not the COFEP, which arguably provided the closest analogue to FEPC. And here, the NLRB's prewar experience should have given FEPC's champions pause. As with the early COFEP, the newly created NLRB moved to tackle the "Big Boys" of American industry in 1935, challenging the worst forms of employer intimidation.[77] But when the NLRB made rulings in 1938 that disadvantaged the AFL relative to its upstart rival, the Congress of Industrial Organizations (CIO), the response was swift and devastating.[78] The AFL effectively teamed up with conservative business groups, and months of intense hearings led by Republican Congressman Howard Smith of Virginia ultimately forced a housecleaning of NLRB members and officials, a major internal restructuring, and an "orderly retreat," in the words of the new chairman, from prior policies.[79] In the view of a prominent NLRB historian, the period from 1937 to 1947 saw the NLRB "transformed from an expert administrative agency that played the major role in the

74. *See* Will Maslow, *FEPC—A Case History in Parliamentary Maneuver*, 13 U. CHI. L. REV. 407, 411-12 (1946); *see also* HERBERT GARFINKEL, WHEN NEGROES MARCH: THE MARCH ON WASHINGTON MOVEMENT IN THE ORGANIZATIONAL POLITICS FOR FEPC 78 (1959) (noting importance to black leaders of shielding COFEP from executive officials "whose purse strings were tightly held by Congressional committees"); 1 THE PAPERS OF CLARENCE MITCHELL, at cxxviii (Denton L. Watson ed., 2005) (noting that moving COFEP was "an effort to muzzle" it); *N.A.A.C.P. Issues a Call to Plan Act*, CLEV. CALL & POST, June 5, 1943, at 8B (noting that even "modest efforts" by COFEP had "brought down the wrath of powerful anti-minority forces," reducing it to "virtually complete impotence").

75. MALCOLM ROSS, ALL MANNER OF MEN 85 (1948). For other wartime examples of administrative regimes within which African Americans were dominated by more powerful groups, see Kornhauser, *supra* note 67, at 89-95 (detailing near-complete disregard of African American interests in interest-group jockeying at the wartime Department of Agriculture and Office of Price Administration).

76. Comment, *The New York State Commission Against Discrimination: A New Technique for an Old Problem*, 56 YALE L.J. 837, 843-44 (1947). On tight labor markets, see FAIR EMP'T PRACTICE COMM., FINAL REPORT 41-48 (1946).

77. JAMES A. GROSS, THE RESHAPING OF THE NATIONAL LABOR RELATIONS BOARD: NATIONAL LABOR POLICY IN TRANSITION 1937-1947, at 16-17 (1981).

78. *See id.* at 251, 253. For a contemporaneous view, see Leo Huberman, *The Attack on the NLRB*, 93 NEW REPUBLIC 298, 300 (1938).

79. GROSS, *supra* note 77, at 226-32, 250-51.

making of labor policy into a conservative, insecure, politically sensitive agency preoccupied with its own survival."[80]

The architects of the new fair employment scheme should have taken note, for the takedown of the NLRB had been accomplished by many of the same business groups and AFL unions that would come under the jurisdiction of FEPCs. Yet even a sophisticated observer like leading civil rights lawyer Charles Houston—who *twice* resigned positions with the COFEP to protest political meddling with the Committee's enforcement efforts[81]—could seem strangely oblivious to such concerns. In April 1945, Houston published a letter in *The Washington Post* disputing an editorial advocating purely "voluntary" fair employment legislation to combat union discrimination.[82] Houston was fresh off his victory in *Steele v. Louisville & Nashville Railroad Co.*,[83] which held that unions owed their black members an affirmative duty of fair representation in negotiations with management under the Railway Labor Act.[84] Much of Houston's letter, however, used *Steele* to argue against litigation and instead called for the creation of an "administrative tribunal" to attack job discrimination.[85] "[C]ourt litigation," Houston noted, "is too hazardous, too cumbersome, too expensive and too slow."[86] Administrative enforcement, by contrast, promised "speedy, certain and inexpensive relief."[87]

But in the very same paragraph that Houston argued against private civil enforcement, he complicated his claim. Houston noted that the black railroad workers in *Steele* had sought relief in the courts because the National Railway Adjustment Board was "not available to Negro railway workers who complain against union discrimination" because "one half of the Board members are representatives of the very lily-white unions the Negro railroad workers are complaining against."[88] Thus, a new "administrative tribunal" was needed, Houston seemed to suggest, because the other obvious agency that might do the work of desegregating railroad unions was captured by hostile interests. Without direct-

80. *Id.* at 4.

81. Houston first resigned as COFEP special counsel upon President Roosevelt's transfer of the Committee to WMC in 1942. He resigned again in 1945 as Committee member when President Truman compelled the Committee to delay issuing an adverse order against a Washington, D.C., company. *See* REED, *supra* note 48, at 334-36.

82. *See* Charles Houston, "*The Union and FEP": A Communication*, WASH. POST, Apr. 13, 1945, at 8.

83. 323 U.S. 192 (1944).

84. *See id.* at 202-03. A companion case was *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U.S. 210 (1944). For background, see DAVID E. BERNSTEIN, ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS, AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL 62-65 (2001); GOLUBOFF, *supra* note 14, at 202-03; and HERBERT HILL, BLACK LABOR AND THE AMERICAN LEGAL SYSTEM 108-11 (1977).

85. Houston, *supra* note 82, at 8.

86. *Id.*

87. *Id.*

88. *Id.*

ly acknowledging it, Houston had put his finger on a concern about administrative enforcement that many others were beginning to voice. "Negro leaders have learned," political scientist Louis Kesselman noted just a few months after Houston's letter, "that it is one thing to be able to gain governmental concessions when mass pressures are at their peak but that it is more difficult to maintain these gains against administrative and Congressional manipulation afterwards."[89]

3. *"'Dead letter' legislation": the New York experience*

The debate that attended the design, enactment, and implementation of New York's trailblazing fair employment law offers some of the best evidence that the case for FEPC was not as clear as many of the public claims made on its behalf. The enactment of New York's FEPC law in 1945 came after more than a year of vigorous efforts by the New York State Temporary Commission Against Discrimination (TCAD), a study commission created in 1944 by Republican Governor Thomas Dewey upon the failure of New York's first fair employment bill that same year.[90] After statewide hearings in 1944, the TCAD recommended a bill with the features that would become the hallmark of the FEPC model: a multimember commission, mandatory conciliation of disputes, and a highly individualized, purely injunctive remedial scheme.[91]

Some within the liberal fair employment coalition, however, had their doubts. Charles Burlingham, a prominent lawyer and advisor to multiple New York governors, railed against administrative enforcement in a pair of letters to *The New York Times*, arguing that enforcement authority should go to the courts instead. Of particular concern was his view that the proposed commission would be subject to patronage politics and capture: while the initial commissioners would no doubt be "men and women of high character," Burlingham explained, the "rich plums" of commissioner positions "will sooner or later be plucked by placemen."[92] "I prefer the Courts to the Bureaucrats," he separately pronounced.[93] Samuel Leibowitz, a recently appointed New York state court judge who had previously served as defense counsel in the infamous Scottsboro case in Alabama, was far more dismissive, publicly blasting New

89. Kesselman, *supra* note 68, at 45; *see also* NORTHRUP, *supra* note 52, at 253 ("Agency after agency which has made an honest attempt to further Negro participation has been disbanded, has had its appropriations reduced, or has been forced to modify its policy to suit the working majority of recent Congresses . . . .").

90. *See* CHEN, *supra* note 8, at 95-97.

91. TCAD REPORT, *supra* note 60, app. E at 29-32.

92. C.C. Burlingham et al., Letter to the Editor, *Faults Found in Ives Bill*, N.Y. TIMES, Feb. 13, 1945, at 22. The term "placeman" is a derogatory British term for one who holds public office for private profit or as a political reward.

93. CHEN, *supra* note 8, at 102.

York's law shortly after enactment as a "mere eggshell" and a "car without a carburetor."[94]

Key voices within the ranks of civil rights groups voiced similar concerns. The National Lawyer's Guild expressly sought to add courts as an enforcement option via an amendment that would "allow an individual to institute a suit for damages against any employer or labor organization."[95] It further requested that "a clause be added after 'back pay' to read 'or damages for a discriminatory refusal to hire,'" keeping open the possibility that payouts could extend beyond simple back pay, and perhaps to exemplary (or punitive) damages as well.[96] Similarly, the ACLU had long pushed for a bill providing a civil action for damages and authorizing recovery of damages by any person "to whom such person shall assign his cause of action."[97] "We are aware that other drafts have been prepared," ACLU Executive Director Roger Baldwin noted in a letter, "but we believe this to represent more workable provisions than those we have seen."[98]

Still others took issue with the statutorily mandated process of agency-led "conciliation." The New York City Committee of the ACLU submitted a memorandum to the TCAD questioning "the usefulness of the tribunal proposed to be set up." "We seriously doubt," it noted, "the desirability of compelling resort to conciliation, primarily because of the possibilities for delay inherent in the proposal. It would be better to give the commissioner authority to attempt conciliation whenever he thought it desirable to do so."[99] Elmer Carter—a leader within New York's civil rights community and, later, a commissioner and chairman of New York's FEPC—went further, calling for the "elimination of the word 'conciliation' as used throughout the article." "There can be no conciliation," he intoned, "of a basic civic right."[100]

But such concerns went unheeded. In testimony before the TCAD in early December 1944, Thurgood Marshall did not voice them, instead noting that the

94. *'Fear' Move on to Smear SCAD's Work*, N.Y. AMSTERDAM NEWS, Mar. 2, 1946, at 1.

95. N.Y.C. CHAPTER, NAT'L LAWYER'S GUILD, RECOMMENDATIONS OF THE NEW YORK CITY CHAPTER OF THE NATIONAL LAWYER'S GUILD CONCERNING THE TENTATIVE PROPOSAL UNDER CONSIDERATION BY THE STATE COMMISSION AGAINST DISCRIMINATION 5 (1944) (on file with the NAACP Papers, Part II, Box A261).

96. *Id.*

97. KONVITZ, *supra* note 40, app. 2 at 151; *see also* Letter from Roger N. Baldwin, Exec. Dir., Am. Civil Liberties Union, to Nat'l Agencies Interested in Racial Rights (Dec. 15, 1944) (on file with the NAACP Papers, Part II, Box A185). For a full reprinting of the model bill, see KONVITZ, *supra* note 40, app. 2 at 148.

98. Letter from Roger N. Baldwin to Nat'l Agencies Interested in Racial Rights, *supra* note 97.

99. Memorandum from the N.Y.C. Civil Rights Comm., ACLU, to Comm. Against Discrimination 2 (1944) (on file with the NAACP Papers, Part II, Box A261).

100. Letter from Elmer A. Carter, Member, N.Y. Unemployment Ins. Appeal Bd., to Thurgood Marshall, NAACP (Nov. 17, 1944) (on file with the NAACP Papers, Part II, Box B109).

NAACP was "in complete accord with the principles outlined in the proposed legislation."[101] The Urban League, too, stated it was "unqualifiedly in favor" of the proposed legislation save a few minor tweaks.[102] And yet, many of the concerns expressed by other civil rights groups would soon prove prescient. Only months after New York's State Commission Against Discrimination (SCAD) opened its doors, civil rights groups began to see worrying signs. The SCAD announced it would not publicize settlements reached via conciliation, vastly reducing the law's deterrent value.[103] And civil rights leaders received a maddening response during a March 1946 meeting with SCAD commissioners when they asked why SCAD had not done more to disseminate information about its existence and workings: such efforts were to be avoided, a commissioner noted, to avoid the perception that the Commission was "advertising for business."[104] That same month, a survey of dozens of organizations that had supported enactment of New York's law overwhelmingly reported they were unaware of "any tangible results or achievements stemming from the Commission's work to date."[105] One respondent called for a "thorough overhauling" of the Commission.[106] Another curtly suggested that the Commission "begin vigorous enforcement of the law."[107]

The gathering critique gained still more momentum throughout 1946 and 1947 when the NAACP, Urban League, and American Jewish Congress formed a joint committee to monitor SCAD's implementation efforts and made further disturbing discoveries. Complaints had languished for two years without action, and SCAD had repeatedly softened its demands during conciliation efforts, set-

101. TCAD REPORT, *supra* note 60, at 73; *see also* Statement of Thurgood Marshall, Representing the National Association for the Advancement of Colored People Before the Joint-Committee on the Ives-Quinn Bill to Prohibit Discrimination in Employment 1 (on file with the NAACP Papers, Part II, Box B109) (noting Marshall's "approv[al] without reservations [of] the Ives-Quinn Bill").

102. Memorandum from Julius A. Thomas, Dir., Dep't of Indus. Relations, Nat'l Urban League, to Chairman, Ives Bill Hearings of the Comm'n Against Discrimination 1 (Dec. 5, 1944) (on file with the National Urban League Papers, Library of Congress, Series 4, Part I:D, Box 13).

103. S.W. Garlington, *Progress of SCAD Can't Be Released—So Says the Law: State Anti-Bias Commission Issues First "Skimpy" Report*, N.Y. AMSTERDAM NEWS, Nov. 27, 1945, at 28.

104. Memorandum on Conference with Commissioners Turner and Carter at the Office of the State Commission Against Discrimination 2 (Mar. 18, 1946) (on file with the NAACP Papers, Part II, Box B109).

105. Report on Survey of Opinion Regarding the New York State Commission Against Discrimination 2 (on file with the NAACP Papers, Part II, Box A457); *see also Former FEPC Head "Finds" SCAD Is Weak: Made Survey of Thirty Eight Organizations and Gets Criticisms*, N.Y. AMSTERDAM NEWS, Apr. 6, 1946, at 1 (reporting survey results); *N.Y. Citizens' Group Rips Laxity on Racial Problems*, CHI. DEFENDER, Apr. 6, 1946, at 4 (noting "caustic criticism" of SCAD).

106. Report on Survey of Opinion Regarding the New York State Commission Against Discrimination, *supra* note 105, at 3.

107. *Id.* at 6.

tling complaints on the basis of mere promises by an employer to change its policies rather than concrete complainant relief.[108] By 1949, the committee had seen enough. A report of its findings sent to Governor Dewey warned that New York's fair employment law was in "grave danger of . . . becoming virtual 'dead letter' legislation for want of action under it."[109] Soon thereafter, the NAACP issued its own verdict, noting in a press release that "serious doubt is being cast upon the wisdom of relying solely upon the machinery of the Commission for the settlement of discrimination cases."[110]

In short, even as civil rights groups cemented their support for the FEPC model in the immediate postwar years and conducted legislative campaigns in large industrial states like Pennsylvania, Ohio, and Illinois, the first and best-developed FEPC scheme in New York was falling well short of expectations. Yet those groups continued to press the FEPC model even where political moderates (and legislative pivots) stood ready to enact into law a range of court-centered regulatory alternatives.

B. *Judicial Alternatives*

If the supposed virtues of the FEPC model ran contrary to the New York experience, then many of the concerns FEPC's proponents expressed about judicial enforcement are equally puzzling. As the earliest fair employment campaigns got off the ground in the 1940s, much of the debate revolved around the success or failure of litigation efforts under the Reconstruction-era state civil rights acts prohibiting discrimination in public accommodations. Some at the time noted a decided uptick in such litigation and hinted that those efforts might be seeing increasing success.[111] Others, however, noted the absence of published opinions and offered the conclusory assertion that litigation efforts under the civil rights acts had failed.[112] As with the case for administrative en-

108. *See* A Project to Promote Better Enforcement of the New York Ives-Quinn Law 1 (on file with the NAACP Papers, Part II, Box B109). For an early account, see Comment, *supra* note 76, at 841-44.

109. COMM. TO SUPPORT THE IVES-QUINN LAW, THE NEW YORK STATE COMMISSION AGAINST DISCRIMINATION, AN APPRAISAL OF THREE AND A HALF YEARS UNDER THE IVES-QUINN LAW 15 (1949); *see also* Letter from Newbold Morris to Thomas E. Dewey, Governor of N.Y. 1 (Jan. 25, 1949) (on file with the NAACP Papers, Part II, Box A264). *See generally* MARTHA BIONDI, TO STAND AND FIGHT: THE STRUGGLE FOR CIVIL RIGHTS IN POSTWAR NEW YORK CITY 98-111 (2003) (describing early SCAD implementation efforts).

110. Press Release, NAACP, SCAD Inaction Hit by NAACP (May 5, 1949) (on file with the NAACP Papers, Part II, Box B109).

111. *See* A. Bruce Hunt, *The Proposed Fair Employment Practices Act; Facts and Fallacies*, 32 VA. L. REV. 1, 37 (1945).

112. *See, e.g.*, Comment, *supra* note 76, at 839-40; Note, *Legislative Attempts to Eliminate Racial and Religious Discrimination*, 39 COLUM. L. REV. 986, 1002 (1939). Equally conclusory analyses looking back from the vantage point of the 1960s blamed discriminatory juries and the cost-prohibitive nature of private litigation. *See* SOVERN, *supra* note 11, at 20 (enforcement of state civil rights acts had "presumably foundered" because of ignorance of

forcement, the reality during the earliest legislative campaigns was far more complex than either of these accounts suggests.

1. *State civil rights acts and the ghost of* Lochner

At one level, the checkered history of efforts to enforce the Reconstruction-era civil rights acts made distrust of judicial enforcement understandable. The *Lochner*ism that had gripped federal and state judiciaries in the decades leading up to the New Deal meant that courts were widely seen as a brake on, not a spur to, social reform. And while *Lochner* has come to symbolize the broader antiregulatory stance of the pre-New Deal judiciary,[113] it is hard to find a better illustration of its regressive workings than early court implementation of state civil rights acts. Relying on the rule that statutes in derogation of the common law are to be construed narrowly, many courts at the turn of the century refused to enforce the civil rights acts by finding that public places not specifically enumerated by statute—including billiard rooms, ice cream parlors, and restaurants—were not places of public accommodation, amusement, or resort.[114] The result was a cat-and-mouse game in which state legislators continually filled gaps in their prior draftsmanship following narrowing judicial interpretations.[115]

But this judicial parade of horribles does not add up to a uniformly antagonistic stance. Nearly all of the worst offending cases were decided decades earlier, during the Progressive era, when American race relations took a precipitous turn for the worse and the Supreme Court made few demands on state-level doctrine.[116] More importantly, *Lochner*ism was clearly on the wane as the first legislative campaigns got off the ground.[117] This does not mean that questions about the constitutionality of the new fair employment laws did not issue

their existence and litigation costs); *see also* Note, *The Right to Equal Treatment: Administrative Enforcement of Antidiscrimination Legislation*, 74 HARV. L. REV. 526, 526 (1960) (asserting, without further discussion, that "[e]xperience has demonstrated" the inadequacies of private civil remedies in the civil rights context).

113. In this Article, *Lochner* is used as a symbol of a set of legal understandings at the turn of the century regarding property and liberty of contract. I do not suggest that contemporaries in the 1940s saw the case as embodying a single, coherent set of ideas. As some have noted, the *Lochner* case did not become a conceptual placeholder for these ideas until at least the 1970s. *See* Gary D. Rowe, Lochner *Revisionism Revisited*, 24 LAW & SOC. INQUIRY 221, 221-22 (1999).

114. *See generally* Comment, *Private Remedies Under State Equal Rights Statutes*, 44 ILL. L. REV. 363, 370 (1949) (discussing cases).

115. *See* Davison M. Douglas, *Contract Rights and Civil Rights*, 100 MICH. L. REV. 1541, 1556-57 (2002) (book review).

116. *See* KLARMAN, *supra* note 23, at 62.

117. *See* Monrad G. Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91, 117 (1950) (noting *Lochner*'s continuing but weakening sway in state constitutional law).

from certain quarters during the earliest legislative campaigns.[118] But such arguments were soon laid to rest, in 1945, when the Supreme Court announced *Railway Mail Ass'n v. Corsi*, upholding a 1941 New York law prohibiting union discrimination and, by implication, New York's recently enacted FEPC law.[119]

The 1940s were also a time of significant doctrinal change on race matters more generally. As the earliest fair employment campaigns got underway, federal and state courts had begun to take a hard line against discriminatory unions in particular. Charles Houston's successful litigation effort in *Steele* and related cases is one example.[120] Notable as well was the California Supreme Court's 1944 decision in *James v. Marinship Corp.*, holding that unions could arbitrarily exclude black members or maintain a closed shop, but they could not do both.[121] *James* also illustrates another critically important point about *Lochner*'s legacy: black claims to be free from union discrimination were in many respects entirely consistent with the *Lochner*-era protection of the right to work and pursue a livelihood that reached all the way back to Justice Field's dissent in the *Slaughter-House Cases*.[122] By the 1940s, the California Supreme Court in *James*, and the Kansas Supreme Court as well, had expressly made the connection between substantive due process and protection from union racial discrimination on the theory that statutory labor protections made unions "quasi-public" intermediaries between workers and private employers.[123] In short, it was unlikely that judicial enforcement of the new fair employment laws would meet with the same raw obstructionism aimed at state civil rights acts decades earlier, and there was good reason to believe that judges might be sympathetic enforcers of the new laws as to union discrimination in particular.

118. *See* Morroe Berger, *The New York State Law Against Discrimination: Operation and Administration*, 35 CORNELL L.Q. 747, 751 (1950) (noting 1945 New York Bar Association opposition to FEPC law "on the ground that it was an unconstitutional infringement of freedom of contract"); *Statement of Members of the Executive Committee in Regard to the Pending Anti-Discrimination Bills*, MASS. L.Q., May 1945, at 10, 11 (setting forth view of Massachusetts Bar Association that proposed FEPC law was unconstitutional).

119. 326 U.S. 88, 93-94 (1945). *See generally* KONVITZ, *supra* note 40, at 131 (noting likely constitutionality of fair employment laws after *Corsi*).

120. *See supra* notes 83-89 and accompanying text.

121. 155 P.2d 329, 342 (Cal. 1944); *see also* WEAVER, *supra* note 70, at 229 (detailing similar federal court decision in Providence in 1944 invalidating black auxiliaries).

122. 83 U.S. (16 Wall.) 36, 110 (1872) (Field, J., dissenting); *see* GOLUBOFF, *supra* note 14, at 205-09; MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961, at 76-77 (1994); Mack, *supra* note 14, at 320; Reuel E. Schiller, *From Group Rights to Individual Liberties: Post-War Labor Law, Liberalism, and the Waning of Union Strength*, 20 BERKELEY J. EMP. & LABOR L. 1, 27 (1999). For a contemporary view, see Murray, *supra* note 7, at 404.

123. *See James*, 155 P.2d at 339-40; Betts v. Easley, 169 P.2d 831, 843 (Kan. 1946).

2. *Aggregation and the problem of litigation costs*

Even if *Lochner*ism no longer posed a barrier to judicial implementation, FEPC's advocates could still point to various practical concerns with a court-centered approach. For instance, some rightly noted that criminal enforcement was unlikely to provide effective redress for victims of job discrimination.[124] On the civil side, however, things were far less clear.

Most notable is the concern with litigation costs. American courts have historically favored the "American rule" whereby even prevailing parties bear their own costs in lawsuits. Yet mechanisms existed to help civil rights plaintiffs economize on litigation expenses. Fee-shifting statutes authorizing the judicial grant of attorney's fees were in full use by the 1940s in a variety of contexts, including civil rights.[125] Contingency fee lawsuits were also increasingly prevalent and could easily be deployed in the job discrimination context, especially where recovery pools could be boosted either by liquidated or multiple-damages provisions, or by aggregation mechanisms such as permissive joinder or the ability to make unlimited assignment of claims.[126] Here, the industrial work-accident crisis at the turn of the century offered a how-to guide: in the decades leading up to fair employment's emergence, a growing urban plaintiff's bar had learned to create economies of scale and save on litigation costs by signing up large numbers of clients and then assigning all of their claims to a single claimant for trial.[127] Class action lawsuits—or their state-level equivalent, the "representative action"—offered still another, but less tested, aggregation possibility.[128] Indeed, soon after the 1938 adoption of the Federal Rules of Civil Procedure, some commentators had begun calling for use of the Rule 23 class device as a substitute for failed administrative regulation.[129]

Civil rights groups were very much aware of these possibilities. Recall that early fair employment bills at the federal and state levels provided for civil causes of action that included attorney's fees,[130] authorized unlimited assign-

124. *See* Robert E. Goostree, *The Iowa Civil Rights Statute: A Problem of Enforcement*, 37 IOWA L. REV. 242, 244-47 (1952) (reviewing Iowa's penal experience and noting problems of prosecutorial discretion and the high criminal proof standard of "beyond a reasonable doubt").

125. *See* Legislation, *Race Equality by Statute*, 84 U. PA. L. REV. 75, 80 (1935). Similarly, New Jersey's civil rights act had long authorized suit in the state's name and recovery of costs and attorney's fees. *See* KONVITZ, *supra* note 40, at 203.

126. Many regulatory statutes featured multiple damages provisions, including, among others, the Clayton Act. *See* 15 U.S.C. § 15 (2006).

127. Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregated Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1597 (2004).

128. *See* Comment, *The Class Action Device in Antisegregation Cases*, 20 U. CHI. L. REV. 577, 577 (1953).

129. *See* Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 687 (1941) (exploring "the possibilities of revitalizing private litigation to fashion an effective means of group redress").

130. *See supra* note 35 and accompanying text.

ment of claims,[131] or, as with Diggs-DeFoe, expressly provided class action authority.[132] Events in Michigan at the time offer still more support. Just months after Diggs-DeFoe was introduced in 1943, a female plaintiff suing on her own behalf and as assignee of twenty-eight other women under a Michigan penal statute mandating equal pay by gender won what was almost certainly the first large damages judgment in an employment discrimination suit—$55,690, or some $600,000 in present-day dollars.[133] And a year later, the Michigan legislature considered a bill outlawing gender-based wage discrimination that created a civil action for damages and "in an additional equal amount of liquidated damages" (i.e., double damages), provided that such action "may be maintained in any court of competent jurisdiction by any 1 or more employes for and in behalf of himself or themselves and other employes similarly situated," and authorized "reasonable attorney's fees" for successful claimants.[134]

Importantly, aggregated damages actions fit more naturally with fair employment than the earlier civil rights acts prohibiting discrimination in public accommodations. Courts and commentators had long lamented the "insurmountable burden of proof" facing plaintiffs in showing "measurable actual damage" for exclusion from places of public accommodation and amusement,[135] and had also puzzled over how to place a price tag on violations of "civil liberties" more generally.[136] But this problem was easily solved in the job discrimination context because lost wages provided a readily calculable measure of actual damages. Similarly, it is useful to note that the problem of job discrimination in the mid-1940s took a radically different form than it does today and was arguably far more amenable to aggregated litigation. Present-day employment law scholars debate how flexible remedies might be crafted to counter subtle, "second-generation" discrimination resulting from unconscious or implicit bias.[137] But the core problem of job discrimination at midcentury

131. *See supra* note 97 and accompanying text. For examples of use of joinder in civil rights actions, see, for example, *Suttles v. Hollywood Turf Club*, 114 P.2d 27 (Cal. Ct. App. 1941); *Evans v. Fong Poy*, 108 P.2d 942 (Cal. Ct. App. 1941); and *McCrary v. Jones*, 39 N.E.2d 167 (Ohio Ct. App. 1941).

132. *See supra* note 3 and accompanying text.

133. *See* St. John v. Gen. Motors Corp., 13 N.W.2d 840, 840-41 (Mich. 1944). On the rise of equal pay laws, which were private civil action rather than administrative schemes, see PAUL BURSTEIN, DISCRIMINATION, JOBS, AND POLITICS: THE STRUGGLE FOR EQUAL EMPLOYMENT OPPORTUNITY IN THE UNITED STATES SINCE THE NEW DEAL 63 (1985).

134. S.B. 338, 63d Leg., 1945 Sess. (Mich. 1945).

135. Ronald P. Klein, *The California Equal Rights Statutes in Practice*, 10 STAN. L. REV. 253, 266 (1958); *see also* Note, *Civil Rights: Extent of California Statute and Remedies Available for Its Enforcement*, 30 CALIF. L. REV. 563, 567 (1942) ("It is highly questionable that the remedy of damages against a private individual can be said in all cases to be adequate.").

136. Joseph Moscovitz, *Civil Liberties and Injunctive Protection*, 39 ILL. L. REV. 144, 144 (1944).

137. *See* Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460 (2001).

was the absolute exclusion of African Americans by large industrial concerns and unions.[138] Near-total exclusion made aggregation—and, with it, cost mitigation—far easier to envision.

3. *The jury problem*

Perhaps the most oft-cited criticism of private civil enforcement was the threat of discriminatory juries. This concern would later lead architects of Title VII of the Civil Rights Act of 1964 to provide for injunctive relief only (which also included back pay) as an express end-run around racist southern juries.[139] Yet this also suggests it was possible to design a court-centered scheme that did not employ juries at all.

More fundamentally, jury bias was plainly less of a concern in many of the northern and western states that enacted fair employment laws in the immediate postwar period. To be sure, midcentury race relations in many northern states, especially outside urban centers, were bleak.[140] Some smaller cities and towns even barred African Americans after sundown.[141] In Michigan, hotels beyond Detroit and Grand Rapids were open to African American patrons only for special events.[142] And in a towering historical irony, the upscale Abraham Lincoln Hotel in the rural downstate capital of Springfield, Illinois, openly barred African Americans and reportedly refused rooms to a black assistant attorney general and, later, a black Chicago alderman, both in town on official business.[143]

But there were also many hopeful signs of change. Opinion polls taken during early legislative campaigns found that respondents overwhelmingly supported fair employment legislation in the more liberal states of the Northeast and upper Midwest.[144] In any event, the northward migration of African

138. *See, e.g.*, TERRY H. ANDERSON, THE PURSUIT OF FAIRNESS: A HISTORY OF AFFIRMATIVE ACTION 25 (2004) (noting FEPC chairman statement that "company after company admitted that it did not employ Negroes . . . regardless of their fitness for the job"). For a contemporary account, see FAIR EMP'T PRACTICE COMM., *supra* note 76, at 18-19 (citing examples).

139. *See* BRIAN K. LANDSBERG, ENFORCING CIVIL RIGHTS: RACE DISCRIMINATION AND THE DEPARTMENT OF JUSTICE 55 (1997).

140. *See generally* SUGRUE, *supra* note 43 (surveying discrimination throughout the industrial North across a range of contexts).

141. *See generally* JAMES W. LOEWEN, SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM (2005) (documenting phenomenon and describing its rise in decades leading up to 1940).

142. *See* SIDNEY FINE, "EXPANDING THE FRONTIERS OF CIVIL RIGHTS": MICHIGAN, 1948-1968, at 29 (2000).

143. *See The Abraham Lincoln Hotel*, CHI. DEFENDER, Jan. 6, 1940, at 14.

144. *See* Gallup Poll #349 (Roper Center, Storrs, Conn., 1945) (data on file with author) (noting seventy-five percent of residents in New York and seventy-one percent in Connecticut favored enactment of fair employment legislation); *see also* CHEN, *supra* note 8, at 270 (noting that, by 1950, seventy-five percent of Minnesotans supported passage of a fair employment law, climbing to eighty-four percent in 1953).

Americans during the interwar and war years and their concentration in major urban areas meant that employment discrimination disputes would largely be city affairs and likewise ensured that blacks would be a substantial proportion of civil jury pools.[145] This may help explain why an African American plaintiff who brought a case in 1948 under New Jersey's civil rights act after she was barred from a public swimming pool affirmatively requested a jury trial after the white defendants waived that right.[146] Still more evidence comes from the 1955 fair employment campaign in Minnesota, which nearly imploded over the question whether the statutory sanction for a respondent's failure to comply with a commission cease-and-desist order should take the form of a judge-made civil contempt order or a jury-based imposition of criminal fines and imprisonment. Participants noted that "the split runs deep," and that the issue quickly became one of "white vs black."[147] But it was black civil rights groups that preferred the jury version, with white civic groups advocating judge-issued contempt.[148]

The jury issue seemed to be less of a concern even in more racially conservative areas like downstate Illinois. Testimony before the Illinois Commission to Investigate the Living Conditions of the Urban Colored Population in 1940 is revealing. Asked why "in view of all these denials of accommodations under the Civil Rights Law, no people in this community have filed suits under that Act?," an NAACP representative from East St. Louis explained:

> [N]obody wants to be made the goat. The persons who would have nerve enough to file suits and stick to them are usually in business. They are afraid it will hurt their business or something will clash, because we have terrible criticism against people who do try to stand up against these things. They haven't had anybody that wanted to do it.

Asked specifically whether the NAACP believed that plaintiffs would "not get fair treatment because of the jury or at the hands of the court," she responded, "No, no, we know better than that."[149] This was a standard refrain: It was not racist juries, but rather the threat of community opprobrium that initiation of lawsuits often brought upon the middle class African American business owners, schoolteachers, and assorted service providers who had the resources

145. *See, e.g.*, FINE, *supra* note 142, at 73 (noting seventy percent of claims before Michigan FEPC came from metropolitan Detroit). On the migration, see KLARMAN, *supra* note 23, at 100-02, 173-74, 187-88.

146. *See* State v. Rosecliff Realty Co., 62 A.2d 488, 489 (N.J. Super. Ct. App. Div. 1948).

147. Letter from Sydney Lorber to NAACP (Dec. 9, 1954) (on file with the NAACP Papers, Part II, Box A257); Letter from Samuel Scheiner to Will Maslow (Dec. 1, 1954) (on file with the NAACP Papers, Part II, Box A257).

148. *See* Letter from Howard Bennett to Roy Wilkins (on file with the NAACP Papers, Part II, Box A257).

149. Hearing by the Illinois State Commission on the Condition of the Urban Colored Population 133-34 (Nov. 22, 1940) (on file with the Illinois State Archives) [hereinafter Illinois State Commission Hearings].

to frequent restaurants, theaters, or concert halls but also often depended on white custom and goodwill for their livelihood.[150] But the working class blacks who were largely excluded from the American industrial order were likely less dependent on white goodwill than middle class black service providers—and, one might conclude, less skittish about challenging their wholesale exclusion by large industrial concerns.

4. *A rising tide of civil rights litigation*

The best evidence that court-centered enforcement offered a sound regulatory alternative to FEPC is that, despite litigation costs, the risk of discriminatory judges and juries, and fears about being labeled a "goat," the years immediately preceding the first fair employment campaigns witnessed a rising tide of civil rights lawsuits. One could point to the litigation campaigns against discriminatory unions that yielded victories in *Steele*, *Tunstall*, and *James*, or to NAACP litigation campaigns challenging the white primary and discriminatory teacher salaries, university admissions, voter registration, and interstate transportation.[151] Yet the rising tide of litigation also extended to more retail efforts under state civil rights acts prohibiting discrimination in public accommodations—the same litigation that some commentators, mostly looking back from the 1960s, had dismissed as scattershot and ineffective.[152]

It is hard to quantify increases in this latter type of litigation. Published opinions, some contemporary observers noted, did not accurately capture litigation activity.[153] But evidence of a litigation explosion was all around. Beginning in the mid- to late 1930s, the pages of the nation's black newspapers ran thick with accounts of scores of lawsuits brought in large industrial states like Ohio, Illinois, New York, Michigan, and California, in which all- or mostly white juries regularly returned damages verdicts in favor of black plaintiffs.[154]

150. *See* CHRISTOPHER ROBERT REED, THE CHICAGO NAACP AND THE RISE OF BLACK PROFESSIONAL LEADERSHIP, 1910-1966, at 98 (1997); Bonfield, *supra* note 13, at 1050; Joseph P. Witherspoon, *Civil Rights Policy in the Federal System: Proposals for a Better Use of Administrative Process*, 74 YALE L.J. 1171, 1178 (1965).

151. *See* KLARMAN, *supra* note 23, at 196-224. On *Steele*, *Tunstall*, and *James*, see notes 84, 120-23, and accompanying text.

152. *See supra* note 112.

153. *See* Note, *Legislative Attempts to Eliminate Racial and Religious Discrimination*, 39 COLUM. L. REV. 986, 999 n.81 (1939) (noting that one hundred reported cases formed "only a small part of the number of suits brought under the acts"); Comment, *supra* note 76, at 839 (reported cases "not a wholly accurate criterion").

154. Electronic searches in six papers in ProQuest's Black Newspaper Service (*Pittsburgh Courier*, *New York Amsterdam News*, *Philadelphia Tribune*, *Los Angeles Sentinel*, *Chicago Defender*, *Cleveland Call & Post*) returned more than one hundred articles between 1935 and 1948 recounting lawsuits brought under state civil rights acts in Ohio, New York, California, and Illinois. For a representative sample of successful outcomes in Ohio, see, for example, *Drug Store Pays $500 for Jim Crow*, CLEV. CALL & POST, Mar. 21, 1942, at 14 (all-white jury); *Lorain Couple Wins Civil Rights Damages: Collect $500 for Jim-Crow at*

Testimony before various state commissions examining civil rights issues likewise suggests substantial litigation activity.[155]

Litigation's potential was on clearest display in wartime Ohio. Between 1940 and 1943, local militant civil rights groups soaked Ohio theaters, restaurants, and retail stores under a "shower of suits" in a phased and carefully choreographed litigation campaign under the Ohio Civil Rights Act.[156] In Columbus, the four main movie theaters and a host of downtown retail stores and eateries—the latter hit with more than twenty lawsuits on the eve of the state restaurant association's annual convention—caved under the onslaught.[157] In

Isaly Co., CLEV. CALL & POST, Dec. 12, 1942, at 13 (eleven whites, one black on jury; white plaintiff's attorney); Bob Williams, *Roxy Bar Suits in Settlement*, CLEV. CALL & POST, May 31, 1947, at 1A ($1000 in out-of-court settlements); and *Youngstown Vet Awarded $350 in Civil Rights Suit*, CLEV. CALL & POST, Sept. 28, 1946, at 12B (eleven whites, one black on jury). In New York, see, for example, *Hotel Knickerbocker Pays for Jim Crow*, PHILA. TRIB., Jan. 13, 1945, at 1 ($500 jury verdict against New York hotel); *Refused Drink; He Files Suit*, N.Y. AMSTERDAM NEWS, Sept. 15, 1945, at A4 ($500 judgment); *Southernaires Win Suit Against N.Y. Hotel: Famed Radio Quartet Sued Sagamore Hotel After Discrimination*, PITT. COURIER, Dec. 26, 1942, at 21 ($980 jury judgment); *Wins $1000 in Civil Rights Suit*, N.Y. AMSTERDAM NEWS, May 29, 1948, at 1 (refused elevator service); and *Wins Civil Action Suit*, N.Y. AMSTERDAM NEWS, Mar. 11, 1944, at A1 ($300 judgment against skating rink). In California, see, for example, *Actress Victor in Civil Rights Suit*, PITT. COURIER, Feb. 7, 1943, at 20 ($100 to each of two plaintiffs); *Cafe Bias Suit Won by Three in Montebello*, L.A. SENTINEL, Aug. 21, 1947, at 10 ($300 judgment); *Cafe Fined, 1 Acquitted in 'Refusal to Serve' Suits*, L.A. SENTINEL, Jan. 23, 1947, at 3 ($100 to each of three plaintiffs); and *Dooley Wilson's Wife Wins $250 in Service Suit*, L.A. SENTINEL, Apr. 29, 1948, at 3 ($750 among three plaintiffs). In Illinois, see, for example, *Awarded Damages in Case of Tavern by White Jurors*, CHI. DEFENDER, Mar. 7, 1936, at 1 (all-white jury awards $250); *Hotel Must Pay $500 for Refusing a Meal*, CHI. DEFENDER, Mar. 21, 1942, at 13; *Loop Cafe Loses Jim Crow Suit; Must Pay: Judge Awards $300 Each in Three Cases*, CHI. DEFENDER, Mar. 23, 1935, at 18 ($900 judgment among three plaintiffs); *Refusal to Serve Pair Costs Restaurant $500*, CHI. DEFENDER, Feb. 25, 1939, at 24; and *Wins Jim Crow Suit Against Loop Hostelry: Court Official Wins $200 Settlement*, CHI. DEFENDER, May 22, 1937, at 5.

155. *See, e.g.*, *Public Hearing on Assemb. Bills Relative to Fair Employment Practices Before Assemb. Judiciary Comm.*, 169th Leg., 1945 Sess. 27 (N.J. 1945) (statement of Hon. J. Mercer Burrell) (recounting nine successful prosecutions under New Jersey's civil rights act in Newark in previous twelve months).

156. *Vanguard League Files Fourteen Civil Rights Cases: Shower of Suits Aimed at Columbus Restaurants*, CLEV. CALL & POST, May 9, 1942, at 17. For other examples of a multiple-litigation strategy, see *Columbus Stores Settle 11 Civil Rights Suits*, CLEV. CALL & POST, Nov. 21, 1942, at 13; John Fuster, *Columbus Opens Major Theaters to Negroes: Action Hailed as Decisive Victory for Vanguards in Crusade for Civil Rights*, CLEV. CALL & POST, July 5, 1941, at 1A; *Organization Files Against Theaters*, N.Y. AMSTERDAM NEWS, Mar. 1, 1941, at 21; and *Vanguard League Files Six More Jim-Crow Suits*, CLEV. CALL & POST, Aug. 15, 1942, at 12.

157. *See* Barbee Durham, *Columbus Vanguards Kayo Jim-Crow in Eateries: Restaurant Association Bends in Face of 23 Suits*, CLEV. CALL & POST, June 6, 1942, at 17; *Vanguard League Files Fourteen Civil Rights Cases: Shower of Suits Aimed at Columbus Restaurants*, *supra* note 156.

downstate, racially conservative Cincinnati, a flood of lawsuits "smashed" the exclusionary practices of movie theaters.[158]

Importantly, the Ohio litigation campaign bore many of the characteristics of the work-accident litigation boom decades earlier.[159] A patchwork of local civil rights groups achieved informal aggregation by resolving to file at least five suits at a time and treat them as "job lots" to be pushed through the courts in assembly-line fashion.[160] Moreover, while counsel was most often provided by black attorneys drawn from the groups' memberships, some plaintiffs were represented by white counsel, especially white ethnics, presumably part of a growing urban plaintiffs' bar at the time.[161] Most significant of all, civil rights plaintiffs repeatedly expressed surprise at the warmth of the judicial reception. Some judges expressed outrage at the defendants' exclusionary conduct and tacked costs and attorneys' fees onto damages judgments.[162] After an early round of litigation in five Ohio cities in 1938, an editorial in the *Cleveland Call & Post* reprinted in full a Xenia judge's forceful jury charge and declared that if the case was "any criterion of the kind of judicial reaction we are going to get, then it behooves Negroes in every county to get busy with their suits."[163]

To be sure, lawsuits were not always successful.[164] There were also rumors that larger entities like amusement parks and skating rinks would keep a "slush fund" to pay out any judgments while maintaining all-white patronage.[165] Nonetheless, enforcement efforts in many cities had by the late 1940s made surprising headway. In Columbus, Ohio, where litigation had been particularly intense, a 1948 newspaper article on race relations reported that hotels were open to blacks, restaurants were mostly so, and theaters had seen "little or no

158. *Theater Ban Smashed in Cincinnati*, PHILA. TRIB., Dec. 27, 1941, at 2. *See generally* SUGRUE, *supra* note 43, at 140-41 (recounting Cincinnati litigation campaign).

159. *See supra* text accompanying note 127.

160. *Vanguard League Files Fourteen Civil Rights Cases: Shower of Suits Aimed at Columbus Restaurants*, *supra* note 156; *see also Organization Files Against Theaters*, *supra* note 156.

161. *See, e.g.*, *Lorain Couple Wins Civil Rights Damages: Collect $500 for Jim-Crow at Isaly Co.*, *supra* note 154; *Youngstown Vet Awarded $350 in Civil Rights Suit*, *supra* note 154.

162. *See, e.g.*, *Cafe Man Fined on Complaint of Cleveland Trio*, N.Y. AMSTERDAM NEWS, July 15, 1939, at 1.

163. *Civil Rights Laws Challenge Race to Action*, CLEV. CALL & POST, Feb. 17, 1938, at 6.

164. *See, e.g.*, *2 Lose Civil Right Suit in New York City: Roy Wilkins and Hubert T. Delany Took Golf Club to Court*, PHILA. TRIB., June 12, 1941, at 16; Alger L. Adams, *Resort Hotels Ignore State Anti-Bias Laws*, N.Y. AMSTERDAM NEWS, Aug. 18, 1945, at 1; *Daytonian Loses Civil Rights Suit Against McCrory's*, CLEV. CALL & POST, Mar. 27, 1943, at 1B; *Hines Denied Damages in Discrimination Suit*, CHI. DEFENDER, May 18, 1940, at 12.

165. *See* Bob Williams, *Euclid Beach Pays Off for Biased Policy*, CLEV. CALL & POST, Feb. 10, 1945, at 4A; Cleveland Branch NAACP, Minutes of the Executive Committee 4 (Oct. 15, 1945) (on file with the WRHS, Manuscript Collection 3520, Folder 9) (describing skating rink's "segregation policy" as a "business proposition" and noting owner "has money in his budget to pay for such cases").

'trouble'" in recent years.[166] In other locales, litigation had moved to mop-up issues, including whether segregated seating in theaters—as opposed to outright debarment—was prohibited by law.[167] Even the Abraham Lincoln Hotel in Springfield, Illinois, was in litigation as the drive for fair employment got underway.[168]

* * *

In the end, capacity to break down the midcentury structures of job discrimination does not offer an especially good explanation for why civil rights groups so quickly and so thoroughly coalesced around the FEPC model. There also remain a number of unanswered questions. Why, for instance, did the mainline civil rights groups propose and fight for bills that granted the new FEPCs exclusive jurisdiction—and thus explicitly precluded private rights of action and denied complainants most procedural rights within the administrative process—even as groups like the National Lawyers Guild pleaded for a court-centered option as a complement to administrative enforcement? Why, moreover, did civil rights groups support the hyperindividualized, case-by-case FEPC model over alternative schemes that held out the possibility of a more aggregated, systemic approach? And if juries (but not judges) were the problem, why did civil rights groups repeatedly reject a court-centered, judge-administered injunctive scheme much like what Title VII would become? These and other questions suggest that the FEPC choice at the dawn of American fair employment law resulted from less obvious forces.

III. THE MIDCENTURY POLITICAL ECONOMY OF CIVIL RIGHTS

In Cleveland in late 1942, just months before the drive for fair employment kicked off in neighboring Michigan, a local civil rights group called the Future Outlook League (FOL) filed a trio of lawsuits in common pleas court.[169] The complaints alleged that three of the city's largest war factories had discriminated against African American women seeking employment there. News of the

166. *See* George S. Schuyler, *Columbus, Ohio . . . the Shore Dimly Seen: Intensive Campaign for Full Civil Rights Getting Good Results*, PITT. COURIER, Mar. 13, 1948, at 2.

167. *See* REED, *supra* note 150, at 72; RICHARD W. THOMAS, LIFE FOR US IS WHAT WE MAKE IT: BUILDING BLACK COMMUNITY IN DETROIT, 1915-1945, at 132 (1992); *see also* ST. CLAIR DRAKE & HORACE R. CAYTON, BLACK METROPOLIS: A STUDY OF NEGRO LIFE IN A NORTHERN CITY 100, 102 n.* (1945) (noting that "discrimination against Negroes in downtown movie theaters was virtually non-existent and only a few neighborhood houses tried to Jim-Crow Negroes"). *But see* SUGRUE, *supra* note 43, at 134 (noting 1948 Michigan study detailing "daily humiliation" of African Americans barred from Michigan restaurants, stores, and hotels).

168. *See Win Capital Jim Crow Suit*, CHI. DEFENDER, July 26, 1947, at 6.

169. *See Sues War Plants in Jobs Discrimination: F.O.L. Lawsuit Seeks Court Order Against Jim-Crow*, CLEV. CALL & POST, Nov. 28, 1942, at 1.

lawsuits quickly spread, and they were closely watched far beyond Cleveland.[170]

Things did not go well. After a week-long trial, Judge Frank Merrick, a prominent Democrat, made short work of the complaints. Lecturing from the bench for a little more than an hour, Judge Merrick seized on the fact that the legal predicate for the lawsuits was President Roosevelt's Executive Order 8802, which had established the wartime COFEP and vested it with the power to conciliate disputes, hold public hearings, and issue advisory orders, but created no enforceable rights.[171] "[I]t is important for all of us to keep in mind," Judge Merrick noted, "that advisory suggestions which emanate from time to time from Washington do not have the weight of statutes."[172] As many courts have likewise held in the decades since, a mere executive order, particularly one granting an agency purely advisory powers, did not authorize a private right of action.[173]

But Judge Merrick did not stop there, issuing a rambling twelve-page opinion—all without a single citation—that offers a fascinating window into the thinking of the day.[174] Among other things, Judge Merrick criticized the FOL's lawsuits as "ill-advised" and "inopportune" and accused the plaintiffs of unpatriotically seeking private advantage during wartime.[175] Judge Merrick also voiced skepticism that law could or should alter private racial preferences. "[L]et's recognize that social progress, whether it is by whites, reds, yellows or negroes is a slow progress," Judge Merrick noted. "It cannot be brought about by court edicts, and it cannot be forced down the throats of people by court orders."[176] His decision included a strange, racist flourish as well: because African Americans had only recently come "from the jungles of Africa," they should expect at least some discrimination.[177] Judge Merrick concluded his ruling by ordering the plaintiffs to pay court costs.[178]

170. *See* CHARLES H. LOEB, THE FUTURE IS YOURS: THE HISTORY OF THE FUTURE OUTLOOK LEAGUE, 1935-1946, at 101 (1947) ("Out-of-state newspapers sent special reporters to cover the trial.").

171. *See* Chas. H. Loeb, *Judge OK's Job Jim-Crow! Dismisses FOL Case; Lawyers Plan Appeal*, CLEV. CALL & POST, Dec. 26, 1942, at 1.

172. KIMBERLEY L. PHILLIPS, ALABAMANORTH: AFRICAN-AMERICAN MIGRANTS, COMMUNITY, AND WORKING-CLASS ACTIVISM IN CLEVELAND, 1915-45, at 245 (1999).

173. *See, e.g.*, Stevens v. Carey, 483 F.2d 188, 190-91 (7th Cir. 1973) (executive order not judicially enforceable); Manhattan-Bronx Postal Union v. Gronouski, 350 F.2d 451, 452, 456-57 (D.C. Cir. 1965) (same).

174. Turner v. Warner & Swasey Co., No. 524635, 1942 WL 417 (Ohio Ct. C.P. Dec. 19, 1942).

175. *Id.* at *6, *11.

176. *Id.* at *11.

177. *Id.* at *2. The black press would later ridicule this comment as the "The African Jungle Speech." *See* PHILLIPS, *supra* note 172, at 246; *Judge Merrick Labors and Brings Forth a Mouse*, CLEV. CALL & POST, Dec. 26, 1942, at 20.

178. *Turner*, 1942 WL 417, at *12.

FIGURE 2[179]


BUY WAR SAVINGS BONDS CLEVELAND NEWS

Courtroom Scene at Hearing on Race Prejudice

COURTROOM scene in suit charging race discrimination. Shown are (1) Charles Stillwell, president of the Warner & Swasey Co.; (2) L. D. McDonald, vice president; (3) Attorney Walter T. Kinder; (4) Attorney Luther Day; (5) Attorney Donald B. Leach; (6) John O. Holly, of the Future Outlook League; (7) Attorney Harvey J. Johnson; (8) Attorney Claybourne George; (9) Attorney Chester K. Gillespie; (10) Miss Claretta Johnson, plaintiff's witness.

The publication by the Cleveland News *of a posed courtroom picture, including a legend identifying the trial participants, underscores the pioneering nature of the FOL's 1942 lawsuits.*

The FOL's run-in with Judge Merrick underscored the perils of litigation that could also at times afflict litigation under state civil rights acts[180]: an unsympathetic judge, costly counsel—a 1947 account put the lawsuit's price tag, including unsuccessful appeals, at $6000, a huge sum in those days[181]—and a win-or-lose, feast-or-famine adversarial process. Parts of Judge Merrick's opinion also powerfully illustrate some of the forces that no doubt channeled the movement toward the FEPC approach. Judge Merrick's assertion that "social progress" could not be achieved through "court edicts" reflected beliefs held by many at midcentury—continuing in various respects into the present day—about the autonomy of law and its ability to bring about social change, particularly in the area of race relations.[182] As noted previously, the FEPC model's

179. This picture was printed in the *Cleveland News* on December 14, 1942 (on file with the Ohio Historical Society).

180. *See* sources cited *supra* note 164.

181. LOEB, *supra* note 170, at 102.

182. For modern analysis, see KLARMAN, *supra* note 23, at 5; and GERALD ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 10 (1991). For a contemporaneous view, see Maslow & Robison, *supra* note 62, at 15.

bureau-brokered, conciliation-centered approach to integrating workplaces may have simply fit better with the nature and shape of the problem of discrimination the new laws purported to solve.[183]

But these aspects of Judge Merrick's opinion obscure as much as they clarify. In particular, Judge Merrick's twelve-page discursion does not fully capture the political realities that underlaid the FOL's litigation effort. The FOL was radical for its time, and it enjoyed a long tradition of aggressive mass protest that had often generated open conflict with Cleveland's mainline, middle class civil rights groups like the NAACP. Indeed, in the immediate aftermath of the suits, FOL President John Holly blasted those within Cleveland's black establishment who had initially opposed the suits, noting that "[o]ur greatest holdback is the class system we impose on ourselves."[184] Further, though Judge Merrick alluded to it only in passing, the companies were at the time of the lawsuits already under investigation by President Roosevelt's COFEP, and it was also well known that mainline civil rights groups like the NAACP and Urban League were already engaged in private efforts to persuade the companies to hire more African American workers.[185] Finally, while Cleveland's progressive United Auto Workers applauded the FOL's decision to "air discrimination in court,"[186] company officials testified at trial that it was not management but rather the International Association of Machinists of the AFL who refused to consent to hiring black women—and, indeed, had voted several months previously to exclude African Americans from membership, blocking black workers from all but unskilled positions.[187]

The FOL's failed lawsuits thus hint at a further, and deeper, set of explanations for the FEPC model's rapid rise—explanations that go well beyond perceptions of the relative efficacy of available modes of enforcement. As civil rights groups gathered in the mid-1940s and tried to imagine a comprehensive regulatory scheme attacking private labor market discrimination, they faced a number of daunting challenges. One was a near-total lack of political-organizational capacity outside the blacker wards of large northern cities and a consequent need to ally with other segments of the New Deal bloc, including a heavily conflicted labor movement, in order to win legislation. A second, and related, challenge arose out of a divisive debate among civil rights groups at the time about how hard and by what means to push the white majority in their efforts to pry open the American economic and industrial order. That debate had begun in the decades before the first legislative campaigns, but the drive for fair

183. *See supra* note 63 and accompanying text.

184. *Holly Hits "Caste System" Among Negroes; Urges Unity*, CLEV. CALL & POST, Feb. 6, 1943, at 3A.

185. *See* Turner v. Warner & Swasey Co., No. 524635, 1942 WL 417, at *9 (Ohio Ct. C.P. Dec. 19, 1942).

186. PHILLIPS, *supra* note 172, at 244.

187. *See* Loeb, *supra* note 171, at 1; *Union Business Agent Passes Buck Back to Warner-Swasey*, CLEV. CALL & POST, Dec. 19, 1942, at 1.

employment brought it to a head and opened up divisions among civil rights groups on issues ranging from the best way to confront union discrimination to the appropriateness of money damages to vindicate civil rights and quota-based hiring. In the end, FEPC prevailed because it fit better with the restrained integrationism favored by the mainline civil rights groups and unions who piloted the earliest legislative campaigns. Moreover, FEPC offered mainline civil rights groups and their union allies a critical measure of control over implementation by denying militant and increasingly litigious local civil rights groups an easy entrée into the courts and instead channeling job discrimination disputes into the more controlled, and controllable, FEPC process. It is only against this backdrop that we can understand how and why the FEPC model came to dominate so thoroughly at the dawn of the movement.

A. *Fair Employment and the Problem of Organized Labor*

1. *The shaky black-labor alliance*

As they began to formulate a legislative plan attacking job discrimination in the early 1940s, civil rights groups had a basic political problem. With virtually no political-organizational capacity of their own, civil rights groups had to look elsewhere within the liberal New Deal coalition—to organized labor—for political muscle.[188] In the twelve years between 1933 and 1945, labor had become a potent political force, buoyed by a fivefold increase in total union membership, to some thirty percent of all American workers.[189] But if the meteoric growth of labor's political-organizational capacities made it an essential part of any legislative effort from within the New Deal coalition, then union involvement in early fair employment campaigns was also an ever-present source of coalitional conflict.

The main source of tension was evident on the face of the bills that were flooding legislatures: those bills prohibited discrimination not just by private employers but by unions as well. In theory, this should not have mattered to industrial unions affiliated with the recently formed CIO. Industrial unions stood to gain much from the unionization of black workers, since any excess of unskilled and semiskilled labor threatened to undercut union bargaining leverage or, worse, could supply strikebreaking "scabs."[190] As a result, the CIO made

188. *See* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 201 (1976); *see also* NORTHRUP, *supra* note 52, at 254 (arguing that civil rights groups' "prospects for success are poor" unless they ally with organized labor).

189. Nelson Lichtenstein, *From Corporatism to Collective Bargaining: Organized Labor and the Eclipse of Social Democracy in the Postwar Era*, *in* THE RISE AND FALL OF THE NEW DEAL ORDER, 1930-1980, at 122, 123 (Steve Fraser & Gary Gerstle eds., 1989).

190. *See* BERNSTEIN, *supra* note 84, at 91-93; NORTHRUP, *supra* note 52, at 15; JAMES Q. WILSON, NEGRO POLITICS 28 (1960); Eric Arnesen, *The Quicksands of Economic Insecu-*

black workers in the northern auto, steel, and meatpacking industries a central part of their organizing efforts.[191] By contrast, the more skilled members of craft and trade unions, including much of the AFL, derived their negotiating power from *limiting* the available pool of workers with particular skills. For them, longstanding formal and informal exclusion of African Americans, or the consignment of black members to segregated auxiliaries with only partial privileges, was merely another way of maintaining market power.[192]

But the differing economics of industrial and skilled craft and trade unions does not fully capture the midcentury realities of the hiring hall and workplace. The hundreds of wildcat "hate" strikes by white industrial union members throughout the 1930s, 1940s, and 1950s protesting efforts to hire or upgrade black workers suggest widespread rank-and-file racism even within more progressive CIO unions like the UAW and Steelworkers.[193] More broadly, labor's support for civil rights in general and fair employment in particular was in many ways instrumental, conceived as much as an opportunity to gain black voters and fend off increasingly virulent counterattacks on the New Deal as it was a principled stance on equality.[194]

2. *Labor, fair employment, and regulatory choice*

Economic incentives, rank-and-file racism, and postwar political imperatives combined to create a well-known schizophrenia within the labor movement on the fair employment issue. While many industrial unions were quick to join umbrella organizations pressing for enactment of fair employment legislation, the earliest stages of the movement also saw substantial "overt or covert opposition" from within labor's ranks, particularly at the state and local levels.[195] This was especially true of the AFL, which quickly identified the fair

rity: African Americans, Strikebreaking, and Labor Activism in the Industrial Era, *in* THE BLACK WORKER 41, 42-44 (Eric Arnesen ed., 2007).

191. *See* FRYMER, *supra* note 12, at 52-53; WEISS, *supra* note 16, at 9-11; ROBERT H. ZIEGER, THE CIO: 1935-1955, at 83-85 (1995); Robert Korstad & Nelson Lichtenstein, *Opportunities Found and Lost: Labor, Radicals, and the Early Civil Rights Movement*, 75 J. AM. HIST. 786, 796-98 (1988).

192. *See* BERNSTEIN, *supra* note 84, at 90; NORTHRUP, *supra* note 52, at 5-6; Edward C. Banfield & James Q. Wilson, *Organized Labor in City Politics*, *in* URBAN GOVERNMENT 487, 488 (Edward C. Banfield ed., rev. ed. 1969); Timbers, *supra* note 52, at 35.

193. *See, e.g.*, KEVIN BOYLE, THE UAW AND THE HEYDAY OF AMERICAN LIBERALISM, 1945-1968, at 117 (1995); FRYMER, *supra* note 12, at 49, 52-53; ANDREW EDMUND KERSTEN, RACE, JOBS, AND THE WAR: THE FEPC IN THE MIDWEST, 1941-46, at 143-44 (2000); AUGUST MEIER & ELLIOTT RUDWICK, BLACK DETROIT AND THE RISE OF THE UAW 214 (1979); BRUCE NELSON, DIVIDED WE STAND: AMERICAN WORKERS AND THE STRUGGLE FOR BLACK EQUALITY 220-21 (2001).

194. BOYLE, *supra* note 193, at 5; William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109, 1111 (1989).

195. Timbers, *supra* note 52, at 191; *see also* UNIV. OF CHI. COMM. ON EDUC., TRAINING & RESEARCH IN RACE RELATIONS ET AL., *supra* note 30, at 19-20 (describing varying levels

employment laws flooding Congress in 1944 as a potential source of "considerable harassment."[196] Even where unions publicly supported fair employment laws, their contribution frequently amounted, according to a thorough study at the time, to little more than "perfunctory endorsements" and "occasional statements at hearings urging . . . speedy enactment."[197] And whatever their public stance, unions also plainly exerted substantial sub rosa influence, systematically weakening enforcement provisions in particular.[198] Bills with strong remedies for union discrimination, like the one put forward in New Mexico in 1945 providing for a fine up to $5000 for each proven act of union discrimination, simply withered on the legislative vine.[199] In general, union-sponsored FEPC bills were weaker than those advanced by civil rights groups.[200]

If unions systematically weakened FEPC bills, they also plainly steered the movement away from harder-edged remedial provisions like money damages and toward the go-slow, conciliatory FEPC approach. One example is the failed Diggs-DeFoe bill in Michigan in 1943. Little remains of the legislative history of that bill, but it is suggestive that the principal amendments prior to its referral back to committee to die struck the bill's private civil action and class action provisions and then, two weeks later, removed unions from coverage entire-

of union support for FEPC among the states). For other examples, see PHILLIPS BRADLEY, FAIR EMPLOYMENT LEGISLATION IN NEW YORK STATE 14 (1946); GIBSON HENDRIX GRAY, THE LOBBYING GAME: A STUDY OF THE 1953 CAMPAIGN OF THE STATE COUNCIL FOR A PENNSYLVANIA FAIR EMPLOYMENT PRACTICE COMMISSION 38 (1970); and KENNETH E. GRAY, A REPORT ON POLITICS IN CINCINNATI, at V-7 (1959) [hereinafter GRAY, CINCINNATI REPORT].

196. Memorandum on Lafollette—H.R. 4005; Dawson, H.R. 4004; Scanlon H.R. 3986 (Apr. 1944) (on file with the George Meany Memorial Archives (GMMA), Silver Spring, Md., RG21-001, Series 4, Folder 43). President William Green and other AFL officials made public statements as late as 1947 opposing fair employment laws. *See Fair Employment Practices Act: Hearing on S. 2048 Before a Subcomm. of the S. Comm. on Educ. & Labor*, 78th Cong. 194-95 (1944) (reproducing letter stating AFL opposition to any regulation, including fair employment, that limited "the self-government of labor organizations"); Timbers, *supra* note 52, at 184-85 (noting that AFL Executive Council in 1946 and 1947 described FEPC as "most objectionable and dangerous" and "inimical to the basic right of freedom of association"). Green also reportedly approached civil rights groups drafting fair employment legislation in 1944 and offered support in exchange for provisions expressly excluding AFL unions. *See* KESSELMAN, *supra* note 21, at 146-47 (citing a September 17, 1944, *Philadelphia Independent* article).

197. Timbers, *supra* note 52, at 279.

198. *See* Engstrom, *supra* note 39, ch. 4 (regression analysis showing states with higher union density enacted weaker FEPC laws).

199. *See Little FEPC for State Sought in Senate Bill*, SANTA FE NEW MEXICAN, Jan. 31, 1945.

200. *Compare* H.B. 354, 1945 Gen. Assemb., Reg. Sess. (Pa. 1945) (on file with the NAACP Papers, Part II, Box B80) (NAACP bill granting the FEPC the power to initiate complaints and omitting any mention of conciliation), *with* H.B. 257, 1945 Gen. Assemb., Reg. Sess. (Pa. 1945) (labor bill denying complaint initiation power and mandating conciliation).

ly.[201] The battle over fair employment in neighboring Ohio in the early 1950s offers another example: One Republican legislator became so frustrated with what he saw as the "hypocritical" stance of unions that he proposed a bill authorizing damages actions, which "would provide a quick means for discriminated-against Negroes to sue the unions."[202] His bill, he explained, would help break the legislative logjam on FEPC by forcing labor to choose between FEPC and a more aggressive court-centered approach.[203]

In many ways, labor's preference for the agency-centered, mediation-based FEPC approach should not be surprising. Implementation of Title VII in the late 1960s and the 1970s revealed union treasuries to be highly vulnerable to damages actions, particularly when augmented with attorney's fee awards.[204] Past history also gave unions good reason to distrust courts. In the decades leading up to the first fair employment campaigns, federal and state courts had yoked labor with a judge-made scheme for regulating industrial conflict through labor injunctions.[205] Worse, as the drive for fair employment got underway, labor's long struggle against injunctions was seemingly giving way to an entirely new judicial threat in decisions like *Marinship*, *Steele*, and *Tunstall* finding antidiscrimination rights against unions and, worse, linking those new rights to the old *Lochner*-era absolute contract rights that had long confined labor's ambitions.[206] It seems unlikely that unions, given a choice, would have willingly cast their lot with courts.

Administrative agencies, in contrast to courts, could also be subjected to direct political control. This much had been clear in the AFL's role in hobbling the NLRB beginning in 1938, and also in the varied fortunes of the President's wartime COFEP as it bounced around the executive branch during 1942 and 1943.[207] The campaign for fair employment in Pennsylvania provides still another, more concrete example. In 1945, unions advanced a bill vesting enforcement authority in the state's Labor Relations Board rather than a dedicated FEPC, and civil rights groups balked at what they saw as a transparent effort to

201. *See* 56 H. JOURNAL, 1943 Leg., Reg. Sess. 1145 (Mich. 1943); 45 S. JOURNAL, 1943 Leg., Reg. Sess. 587 (Mich. 1943); *see also* S.B. 226, 62d Leg., Reg. Sess. (Mich. 1943) (original underlying Diggs-DeFoe bill).

202. Memorandum from Paul Klein to Sam Weisberg (1953) (on file with the WRHS, Container 2, Folder 25, Manuscript Collection 4045); *see also* Mr. Gladorf, A Bill (Mar. 4, 1953) (on file with the WRHS, Container 2, Folder 25, Manuscript Collection 4045) (proposed bill text).

203. *See* Memorandum from Paul Klein to Sam Weisberg, *supra* note 202.

204. *See* FRYMER, *supra* note 12, at 88-94.

205. *See* Forbath, *supra* note 194, at 1149, 1151; *see also* FRYMER, *supra* note 12, at 82-83 (noting union opposition to the 1938 Federal Rules of Civil Procedure based on fear of increased labor injunctions).

206. *See supra* notes 84, 120-23, and accompanying text.

207. *See supra* notes 69-75 and accompanying text.

delegate authority to a union-controlled agency.[208] There was history here. In 1937, civil rights groups had won a provision in Pennsylvania's labor law authorizing the Board to deny legal protections to discriminatory unions. In the eight years since, however, the Board had failed to bring a single enforcement action.[209] Pennsylvania unions, it seems, were acutely aware of the possibilities of political control.

Finally, even for well-meaning, relatively sympathetic labor leaders, FEPC's focus on conciliation was tailor-made to help navigate the difficult racial challenges inside unions. With the race riots in Detroit, Los Angeles, and elsewhere during 1943 and 1944 still a recent memory, many labor leaders braced for further racial conflict that was sure to accompany the peacetime reconversion of the economy.[210] The problem, as Malcolm Ross noted as COFEP head before its demise, was at least threefold: black workers had made virtually all of their employment gains in war industries that would soon shrink or disappear altogether;[211] they enjoyed no seniority as against white coworkers;[212] and, unlike their white counterparts who had also migrated from rural areas during the war, black migrants tended to stay in northern and western industrial centers rather than return home.[213] The result, as Ross darkly warned, would be "hundreds of thousands of minority group workers whom the Government said they needed in wartime, suddenly finding themselves on the street and in competition with white workers."[214] In the view of some labor leaders, the conciliation-centered FEPC model was the "machinery" and the "apparatus" that could oversee what would thus amount to a protracted round of heated pluralist bargaining, as African Americans fought to maintain their tenuous foothold in the industrial order against displaced white workers and returning white veterans.[215] It could, in the words of legendary labor leader Walter Reuther, be the focal point of a process through which labor could "sweat this thing out."[216]

208. *See* H. JOURNAL, 1945 Leg., Reg. Sess. 673-74 (Pa. 1945) (quoting *Pittsburgh Courier* editorial from 1945); *Fifth FEPC Bill Further Muddies Situation in Pa.*, PHILA. TRIB., Mar. 10, 1945, at 1.

209. *See Separate Commission Mandatory if Any FEPC Law Is to Be Enforced*, PHILA. TRIB., Mar. 17, 1945, at 4.

210. *See* WEAVER, *supra* note 70, at 266-80.

211. *See* FAIR EMP'T PRACTICE COMM., *supra* note 76, at 41; *Fair Employment Practice Act Hearings*, *supra* note 55, at 181-83 (statement of Malcolm Ross, Chairman, Fair Employment Practice Committee); NORTHRUP, *supra* note 52, at 254.

212. *See* FAIR EMP'T PRACTICE COMM., *supra* note 76, at xi; *see also The Negro's War*, FORTUNE, June 1942 (noting black workers' lack of formal seniority because union contracts prevented their employment except pursuant to union-controlled "work permits").

213. *See* FAIR EMP'T PRACTICE COMM., *supra* note 76, at xiii, 42.

214. *Antidiscrimination in Employment Hearings*, *supra* note 63, at 310 (statement of Walter P. Reuther, President, UAW-CIO); *Fair Employment Practice Act Hearings*, *supra* note 55, at 163 (statement of Malcolm Ross, Chairman, Fair Employment Practice Committee).

215. *See Fair Employment Practice Act: Hearings Before a Subcomm. of the Comm. on Educ. & Labor on S. 2048*, 78th Cong. 129 (1944) (statement of Professor James Sheldon,

In the end, union leaders who wished to navigate rank-and-file racism and to "sweat out" racial problems on the shop floor during the steep postwar demobilization and reconversion to come—all while protecting union treasuries and maintaining politically advantageous support for civil rights—could do little better than the go-slow, conciliation-centered, injunctive approach at the core of the FEPC model. At best, then, labor's support for FEPC was the product of a particular historical moment as labor leaders tried to envision a more integrated postwar industrial order. At worst, FEPC became the nonnegotiable choice of the liberal fair employment coalition because, contrary to the public face of legislative campaigns extolling FEPC's virtues, it promised to be *less* effective than available court-centered alternatives at rapidly penetrating the structures of discrimination inside unions in particular.

B. *Protest and Accommodation Among Civil Rights Groups*

A second feature of the midcentury political economy of civil rights—and the other piece to the FEPC puzzle—was largely internal to the early civil rights movement itself. Barrels of ink have been spilled recounting the ideological divisions among civil rights groups in the second half of the nineteenth century and first part of the twentieth—between, say, the more separatist, inward-looking, self-help stance of Booker T. Washington and the more integrationist, elite-centered, and protest-oriented philosophy of W.E.B. Du Bois.[217] But as civil rights groups moved beyond challenges to public, Jim Crow dis-

Chairman, New York Metropolitan Council on Fair Employment Practice). In this sense, the FEPC choice, and the preference for an administrative approach, may also have reflected the fact that job discrimination disputes were, in Lon Fuller's classic formulation, "polycentric" rather than "bipolar" and were thus best resolved by an agency that could coordinate and take account of multiple and competing interests. *See* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394 (1978).

216. *Antidiscrimination in Employment Hearings*, *supra* note 63, at 310 (statement of Walter P. Reuther, President, UAW-CIO). Equally important, many labor leaders saw FEPC as merely an extension of the grievance systems that unions had established during the war to mediate racial disputes and believed those internal systems would retain their primacy over FEPC. *See To Prohibit Discrimination in Employment: Hearings Before the Comm. on Labor on H.R. 3986, H.R. 4004 and H.R. 4005*, 78th Cong. 33 (1944) (statement of James B. Carey, Secretary-Treasurer, National Congress of Industrial Organizations) (noting that already-existing grievance systems "worked on the same basis as the F.E.P.C."); *Fair Employment Practices Act Hearings*, *supra* note 55, at 67 (statement of Tilford E. Dudley, Associate General Counsel, United Packinghouse Workers of America) (noting that FEPC could have a "salutary influence" by "standing by," but union grievance procedures would remain primary way to resolve disputes). *See generally* BOYLE, *supra* note 193, at 43 (recounting the United Auto Workers' creation of a Fair Practices Department in 1944); NELSON LICHTENSTEIN, THE MOST DANGEROUS MAN IN DETROIT: WALTER REUTHER AND THE FATE OF AMERICAN LABOR 374-75 (1995) (noting the Fair Practices Department's importance as a bridge to national civil rights organizations like the NAACP and Urban League).

217. *See generally* BLACK PROTEST THOUGHT IN THE TWENTIETH CENTURY (August Meier et al. eds., 2d ed. 1971).

crimination and began to develop a critique of black exclusion from *private* labor markets in the 1930s and 1940s, longstanding differences of opinion about how best to advance the race began to take more concrete forms. The result was strategic conflict across a range of issues between mainline civil rights groups and an increasingly restive and litigious patchwork of renegade local branches and other militant local civil rights groups like Cleveland's FOL. Exploring these fault lines illustrates the ways FEPC entrenched the cautious gradualism of the mainline civil rights groups who piloted the earliest campaigns. It also suggests that FEPC prevailed at least in part because it offered a degree of control over implementation not possible with a court- and litigation-centered approach.

1. *The old guard and the new crowd*

As the first fair employment campaigns got underway in the mid-1940s, the nascent civil rights movement was famously divided. On one side were mainline, middle class civil rights organizations like the NAACP and the Urban League. Since its founding in 1909, the NAACP had pursued a moralistic, reserved, and gradualist program that specifically shunned "mass appeal[s]" in favor of behind-the-scenes persuasion and highly targeted, elite litigation efforts.[218] The Urban League was even more conservative, eschewing direct, mass protest and instead fashioning a program around quiet provision of social welfare services and moral suasion directed at white business elites to hire black workers.[219]

The other side of the divide took several forms, but one of the more prominent came in 1936, when A. Philip Randolph, head of the Brotherhood of Sleeping Car Porters and one of the leading figures on the fair employment issue at the time, and Ralph Bunche, the leading black scholar-activist of his day, founded the National Negro Congress (NNC).[220] The NNC quickly became the organizing hub for black workers and embarked on ambitious efforts to organize black workers in steel, auto, and meatpacking plants throughout the North in collaboration with the more progressive locals of the newly founded CIO.[221]

218. Beth Tompkins Bates, *A New Crowd Challenges the Agenda of the Old Guard in the NAACP, 1933-1941*, 102 AM. HIST. REV. 340, 340-41 (1997); Susan D. Carle, *Race, Class, and Legal Ethics in the Early NAACP (1910-1920)*, 20 LAW & HIST. REV. 97, 97 (2002); August Meier & John H. Bracey, Jr., *The NAACP as a Reform Movement, 1909-1965: "To Reach the Conscience of America,"* 59 J. S. HIST. 3, 6 (1993).

219. *See* GARFINKEL, *supra* note 74, at 29; NANCY J. WEISS, THE NATIONAL URBAN LEAGUE, 1910-1940, at 216-17 (1974). For a contemporaneous account, see Marjorie Greene, *Streamlined for Social Action*, NOW, July 1945 (on file with the WRHS, Manuscript Collection 3573, Folder 1).

220. *See* Beth Tompkins Bates, *Mobilizing Black Chicago: The Brotherhood of Sleeping Car Porters and Community Organizing, 1925-35*, *in* THE BLACK WORKER, *supra* note 190, at 195, 213; Bates, *supra* note 218, at 360.

221. *See* Bates, *supra* note 218, at 363-64.

With Bunche at the helm, the NNC also renewed a line of criticism that more militant groups had long leveled at the NAACP: that its middle class tenor, its dependence on white philanthropy, and its elite litigation focus had divorced it from the bread-and-butter issues affecting most African Americans.[222]

For the NAACP, the NNC's proletarian challenge was especially worrisome because the national scale of its organizing efforts placed it in direct competition with the NAACP at a time when membership contributions were in decline.[223] In response, the NAACP made certain gestures toward mass protest and black unionization that were self-consciously designed to compete for black loyalty and membership.[224] To some extent, these efforts worked. As economic woes eased during wartime, NAACP membership swelled, allowing the NAACP to shift away from white philanthropy and toward membership dues as its financial mainstay.[225] Yet the NAACP's ideological shift was anything but complete, especially on fair employment.[226] An NAACP memo in 1941 expressed concern that the Association was "distinctly aloof" and "an organization far away" on the jobs question and that NNC groups "had seized upon this issue and [were] impressing themselves upon the general public."[227]

The NNC did not last long, ultimately succumbing to McCarthyism.[228] But its leftward challenge in the 1930s and early 1940s nonetheless shaped the FEPC debate in important ways. For instance, the NNC's effort to cast the

222. For a contemporaneous statement, see Ralph J. Bunche, *The Programs of Organizations Devoted to the Improvement of the Status of the American Negro*, 8 J. NEGRO EDUC. 539, 540, 546, 549 (1939). For secondary accounts, see GARFINKEL, *supra* note 74, at 29, 113, 179; GOLUBOFF, *supra* note 14, at 179; Korstad & Lichtenstein, *supra* note 191, at 800-01; and Elliott Rudwick & August Meier, *The Rise of the Black Secretariat in the NAACP, 1909-35*, *in* ALONG THE COLOR LINE 94, 94 (August Meier & Elliott Rudwick eds., 1976). Similar criticisms were leveled at the Urban League. *See* Bunche, *supra*, at 543-44; Earl Brown, *Timely Topics*, N.Y. AMSTERDAM NEWS, Feb. 21, 1948, at 10 (noting that the League "has not enlisted the interest or the support of the masses of Negroes" and so "must depend financially and otherwise upon comparatively a few people, mostly wealthy whites, for its support").

223. *See* Bates, *supra* note 218, at 344; *see also* GARFINKEL, *supra* note 74, at 72 (noting that the NNC challenge "sapped the protest roots of the NAACP").

224. *See* FRYMER, *supra* note 12, at 55-56; MEIER & RUDWICK, *supra* note 193, at 102; Bates, *supra* note 218, at 368-72.

225. *See* GOLUBOFF, *supra* note 14, at 189-90; SUGRUE, *supra* note 43, at 40; Korstad & Lichtenstein, *supra* note 191, at 786-87.

226. *See* GARFINKEL, *supra* note 74, at 29; *see also id.* at 113 (noting widespread view that NAACP "was impotent, that it was a paper organization led by intellectuals and whites with no substantial following among the Negro grassroots"); MYRDAL, *supra* note 61, at 821 ("The branches—and consequently the National Association—have nowhere been able to build up a real mass following among Negroes. The membership is still largely confined to the upper classes.").

227. Memorandum from Mr. Pickens to Mr. Wilkins 1 (Mar. 31, 1941) (on file with the NAACP Papers, Part II, Box B106).

228. *See* GARFINKEL, *supra* note 74, at 47; SUGRUE, *supra* note 43, at 38-39; Meier & Bracey, *supra* note 218, at 18.

NAACP's elite-level litigation efforts as self-serving and too far removed from the issues facing the black masses offers a partial explanation for why the NAACP and like organizations pressed for a "retail" FEPC scheme that promised rapid remediation and concrete relief to individual complainants over a potentially more aggregated but more protracted litigation-centered system of adjudication.[229]

The NNC challenge also illustrates the double bind facing mainline civil rights groups regarding union discrimination in particular. As noted, unions were both part of the problem of job discrimination and an essential part of any legislative solution.[230] Yet civil rights groups were also torn about how best to confront labor Jim Crow. Some saw unions as vulnerable to damages actions and, in the wake of *Steele*, *Tunstall*, and *James*, advocated filing follow-on damages actions as a way to hit unions "in a way they can understand."[231] Just as many, however, questioned an aggressive litigation stance. For them, greater black participation in the labor movement was the best way to advance the race, and so any actions, particularly aggressive litigation, that undermined union strength also undermined the civil rights cause.[232] Further, litigation was a blunt and even ineffective instrument because the more skilled jobs were often allocated through informal union hiring hall procedures and craft apprenticeship admissions.[233] "The courts cannot do very much to solve the problem of discrimination," a 1940 editorial in the black press thus concluded. "Any one can be taken into the union and then be starved to death. These difficulties are more likely to be settled inside the union than by legal action from without."[234] Thus, just as many labor leaders saw FEPC as the best way to "sweat out" racial problems inside unions,[235] so, too, many within the civil rights establishment rejected hard-edged, court-centered adversarialism as a solution to union discrimination and instead believed that FEPC, where it was necessary at all,

229. For deployment of a similar categorization of FEPC as a "retail" approach, see CHEN, *supra* note 8, at 52; and GRAHAM, *supra* note 16, at 235.

230. *See supra* Part III.A.1.

231. Letter from Herbert Resner to Thurgood Marshall 2 (Apr. 4, 1945), *microformed on* NAACP Papers, Part 13-C-1 (Library of Cong.).

232. *See* FRYMER, *supra* note 12, at 41; GARFINKEL, *supra* note 74, at 31; GOLUBOFF, *supra* note 14, at 223; SUGRUE, *supra* note 43, at 35; WEAVER, *supra* note 70, at 311; Lee, *supra* note 15, at 339-40; *see also* NORTHRUP, *supra* note 52, at 256 ("[I]t is difficult to understand how Negroes can improve their lot without the aid of organized labor.").

233. *See* WEISS, *supra* note 16, at 13.

234. A.M. Wendell Malliet, *Jim Crowism Still Rampant in Labor Union Despite Law*, N.Y. AMSTERDAM NEWS, Aug. 17, 1940, at 9; *see also* Letter from Herbert Resner to Thurgood Marshall, *supra* note 231, at 2 (noting that, though damages actions could hit unions "at their most vulnerable spot," the real battle was "primarily a job of organization" and an issue that "[n]o court can solve").

235. *See supra* Part III.A.2.

could supplement internal reform efforts without undermining union strength.[236]

Finally, the NNC challenge illustrates just how poorly positioned the NAACP and like groups were to take up the mantle of leadership on job discrimination as the first fair employment campaigns got underway. The Association drew its core leadership and membership from traditional middle and upper middle class strata—lawyers, doctors, ministers, and teachers—and so had few direct ties to working class communities from which aggrieved workers, often newly arrived from the South, might come.[237] By contrast, the NNC and the progressive unions of the CIO had quickly developed an organizational apparatus inside industrial workplaces that could reach working class African Americans.[238] Sapped of its protest roots by the insurgent NNC, under fire for its elite, litigation focus, and with few institutionalized linkages to the black working class, the NAACP's support for a legal-administrative approach, particularly multimember commissions on which mainline civil rights groups were typically granted representation, is unsurprising. FEPC offered the civil rights establishment the best prospect for a seat at the table and, with it, a measure of control over implementation.[239]

2. *Private litigation, direct action, and FEPC*

Yet the NNC was not the most prevalent, or even the most threatening, challenge to the mainline civil rights groups at the time. As the first fair employment campaigns got underway, the old guard was also facing persistent challenges from a militant local patchwork of civil rights groups and renegade branches that, rather than building the movement from within organized labor, had developed their own brand of aggressive mass protest.[240] This local protest network was also making increasing use of the courts, and the result was litiga-

236. *See* FRYMER, *supra* note 12, at 60-61 (noting general belief among key NAACP officials that change could occur only through "internal organizing against the AFL bureaucracy" and advocating mediation rather than a "rush to litigation" in resolving disputes). A corollary of this in the labor law context was the view within the NAACP at the time that administrative proceedings before the NLRB, not courts, should be the "initial approach" in remedying union discrimination. *See* Lee, *supra* note 15, at 346.

237. *See* Korstad & Lichtenstein, *supra* note 191, at 797; Siskind, *supra* note 27, at 7.

238. *See* Bates, *supra* note 218, at 363-64; Korstad & Lichtenstein, *supra* note 191, at 794-97.

239. *See* Siskind, *supra* note 27, at 17 (noting that, for mainline civil rights groups, FEPC offered a seat at the table, including "more regular access to state government and in many cases actually a place in it").

240. *See, e.g.*, SUGRUE, *supra* note 43, at 40; Bates, *supra* note 218, at 345; Berky Nelson, *Before the Revolution: Crisis Within the Philadelphia and Chicago NAACP, 1940-1960*, 61 NEGRO HIST. BULL. 20, 20 (1998); *see also* COUNTRYMAN, *supra* note 27, at 35-36 (recounting 1945 victory of Communist leadership slate in Philadelphia NAACP branch elections).

tion positions that deviated from the established policies and practices of the NAACP in particular.

Legal scholars have long noted litigation-based disputes within the early civil rights movement. Beginning with the NAACP's earliest litigation campaigns, the Association's national leadership often conflicted with the local black lawyers who staffed most of its cases.[241] Another oft-cited example is intramovement debate about whether the factual record in *Shelley v. Kraemer*[242] made it a suitable vehicle for challenging the constitutionality of racial covenants in housing.[243] And, as I show later, renegade local branches and other, more militant local groups also clashed with the national NAACP during the 1940s by taking litigation positions on the propriety of quota-based hiring that diverged from the national office's public position.[244] By the late 1940s, concern about wayward lawsuits had grown sufficiently acute that Thurgood Marshall, as part of an overhaul of the Association's National Legal Staff, sought to achieve greater control over litigation by requiring that branches "agree that they will not enter upon legal cases until they first clear [them] with their state conference and the national office."[245]

Percolating concerns about litigation created tensions that plainly channeled the movement toward FEPC during the earliest legislative campaigns. Perhaps the most revealing source of friction was local militant groups' aggressive pursuit of damages actions under state civil rights acts throughout pockets of the urban North, as detailed in Part II.B.4. Disagreement over use of money damages to vindicate civil rights had deep roots. In 1923, the leadership of the NAACP's Chicago branch publicly refused to involve the Association in a lawsuit against a downtown theater, strongly condemning litigation that sought

241. *See* Kenneth Mack, *Law and Mass Politics in the Making of the Civil Rights Lawyer, 1931-1941*, 93 J. AM. HIST. 37, 40 (2006); *see also* TOMIKO BROWN-NAGIN, COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT (2011) (reconstructing class and national-local organizational tensions around legal advocacy for civil rights in postwar Atlanta); Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976) (reviewing lawyer-client conflicts that evolved out of postwar school desegregation litigation); William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1625 (1996) (analyzing historical examples of "group dissension concerning the goals and means of civil rights litigation").

242. 334 U.S. 1 (1948).

243. *See* KLUGER, *supra* note 188, at 249; TUSHNET, *supra* note 122, at 90; Rubenstein, *supra* note 241, at 1627-28.

244. *See infra* notes 310-17 and accompanying text. In addition, Sophia Lee has shown how local branches during the 1950s repeatedly defied the national NAACP by taking litigation positions before the NLRB that violated the national office's careful avoidance of conflict between AFL and CIO unions in election disputes. *See* Lee, *supra* note 15, at 356-57; *see also* GOLUBOFF, *supra* note 14, at 223-24.

245. Memorandum from Thurgood Marshall for Annual Conference 3 (1949) (on file with the NAACP Papers, Part II, Box A38).

money damages rather than "principle."[246] When a branch secretary nonetheless pursued the case as a private citizen, the resulting spat received play in the *Chicago Defender*.[247] Yet many within the civil rights establishment continued to express similar concerns throughout the 1930s and well into the 1940s. A 1936 letter to the editor of the *Philadelphia Tribune* echoed the traditional focus of mainline civil rights groups on intracommunity cultural and economic "uplift," denouncing litigation under the Pennsylvania civil rights act as a "stylish venture" that would do little "to encourage support for our Negro institutions" or to "promot[e] Negro enterprises."[248] Ten years later, with the drive for fair employment in full swing, a series of articles in the *Pittsburgh Courier* railed against private damages actions and made the case for expanded criminal sanctions for public accommodations discrimination under the Pennsylvania civil rights act instead. The proper goal of civil rights enforcement, the author noted, was to "protect the right of the person," not to "aid some mercenary member of a minority [in] collect[ing] a few dollars in what amounts to a 'shakedown.'"[249] "In the fight for Civil Rights," the column concluded, "there is no such thing as Santa Claus."[250]

Such perception concerns were arguably even more pronounced in the fair employment context. State civil rights acts prohibiting discrimination in public accommodations were backed by a common law tradition that saw exclusion from certain places or services—common carriers, inns, and public utilities, among others—as a matter of public, not private, welfare.[251] Fair employment, by contrast, lacked a ready-made public gloss. Worse, the 1940s saw a mounting critique that civil rights groups had come to function as just another self-interested "pressure group" seeking private advantage within the expanding New Deal state.[252] This would be a standard weapon of legislative opponents in the drive for fair employment.

246. REED, *supra* note 150, at 58-59 (citing a March 24, 1923, *Chicago Defender* article).

247. *See id.*

248. T.A. Smith, Letter to the Editor, *Terms Equal Rights Tests Stylish Ventures*, PHILA. TRIB., Feb. 6, 1936, at 4. On "uplift" philosophy, see KEVIN K. GAINES, UPLIFTING THE RACE: BLACK LEADERSHIP, POLITICS, AND CULTURE IN THE TWENTIETH CENTURY 1-2 (1996); and Mack, *supra* note 14, at 287.

249. Ralph E. Koger, *There Is No Santa in Fight to Enforce Equal Rights Law*, PITT. COURIER, Dec. 28, 1946, at 14.

250. *Id.*

251. *See* Mack, *supra* note 14, at 277.

252. *See* CHEN, *supra* note 8, at 124. For contemporary examples, see 93 CONG. REC. 4361 (1948) (statement of Rep. Joseph R. Bryson) ("Pressure groups have managed to force similar measures through the legislatures of New Jersey and Connecticut."); *Antidiscrimination in Employment Hearings*, *supra* note 63, at 500 (statement of Robert W. Gilbert, Co-chairman, L.A. Chapter, National Council for a Permanent FEPC) (noting "racial pressure groups seeking special privileges"); and H. JOURNAL, 1952 Leg., 51st Sess. 1000 (Mich. 1952) (statement of Rep. Bassett) (noting concern that "pressure groups" would work "quiet-

As a result, as civil rights groups gathered in the mid-1940s and tried to imagine a legal scheme regulating private labor market discrimination, a large part of the civil rights project was convincing wary legislators and an even warier public that redressing discrimination between private individuals was a public obligation. A common refrain among FEPC's advocates was that discrimination imposed economic costs, making fair employment laws a good public investment.[253] The FEPC approach to job discrimination bolstered such efforts. Private damages actions of the sort that more militant civil rights groups were increasingly pressing under state civil rights acts throughout the industrial North could be cast as a drag on economic growth. Purely injunctive approaches to job discrimination in which FEPCs would mediate disputes and gently correct irrational and inefficient deployments of skill on factory floors could not.

Tracing this line of thinking also helps to make sense of otherwise cryptic defenses of FEPC over private civil remedies like the one that appeared in a 1945 law review article: "Insofar as the objection [to an administrative agency] is limited to its F.E.P.C. context, it is important to remember that a public, and not a private right, is involved here. A civil action would not cover the situation."[254] The NAACP advanced a similar argument in 1949 when it made the FEPC "method" part of its constitutional defense of Connecticut's fair employment law: FEPC was a narrowly tailored and thus appropriate way to vindicate a "public right," the NAACP argued, because "[p]ublic welfare requires the elimination of discrimination, not the payment of damages."[255] On both of these views, committing regulation of private discrimination to an agency armed with injunctive powers, rather than private litigants seeking damages, lent a much-needed public imprimatur to the new regime, linking the new rights to the public welfare and dampening criticism that civil rights groups were merely seeking private advantage through their vindication.

A second way intramovement tensions channeled regulatory choices in the early fair employment campaigns can be glimpsed in the "Don't Buy Where

ly and obscurely" on FEPC administrators). *See generally* V.O. KEY, POLITICS, PARTIES, AND PRESSURE GROUPS (1948) (offering a seminal analysis of "pressure group" politics).

253. *See, e.g.*, NAT'L COUNCIL FOR A PERMANENT F.E.P.C., *supra* note 56, at 10-11 ("Raising the living standards of the most depressed group in a community automatically results in raising the standards of all other groups. The corner grocer, the dry goods merchant, the public utilities, all prosper when the workingman has a job and decent wages."). New York's TCAD put the point more succinctly in its 1944 report accompanying its FEPC proposal: "Social injustice always balances its books with red ink." TCAD REPORT, *supra* note 60, at 49.

254. Harold Dublirer, *Legislation Outlawing Racial Discrimination in Employment*, 5 LAW. GUILD REV. 101, 108-09 (1945).

255. Brief for Plaintiff at 2, 16, Draper v. Clark Dairy, Inc., 17 Conn. Supp. 93 (Super. Ct. 1950) (No. 73800) (on file with the NAACP Papers, Part II, Box A251). For a contemporary analysis (and critique) of conceptions of "public" and "private" rights at the time, see Louis L. Jaffe, *The Public Right Dogma in Labor Board Cases*, 59 HARV. L. REV. 720 (1946).

You Can't Work" protests that swept dozens of northern and western cities during the 1930s and 1940s. Part of a militant turn to "direct action" within the nascent civil rights movement, the "Don't Buy" movement saw local civil rights groups from Boston to Los Angeles organize boycotts of stores believed to be engaged in discriminatory employment practices, picketing the worst offenders and demanding black jobs.[256] In their most dramatic forms, the protests resulted in the hiring of African Americans straight out of picket lines.

The "Don't Buy" protests highlight ideological divisions between mainline civil rights groups and more radical local protest networks on at least two issues. One was the broad question of how far and how hard to push for inclusion in the American economic and industrial order. The NAACP had only a minimal role in the "Don't Buy" protests, and many local branches openly opposed the boycotts.[257] The reason was that direct action tactics were an affront to the culture of civility that had permeated the "old-guard" relations of organizations like the NAACP and Urban League with the political and economic power structure on which they depended for support.[258] One of the more dramatic examples of the cozy relationships that such tactics threatened to disrupt came in 1933 when the NAACP's national office compelled the Chicago branch to terminate its protest effort against Sears, Roebuck and Co. stores during the negotiation of a major contribution from the company's controlling family.[259] Such concerns were even more pronounced at the local level. In 1947, the director of the Pittsburgh Urban League had no choice but to dismiss an officer who had organized a "Don't Buy" campaign because, as the terminated officer would later recount, he had offended the "white man downtown."[260] Thus, well after the first fair employment campaigns were up and running, a more confrontational approach to job discrimination was seen as too threatening to the settled equilibrium—and, perhaps more importantly, the steady financial support—that the NAACP and Urban League had long nurtured with the downtown business establishment.

The "Don't Buy" protests also undermined—and were in many cases a conscious rejection of—the efforts of mainline civil rights groups to use behind-the-scenes, nonconfrontational negotiations to secure placement of small numbers of overqualified African American workers in "breakthrough" jobs

256. *See* August Meier & Elliott Rudwick, *The Origins of Nonviolent Direct Action in Afro-American Protest: A Note on Historical Discontinuities*, *in* ALONG THE COLOR LINE, *supra* note 222, at 307, 316. For other surveys of prewar direct action protest efforts, see MORENO, *supra* note 16, at 30-31; WEISS, *supra* note 16, at 17; and Gary Jerome Hunter, "Don't Buy from Where You Can't Work": Black Urban Boycott Movements During the Depression, 1929-1941 (1977) (unpublished Ph.D. dissertation, University of Michigan) (on file with author).

257. *See* Meier & Rudwick, *supra* note 256, at 325, 331.

258. *See* Bates, *supra* note 218, at 347-48.

259. *See id.* at 349-50.

260. Eric Ledell Smith & Kenneth C. Wolensky, *A Novel Public Policy: Pennsylvania's Fair Employment Practices Act of 1955*, 69 PA. HIST. 489, 502-03 (2002).

with sympathetic businesses.[261] That practice had long been a staple of the NAACP and Urban League.[262] When word of discrimination arose, officials from these groups would privately contact the entity concerned and attempt to persuade its managers to cease discriminating, filling any opened positions from their own membership rolls.[263] More militant members of the civil rights community, however, were none too impressed. In the view of a young Cincinnati attorney, the Urban League did not accomplish anything: "They get a Negro a job someplace . . . and then they let it drop. Just because they get one Negro employed where there hasn't been one before, they think that's enough."[264] By 1940, George Schuyler, an influential columnist for *The Pittsburgh Courier*, noted that many were "getting fed up on these frauds" of private conferences and petitions.[265] What African Americans needed, Schuyler wrote, was "some technique of fighting other than sending letters and telegrams of protest."[266]

With the outbreak of war and the creation of President Roosevelt's COFEP, the lines were thus already drawn within the movement on how best to attack discrimination within war industries. The mainline NAACP and Urban League quickly formed umbrella entities like the Metropolitan Detroit Fair Employment Practice Council (MDFEPC), the Philadelphia-based Metropolitan Council for Equal Job Opportunity, and Cleveland's Metropolitan Council for Fair Employment Practice (MCFEP).[267] The goal, as Cleveland's MCFEP charter put it, was to craft a "broadly representative" approach to job discrimination, interfacing with the newly formed COFEP where possible, but otherwise engaging employers and unions in the same private negotiation efforts that mainline civil rights groups had long pursued.[268] The councils would also serve

261. Sugrue, *supra* note 16, at 149; *see also* SUGRUE, *supra* note 43, at 122.

262. *See* KERSTEN, *supra* note 193, at 83; KESSELMAN, *supra* note 21, at 93; KRYDER, *supra* note 70, at 26, 42.

263. *See, e.g.*, Urban League of Clev., Annual Report 1945 (on file with the WRHS, Manuscript Collection 3573, Folder 2) (describing "selective placement" program).

264. GRAY, CINCINNATI REPORT, *supra* note 195, at V-10 (quoting a local attorney).

265. GARFINKEL, *supra* note 74, at 38.

266. *Id.*

267. *See* KERSTEN, *supra* note 193, at 99-100; James Wolfinger, *"An Equal Opportunity to Make a Living—and a Life": The FEPC and Postwar Black Politics*, 4 LABOR 65, 71 (2007). For a contemporaneous account of Detroit's MDFEPC, see Metro. Detroit Council on Fair Emp't Practice, A Nine-Month History of the Activities of the Metropolitan Detroit Council on Fair Employment Practice (1944) (on file with the NAACP Papers, Part II, Box C87).

268. Metro. Council on Fair Emp't Practice, Minutes of the Second Meeting of the Temporary Steering Committee 1, 3 (Mar. 24, 1942) (on file with the NAACP Papers, Part II, Box C145). *See generally* KERSTEN, *supra* note 193, at 83-84 (noting deliberately broad and interracial representation within MCFEP and its focus on conciliation of job discrimination disputes via cooperation with the COFEP); KRYDER, *supra* note 70, at 46, 52 (noting hope among civil rights groups that FEPCs could augment and even replace private conciliation efforts); PHILLIPS, *supra* note 172, at 240 (noting hope within NAACP that MCFEP would facilitate role for Association as "intermediaries" between employers and black masses).

strategic organization-building goals, as Walter White made clear in a letter to all branches immediately following the COFEP's creation, by rechanneling black militancy into the process of investigation and negotiation and thus helping cast the NAACP as the responsible voice on fair employment.[269] Accordingly, when other entities such as Detroit's Citizens Council for Jobs in War Industry began to resort to mass meetings and picketing of major defense contractors, the NAACP quickly withdrew its support and redoubled its efforts with more restrained councils like the MDFEPC.[270]

This backstory places the FOL's failed 1942 litigation effort in Cleveland in its proper perspective. Founded in 1935 by working class southern migrants dissatisfied with the work of Cleveland's established civil rights organizations on the jobs question in particular, the FOL quickly became the militant face of the city's nascent civil rights movement.[271] In the years leading up to the 1942 lawsuits, the FOL conducted some of the more dramatic "Don't Buy" campaigns, even seeing some of its members jailed for violating injunctions.[272] The FOL was also far more willing to go to court than the more established civil rights groups. Like its Columbus affiliate, the Vanguard League, the FOL filed clusters of damages actions under Ohio's civil rights act challenging exclusion from places of public accommodation.[273] Perhaps most important of all, the FOL was far more likely to see organized labor as an obstacle, not a solution, to job discrimination. In the years leading up to the lawsuits, the FOL had fought a series of running battles both in and out of court with discriminatory AFL locals, and it had even built its own separate, all-black union rather than work from within established labor.[274] By 1942, as the FOL's pathbreaking lawsuits unfolded in Judge Merrick's courtroom, one FOL member delighted in watching "the Negroes sick [sic] one white organization on another."[275]

Yet despite success in slotting African Americans into jobs, desegregating public places, and facing down discriminatory unions, the FOL never enjoyed

269. *See* PHILLIPS, *supra* note 172, at 240.

270. *See* FINE, *supra* note 142, at 13.

271. *See, e.g.*, *Job Equality Order Loses in Ohio Court*, PITT. COURIER, Dec. 26, 1942, at 1 (noting FOL was "the strongest Negro militant organization in this city").

272. *See* LOEB, *supra* note 170, at 56-57; PHILLIPS, *supra* note 172, at 213.

273. *See, e.g.*, *Ten File Lawsuits Against Loop, Inc. in Discrimination*, CLEV. CALL & POST, Feb. 27, 1943, at 1A.

274. *See* LOEB, *supra* note 170, at 65-73; *see also* Meeting Minutes for July 7, 1942, *in* FOL Minutes Notebook 39 (on file with the WRHS, Manuscript Collection 4171) (noting ongoing battles between independent black ice-and-coal men, butchers, and clerks and AFL unions); Meeting Minutes for July 14, 1946, *in* FOL Minutes Notebook, *supra*. For broader discussion of "independent black unionism" throughout the 1930s and 1940s, see ERIC ARNESEN, BROTHERHOODS OF COLOR: BLACK RAILROAD WORKERS AND THE STRUGGLE FOR EQUALITY 139-41 (2001).

275. Meeting Minutes for Dec. 16, 1942, *in* FOL Minutes Notebook, *supra* note 274.

the full support of Cleveland's civil rights establishment.[276] Many within Cleveland's black professional class had long maintained that blacks needed social welfare efforts, not street radicalism, and should work with "established social agencies" instead.[277] So strong were the divisions that, when FOL pickets of retail stores in Cleveland's black neighborhoods began to take on a more confrontational and even violent tone in 1938, some middle class African American women crossed the pickets and deliberately patronized the targeted white-owned businesses to express their disapproval of the FOL.[278]

Such tensions only increased in 1942 in the months leading up to the FOL's lawsuits when the FOL turned its attention away from small retail stores and began to picket larger concerns, particularly public utilities and large war plants located in black neighborhoods.[279] Indeed, soon after the formation of the MCFEP, its members complained that the FOL's mass protests were undermining its purpose and goals.[280] FOL President John Holly responded in kind, angrily asserting that that it was time to "cease dilly dallying around with a lot of unnecessary 'red-tape,'"[281] a clear reference to the protracted and often fruitless negotiations undertaken by the NAACP and Urban League via the MCFEP. Soon thereafter, with appeals of Judge Merrick's dismissals of the FOL's lawsuits pending, Holly openly criticized Cleveland's mainline civil rights groups for their timidity and dependence on white support: "Negroes will have to get in a position to demand their rights and stop accepting charity from whites," asserted Holly. "Your Future Outlook League does not accept one penny from whites, therefore we can stand up and fight them like men."[282]

Hence, the FOL's decision to file its trio of lawsuits in late November 1942 was a pointed rejection of the establishment approach. Not only were the same

276. *See* Kenneth M. Zinz, The Future Outlook League of Cleveland: A Negro Protest Organization 23 (Aug. 1973) (unpublished M.A. thesis, Kent State University) (on file with author) (noting 1938 Urban League resolution that FOL methods were "detrimental to the harmonious relations that have existed between various racial and national groups in Cleveland"); *id.* at 47-48 (noting that FOL protest against theater demanding immediate replacement of white employees with blacks "stirred debate in the Negro community" and drew particular opposition from prominent NAACP members).

277. PHILLIPS, *supra* note 172, at 205, 218; *see also* Zinz, *supra* note 276, at 24 (noting that "Negro professionals and members of the upper class did not support the League").

278. *See* PHILLIPS, *supra* note 172, at 210-13.

279. *See Picketing on a New Front*, CLEV. CALL & POST, May 16, 1942, at 22.

280. *See* PHILLIPS, *supra* note 172, at 240; *see also* KERSTEN, *supra* note 193, at 83 (noting that umbrella organizations like MCFEP "differed from the FOL in almost every way," particularly in their pursuit of "close cooperation with the [COFEP] rather than through independent, direct action"); Zinz, *supra* note 276, at 89-90 (noting unraveling of joint campaign of FOL, NAACP, and Urban League against Ohio Bell Telephone in spring 1941 when FOL broke from group and began picketing).

281. *Seeks Jobs for Negro Women in War Plants*, CLEV. CALL & POST, Apr. 25, 1942, at 1.

282. *Holly Rallies Canton Negroes to Fight Timken Demotions*, CLEV. CALL & POST, May 8, 1943, at 1B.

factories that the FOL sued currently under investigation by President Roosevelt's COFEP, but the MCFEP—the vehicle through which the NAACP and Urban League were pursuing their conciliatory job placement efforts[283]—had already persuaded the companies to employ more African American men, albeit in unskilled positions.[284] To that extent, the FOL's turn to the courts was a symbolic rejection of both the administrative process prescribed by President Roosevelt's wartime Committee and also the more restrained negotiation approach of the MCFEP.[285] For the FOL, courts meant confrontation and direct action. The administrative process—and, in particular, the conciliation-centered FEPC model—meant a continuation of the gradualist, behind-the-scenes negotiation efforts of the old-guard civil rights organizations.

3. *Racial "proportionalism" and FEPC*

A final critical divide among civil rights groups that helped frame the FEPC choice during the earliest fair employment campaigns centered on racial "proportionalism"—or, in modern parlance, "quotas." Like the divisions apparent in the "Don't Buy" protests and the FOL's 1942 litigation effort, the intra-movement debate over quotas highlights the ways in which the highly individualized FEPC approach entrenched the cautious gradualism of the mainline civ-civil rights groups at the time. Just as important, internal divisions on the quota issue offer a final illustration of the ways in which FEPC, by foreclosing private civil actions and denying complainants most procedural rights within the administrative process, offered a critical degree of control over implementation not possible with a court-centered regime.

The quota question had long dogged the civil rights establishment. Throughout the 1930s and 1940s, the NAACP publicly opposed quota-based hiring.[286] The precise reasons are not entirely clear. Part of it was pragmatic: Some worried that the principle of strict numerical population-workforce symmetry could be used to limit black labor market opportunities to "token" levels,

283. *See* KERSTEN, *supra* note 193, at 83.

284. *See Picketing of Tool Company by Future Outlook League Brings Action by Mayor*, CLEV. CALL & POST, May 9, 1942, at 1.

285. *See* KERSTEN, *supra* note 193, at 82.

286. *See* MORENO, *supra* note 16, at 55, 61; WEISS, *supra* note 16, at 18. The exception was use of quotas to employ black workers on new public projects such as the Tennessee Valley Authority, where hiring was done on a clean slate. *See* MORENO, *supra* note 16, at 61; WEISS, *supra* note 16, at 35. The Urban League, too, took public positions against proportional hiring during the 1940s. *See, e.g.*, *Antidiscrimination in Employment Hearings*, *supra* note 63, at 258 (testimony of Julius A. Thomas, Director, Department of Industrial Relations, National Urban League) ("We do not use percentages in our discussions of employment practices in our organization because we do not think they are a very accurate yardstick by which to measure this whole business . . . .").

particularly outside black neighborhoods.[287] "Minimum quotas," as the *New York Amsterdam News* reminded readers, could easily become "maximum quotas."[288] Quotas also threatened to "solidify racial lines,"[289] and could be used to justify segregation by promoting "bi-racialism."[290] Political calculation is still another possibility. Because application of hard-edged quotas to existing employment schemes threatened to displace white workers, mainline opposition may have reflected a simple strategic judgment about political feasibility and the risk of white backlash.[291] To that extent, the NAACP's opposition to quotas during the 1940s also fit neatly with the effort to cast itself as the responsible voice on fair employment—and was in many ways just an extension of the broader question of protest versus accommodation raised by the "Don't Buy" protests.

Whatever the reasons for opposition, the quota issue plainly divided mainline civil rights groups and more radical ones in the years leading up to the first fair employment campaigns. By the late 1930s and the 1940s, left-leaning and avowedly Communist groups, though initially critical of proportionalism as undermining class consciousness and solidarity, were aggressively supporting a race-conscious approach.[292] The same was true of more militant groups like Cleveland's FOL, which included among its founding "aims and objectives" securing black employment "in proportion" to a company's black patronage.[293] Here again, the "Don't Buy" protests provided a locus for debate. When more militant picketers began to demand that an employer's workforce contain a specific percentage of black workers, a heated exchange followed in the NAACP journal *The Crisis*.[294] Soon after, a Washington, D.C., group conducting pickets dubbed their more diffuse employment demands "intelligently controlled racialism" to distinguish their approach from the explicitly numerical demands of more militant groups.[295]

The massive influx of black workers into industry during wartime, and concern that many of those same black workers would disproportionately suffer

287. *See* MORENO, *supra* note 16, at 55. For expression of similar concerns by top NAACP officials in the context of "Don't Buy" protests, see notes 311-12 and accompanying text.

288. WEISS, *supra* note 16, at 35 (internal quotation marks omitted).

289. *The Job Drive Sweeps On*, PITT. COURIER, Aug. 20, 1938, at 10.

290. *The Fallacy of Racial Proportionalism*, PITT. COURIER, June 6, 1942, at 6.

291. *See* Mark Tushnet, Book Review, 42 AM. J. LEGAL HIST. 337, 338 (1998).

292. *See* MORENO, *supra* note 16, at 82. For earlier views, see Bunche, *supra* note 222, at 543.

293. *See* Zinz, *supra* note 276, at 26, 40.

294. *See* Vere E. Johns, *We Must Have Jobs*, 41 CRISIS 258 (1934); George S. Schuyler, *A Dangerous Boomerang*, 41 CRISIS 259 (1934). *See generally* MORENO, *supra* note 16, at 37-38 (discussing exchange in *The Crisis*).

295. *See* MORENO, *supra* note 16, at 37, 43-44; Mack, *supra* note 14, at 319; *see also Boycott*, 41 CRISIS 117 (1934) (presenting editorial debate on racial picketing following Washington pickets).

postwar layoffs, brought the quota issue to the fore in a new and controversial way just as the first fair employment campaigns got underway. In mid-1944, the COFEP set off a storm of controversy when it began "[e]xploratory conversations" about a system of proportional layoffs as a way to blunt the impact of postwar demobilization on black workers.[296] The idea was to apply a "super-seniority" rule ensuring that a certain percentage of black workers could retain their jobs amidst layoffs even where they had less seniority than whites.[297] The Urban League and the NAACP quickly came out against the idea, and for familiar reasons. "We cannot 'plump' for a quota system," the NAACP's Washington chief Leslie Perry wrote to Walter White, "without, by implication, encouraging its concomitant—segregation."[298] The NAACP was also acutely aware that the strongest voices in support of the proposal were Communist groups like Local 252 of the United Electrical, Radio, and Machine Workers (UE) and the Communist Political Association, as well as the increasingly leftist NNC.[299] Most important of all, the NAACP could not support proportional layoffs without threatening the fragile black-labor alliance: any such scheme, noted George Weaver, head of the CIO's Committee to Abolish Race Discrimination, would be "bitterly resented" and undermine critical unity among black and white workers. [300]

With the debate over proportional layoffs still swirling and fair employment's most ardent opponents harping on the quota issue during legislative debates,[301] FEPC quickly came to represent the antiquota approach. The NAACP and Urban League made the individualized nature of FEPC adjudication a centerpiece of their legislative pitch. Hastie, testifying on behalf of the NAACP in 1945, referred to quotas as "Specter No. 1" raised by fair employment's opponents and assured members of Congress that the FEPC approach placed the burden "upon the complainant in every case to prove that he was refused em-

296. *FEP Weighs Future Policy on Post-War Negro Layoffs*, CHI. DEFENDER, July 29, 1944, at 3; *see also* WEISS, *supra* note 16, at 19 (recounting debate).

297. WEISS, *supra* note 16, at 19; *see also A Sane Approach to Job Seniority*, CHI. DEFENDER, Dec. 16, 1944, at 12.

298. WEISS, *supra* note 16, at 19.

299. *See id.*; *see also* SUGRUE, *supra* note 43, at 91-92; *A Sane Approach to Job Security*, *supra* note 297 (noting NNC and Communist support of proportional layoffs).

300. Richard Durham, *Seniority Debate Big Issue at CIO Parley*, CHI. DEFENDER, Nov. 25, 1944, at 1, 4; *see also* Ralph E. Koger, *CIO Advisor Says: 'Negroes Must Not Seek Special Treatment When Layoffs Come*,*'* PITT. COURIER, Aug. 11, 1945, at 3 (quoting union leader as saying proportional layoffs "would be destructful [sic] to the entire labor movement"); *A Sane Approach to Job Security*, *supra* note 297 (noting possibility that proportional layoffs would "drive a wedge between Negro and white workers," but criticizing labor leaders for failing to offer any practical alternative to reconversion threat to black jobs).

301. *See, e.g.*, CHEN, *supra* note 8, at 88-89 (noting quota debate during New York campaign).

ployment because of race."[302] FEPC, a standard defense during legislative testimony went, "imposes no quotas."[303]

Yet FEPC parried quota concerns in other, less obvious ways as well. Indeed, much of the legislative debate over proportionalism during early legislative campaigns did not concern imposition of numerical remedies by agencies or courts—as just noted, FEPC's champions repeatedly made clear that FEPC bills prohibited such remedies—but rather employer adoption of so-called implicit quotas through the hiring of a particular proportion of black workers to avoid legal entanglement in the first place.[304] The difficulty, as a *Washington Post* op-ed in early 1945 noted, was that, beyond "clear-cut" cases where African Americans "were wholly excluded by an employer," there was "no reasonable criterion" that could retain the evidentiary value of numerical measures without creating a thoroughgoing quota scheme.[305]

The highly individualized, conciliation-focused FEPC approach offered a solution to this seemingly intractable evidentiary dilemma that distinguished it from competing court-centered regulatory alternatives. By the 1940s, commentators had recognized that aggregated, adversarial lawsuits asserting discrimination claims necessarily forced the quota issue by focusing the evidentiary inquiry on patterns of exclusion.[306] Enforcement of antidiscrimination measures

302. *Fair Employment Practice Act Hearings*, *supra* note 55, at 172-73 (statement of William H. Hastie, Dean, Howard University Law School; Chairman, Legal Committee, NAACP).

303. 90 CONG. REC. 6169, 6171 (1944) (statement of Sen. James Mead).

304. *See, e.g.*, *Rules Committee Hearing*, *supra* note 37, at 91 (statement of Rep. O. Clark Fisher) ("If the Commission does not say how many colored men he must hire, he will have to employ a lawyer to help him decide. This is a definite step toward the quota system."); *see also The Anti-Discrimination Bill*, N.Y. TIMES, Feb. 22, 1945, at 24 (noting that "nuisance suits" would compel employers "to employ, or to retain in their employment, obviously inefficient workers; and the net result will be the establishment of 'quota' systems").

305. Merlo Pusey, *Job Equality Bills: Should FEPC Dictate Hiring Policies?*, WASH. POST, Mar. 20, 1945, at 9. For a similar argument, see M. Moran Weston, *Labor Forum*, N.Y. AMSTERDAM NEWS, Jan. 13, 1945, at A10 (advocating the end of "the evil quota practice," yet noting that proportionalism was "[n]ot [a]lways [b]ad," since "[p]opulation ratios are often the most practical and effective test of whether discrimination does in fact exist").

306. *See* Note, *An American Legal Dilemma—Proof of Discrimination*, 17 U. CHI. L. REV. 107, 114-15, 123 (1949). Testimony before Congress and state commissions during the 1940s repeatedly made a similar point. In one particularly memorable exchange before the Illinois Commission on the Condition of the Urban Colored Population, a commissioner responded to testimony by the general counsel of Chicago Surface Lines reporting that his company employed more than 15,000 persons but had only forty-one African Americans serving in largely janitorial roles by asking:

> If you were sitting as a Judge on a matter and it is brought to your attention, that only 41 Negroes are employed in a Company, having some fifteen thousand employees, in various departments, and these 41 Negroes in the least fertile departments, would you rule that there was some definite distinction, especially in those departments that rule out Negroes, would that raise in your mind some presumptions, or some definite indication of discrimination?

through lawsuits, it followed, would inevitably lead to widespread adoption of implicit quotas. Indeed, this had been the principal objection to the FOL's 1942 lawsuits in Cleveland's mainstream press, which accused the FOL of using litigation to establish a "quota system" for black workers.[307] Only judicious efforts to resolve disputes on a case-by-case basis with a "primary reliance" on conciliation—in short, FEPC—could avoid this enforcement paradox by limiting the situations in which the evidentiary dilemma reared its head in the first place.[308] Here again, the *Answer the Critics* pamphlet distributed during the earliest legislative campaigns put it best: responding to the criticism that FEPC laws would "lead to a quota system," the brochure asserted that FEPC's design "would prevent, rather than encourage its use."[309]

If FEPC was a grand finesse of the proportionalism issue, then the quota debate also provides a final illustration of the ways in which FEPC's exclusive enforcement approach offered mainline civil rights groups a useful degree of control amidst widening ideological divisions within the movement. Perhaps the most revealing instance came in 1947, when a radicalized Richmond, California, branch of the NAACP became embroiled in a picketing dispute with the Lucky Stores grocery chain.[310] When branch members picketed and demanded that Lucky hire a specific percentage of black workers, a state court enjoined the picket, ruling that the group's quota-based demand was contrary to state public policy. The ensuing appeals, with branch counsel aggressively challenging the trial court's quota position, tied the national NAACP in knots.[311] At least initially, the national office was critical but kept its distance: Marian Wynn Perry, special counsel at LDF, wrote to NAACP Labor Secretary Clarence Mitchell that she could "think of few things more dangerous" than the Richmond branch's aggressive advocacy of "a quota system of hiring."[312] When the litigation reached the U.S. Supreme Court, however, NAACP lawyers, including Thurgood Marshall, reluctantly became involved.[313] But

The general counsel could only weakly respond that that was "not necessarily so" and that such a situation would, in his opinion, provide "no indication that you have anything against colored people." Illinois State Commission Hearings, *supra* note 149, at 104-05.

307. *See* KERSTEN, *supra* note 193, at 82 (citing *Cleveland Press* article).

308. *See* Note, *supra* note 306, at 123.

309. NAT'L COUNCIL FOR A PERMANENT F.E.P.C., *supra* note 56, at 7; *see also* OHIO COMM. FOR FAIR EMP'T PRACTICES LEGISLATION, *supra* note 57, at 4 (noting that, contrary to concern that the FEPC law would "force an employer to hire a certain percentage of Negroes," the law "forbids hiring on any kind of quota basis").

310. *See* MORENO, *supra* note 16, at 83-84.

311. *See* Letter from Thurgood Marshall to Noah Griffin (June 13, 1947) (on file with the NAACP Papers, Part II, Box B87); Memorandum from Noah W. Griffin to Roy Wilkins (Aug. 7, 1947) (on file with the NAACP Papers, Part II, Box C18).

312. Memorandum from Marian Wynn Perry to Clarence Mitchell (Feb. 18, 1948) (on file with the NAACP Papers, Part II, Box B87).

313. *See* Letter from Cecil F. Poole to Thurgood Marshall (Jan. 10, 1949) (on file with the NAACP Papers, Part II, Box B87).

Lucky's lawyers, at least, wondered for which side: Lucky approached Loren Miller, a member of the NAACP's National Legal Committee, to solicit an amicus brief *in opposition* to the local branch on the quota issue.[314] The NAACP ultimately rejected Lucky's overture, but the dissonance between the merits brief filed by the local branch lawyers and the national NAACP's amicus brief is striking. With branch lawyers vigorously defending quota-based hiring as a policy solution to black poverty,[315] the national NAACP's brief carefully sidestepped the issue, noting in passing its legal irrelevance and then attempting to reframe the case as primarily raising First Amendment concerns.[316]

The Supreme Court's decision in *Hughes v. Superior Court* was ultimately a fizzle: in holding that the California Supreme Court's view of its own state policy against quotas did not run afoul of the Fourteenth Amendment, the U.S. Supreme Court offered little guidance on the likely validity of quotas more generally.[317] But the *Hughes* litigation nonetheless holds a final set of clues as to why the FEPC model came to dominate during the early drive for fair employment. Indeed, the *Hughes* litigation demonstrates the substantial risks entailed by a decentralized litigation approach for mainline civil rights groups seeking to build a unified social movement. The FEPC approach eliminated much of this risk in the job discrimination context by granting the agencies exclusive jurisdiction and denying complainants most or all procedural rights within the administrative process. Thus, FEPC may have been attractive to mainline civil rights groups at least in part because it offered a salutary form of litigation control.

* * *

Taken together, the conflicted role of organized labor and the ideological differences among civil rights groups show the powerful forces channeling the movement toward the FEPC approach during the earliest legislative campaigns. On the one hand, administrative enforcement in general, and the FEPC model in particular, fit better with the organizational needs of the NAACP and other old-guard civil rights organizations as they sought to build an alliance with organized labor and counter criticisms that they were insufficiently focused on the needs of working class African Americans. In particular, the rapid remediation of individual complaints that many hoped—rightly or wrongly—would be-

314. *See* Letter from Frank S. Richards to Thurgood Marshall (Oct. 28, 1949) (on file with the NAACP Papers, Part II, Box B87); Letter from Loren Miller to Thurgood Marshall (Oct. 27, 1949) (on file with the NAACP Papers, Part II, Box B87).

315. *See* Opening Brief for Petitioners at 10, Hughes v. Superior Court, 339 U.S. 460 (1950) (No. 61).

316. *See* Brief of the NAACP as Amicus Curiae at 2, *Hughes*, 339 U.S. 460 (No. 61).

317. 339 U.S. 460.

come FEPC's hallmark promised to insulate the NAACP from growing criticisms about its ability to deliver tangible benefits to working class blacks. The FEPC model and the "retail," case-by-case adjudicative process it contemplated reflected the new and expanding face of the NAACP. Protracted, elite-level litigation did not.

At the same time, however, the FEPC approach was attractive precisely because it preserved the organizational prerogatives of the civil rights establishment and entrenched the behind-the-scenes process of negotiation and accommodation that mainline groups had long pursued. Moreover, the wartime flood of litigation under state civil rights acts, the FOL's pathbreaking lawsuits in 1942, and the *Hughes* litigation together suggest a reason why the NAACP and other groups repeatedly offered bills that made no provision for private rights of action—and, indeed, sharply curtailed complainants' procedural rights during the administrative process—despite calls from other groups to add a private civil option as a complement to administrative action. Indeed, mainline civil rights groups preferred FEPC at least in part because it conferred a measure of control over implementation, denying wayward locals and other more radical protest groups a decentralized and unpredictable point of entrée into the legal system.

IV. THE TAFT PROPOSAL OF 1946 AND THE TRIUMPH OF FEPC

The midcentury political economy of civil rights was on most convincing display—and had perhaps its most enduring effects on early American fair employment law—in 1946 when the liberal fair employment coalition quietly rejected a stunning private overture from Republican Senator Robert Taft of Ohio outlining an aggressive, mostly court-centered, and explicitly quota-based fair employment scheme. Here were many of the themes that characterized fair employment campaigns more generally: the ambiguous role of organized labor; a preoccupation among mainline civil rights groups with offering immediate and concrete relief to complainants and a consequent distrust of complex, elite-level litigation; and squeamishness about quotas. And while some might think Senator Taft's proposal a one-off historical curiosity, it was more than that: the episode would lead to a shake-up within the liberal fair employment coalition and the final crystallization of the FEPC model as the regulatory approach of choice within the liberal coalition going forward. To that extent, the 1946 Taft episode serves as a bookend to the FOL's 1942 litigation effort and the failed Diggs-DeFoe bill just a few months later.

The year 1946 was a critical juncture in the drive for fair employment. The upcoming congressional elections, the first since the war, were shaping up as the most competitive in more than a decade, and so both parties were acutely aware of plentiful black swing votes in key industrial battleground states.[318]

318. *See* MOON, *supra* note 23, at 10; SUGRUE, *supra* note 43, at 113.

For Senator Robert Taft in particular, the black swing vote also threatened personal political ambitions. Senator Taft's reelection bid in 1944 had been surprisingly close given his stature, and it was also clear by 1946 that Senator Taft was alone among likely Republican presidential aspirants in 1948—a group that included former Minnesota Governor Harold Stassen and New York Governor Thomas Dewey—in not having endorsed FEPC.[319] Indeed, civil rights groups would soon begin to target him as the lone holdout among Republican hopefuls.[320]

Referred to by allies and enemies alike as "Mr. Republican," Senator Taft was the undisputed leader of a dozen or so Republican Senators who had led the conservative counterattack on New Deal social and economic policies.[321] Prior to 1946, however, Senator Taft had been all over the map on fair employment regulation. In 1944, Senator Taft concurred with a Senate committee report on a bill creating a fully enforceable FEPC, but he did little or nothing to see it enacted.[322] Senator Taft was plainly walking a tightrope between his own party's inclusion of a strong plank in favor of fair employment in its national platform and deep skepticism about arming a new federal agency with sweeping powers to regulate the party's business supporters.[323] Beginning in 1945, however, Senator Taft charted a new course, advancing a "voluntary" fair employment bill that called for establishment of a federal commission with the power to receive complaints and conciliate disputes, but provided no actual enforcement authority in the event that conciliation failed.[324] This was shrewd politics. By advocating a strictly voluntary approach, Republicans could claim to support fair employment and then stand back and watch as Dixiecrat-led filibusters deepened the sectional conflict within Democratic ranks.[325]

While one might have thus expected yet another "voluntary" bill in 1946, Senator Taft instead made a surprising private overture to the National Council for a Permanent FEPC, the principal national lobbying organization on FEPC, transmitting the full text of a proposed bill that was strikingly different from

319. *See* JAMES T. PATTERSON, MR. REPUBLICAN: A BIOGRAPHY OF ROBERT A. TAFT 278-79 (1972); *see also* CHEN, *supra* note 8, at 89 (Dewey position); JENNIFER A. DELTON, MAKING MINNESOTA LIBERAL: CIVIL RIGHTS AND THE TRANSFORMATION OF THE DEMOCRATIC PARTY 116 (2002) (Stassen position).

320. Letter from Allan Knight Chalmers to FEPC's Friends in Ohio 1-2 (Apr. 4, 1948) (on file with the GMMA, RG09-001, Box 1, Folder 28) (noting targeting of Senator Taft during FEPC campaign because of his perceived vulnerability coming off losses to Governor Stassen in presidential primaries).

321. *See* PATTERSON, *supra* note 319, at 188-94, 255-65.

322. *See* CHEN, *supra* note 8, at 70.

323. *See* SUGRUE, *supra* note 43, at 95-96, 117; Maslow, *supra* note 74, at 417 n.47.

324. *See* S. 459, 79th Cong. (1945).

325. *See, e.g.*, 92 CONG. REC. 1151-52 (1946).

past or future fair employment bills in Congress or elsewhere.[326] Styled "The Fair Employment Practice Act," the bill first provided for the creation of a five-member "Fair Employment Practice Commission" with the authority to formulate "comprehensive plans for the elimination of such discrimination, as rapidly as possible, in regions or areas where such discrimination is prevalent."[327] The "comprehensive plan," the bill continued, would "provide for additional employment throughout the area by increasing the number of persons of the group discriminated against to be employed by specified employers who employ more than fifty persons." Such plans would also require labor unions "to admit to membership persons of the group discriminated against so that the rules of the union shall in no way prevent full employment opportunities for the members of such groups."

The rest of the bill provided remedial teeth. After a comprehensive plan had been in operation for at least six months, the Commission could proceed with "compulsory enforcement" by requiring an employer "to provide forthwith employment of specified character for the number of persons belonging to the group discriminated against," or a labor union to "permit the admission of members of such group as members of such union, so that there may be no hindrance to their employment by the rules of such union."[328] Any failure to comply with such an order, the bill continued, would result in the Commission's filing of a petition for enforcement in a federal district court.[329] Moreover, any person aggrieved by a failure of an employer or union to comply with a compulsory plan could, after filing a written request with the Commission and waiting for thirty days, similarly file suit in federal court to compel compliance.[330] Importantly, the court could revise the plan in any way it deemed appropriate.

Compared to previous Taft offerings, this new bill was almost shockingly broad. Unlike previous proposals, it was fully enforceable and, moreover, provided individuals with direct recourse to federal courts. Once a plan was in place, an individual needed only advise the Commission of her grievance, wait thirty days, and then initiate court action. Finally, the bill's core provisions regarding "comprehensive plans," including the requirement that an employer hire a specified "number of persons belonging to the group discriminated against," seemed to contemplate systemic, quota-based hiring.

As the principals of the National Council worked their way through the bill's provisions, black labor leader A. Philip Randolph was the first to weigh in. Randolph noted that since no fair employment bill "can get thru without bipartisan support I strongly urge acceptance of [the] amended Taft bill since it

326. A Bill (on file with the NAACP Papers, Part II, Box A258). The undated bill is reprinted in full in David Freeman Engstrom, *The Taft Proposal of 1946 & the (Non-) Making of American Fair Employment Law*, 9 GREEN BAG 2d 181, 191-202 (2006).

327. Engstrom, *supra* note 326, at 191, 193, 195.

328. *Id.* at 199-200.

329. *Id.* at 200.

330. *Id.* at 201.

has enforcement and investigatory powers. . . . Hav[ing] spent quite some time in Washington lobbying," Randolph continued, "it is my considered judgement [sic] that it would be [a] tragic blunder not to push Taft bill now with all our forces since there appears to be some possibility of [it] getting passed. Kindly advise council [of] your reaction immediately."[331]

Over the next two days, a series of telegrams, letters, and phone messages made their way to Randolph. Two of these were guarded but favorable. The view of Charles Houston, according to a telegram from the NAACP's Leslie Perry, was that "we should accept [the] compromise if it is [the] best we can get since [the] bill would at least establish policy. [We] must however be assured," he noted, "of enactment this Congress."[332] So, too, Thurman Dodson, another civil rights lawyer and a Houston protégé, noted that he would "reluctantly consent to the proposal if we had a guarantee of its passage."[333]

The remaining responses, however, were uniformly negative. Speaking for the NAACP, executive secretary Walter White balked at the group basis of the remedial scheme: "[The bill is] unsatisfactory in that it does not contemplate nor provide for redress [of] individual grievances but is predicated instead upon discrimination against 'groups.'" Moreover, when the "year or eighteen months" required to negotiate a compulsory plan was combined with the six-month waiting period prior to court action, the resulting delay would "virtually insure [sic] [the] issue being [a] dead one by that time. . . . Regret we cannot go along with you," White concluded.[334] A.B. Makover, a Baltimore lawyer and frequent consultant to the NAACP, concurred, noting that court-ordered remedies requiring an employer to hire "the number of persons of a group" discriminated against would not "insure [sic] that the individual member of the group discriminated against will be given the job he was denied." By contrast, any member of an excluded group would be specifically granted union membership. On Makover's view, the Council should hold out for a statutory scheme that included "provisions more effective for the protection of personal rights than now exist therein."[335]

The response of organized labor sounded many of these same notes. Boris Shishkin of the AFL—which had only recently ceased openly opposing fair employment legislation—observed that the bill "lays the whole stress on the remedy to discrimination on group rather than individual." "The individual is

331. Telegram from A. Philip Randolph to Walter White (May 21, 1946) (on file with the NAACP Papers, Part II, Box A258).

332. Telegram from Leslie Perry to Walter White (May 22, 1946) (on file with the NAACP Papers, Part II, Box A258).

333. Memorandum, Reactions to Proposed Taft Bill 2 (May 22, 1946) (on file with the NAACP Papers, Part II, Box A258).

334. Telegram from Walter White to A. Philip Randolph (May 22, 1946) (on file with the NAACP Papers, Part II, Box A258).

335. Letter from A.B. Makover to Anna Arnold Hedgeman (May 23, 1946) (on file with the NAACP Papers, Part II, Box A258).

reached secondarily and may or may not be reached," Shishkin continued, since "[t]he individual does not have the right to go to court until the plan is in effect." Further, the bill was conceived, in Shishkin's opinion, so that the "time lag between the actual occurrence of discrimination and the remedy makes the remedy moot in practice." He concluded by noting: "If you deal with a right you deal with the right of a man. [With the Taft bill, y]ou are improving a condition perhaps, but you are not making employment opportunity the basic right of an individual."[336] George Weaver, head of the CIO's Committee to Abolish Discrimination, was less detailed but just as emphatic in his conclusion: "We cannot go along with this bill."[337]

To be sure, Houston's labeling the Taft proposal a "compromise" measure suggests a legitimate belief that the FEPC bills pending in Congress might be more effective. And this makes sense: the Taft scheme would have been national in reach, raising concerns about the willingness of southern judges, even federal ones, to enter sweeping injunctive orders or the ability of southern blacks to secure and pay for counsel. Yet the preoccupation with individualized, concrete relief suggests that political and organizational considerations underlay much of the opposition as well. White's and Makover's preference for a regime that focused on "personal rights" and provided individual-level remedies plainly mirrors both the NAACP's staunch opposition to quota-based hiring and also its felt need to create a scheme that could deliver concrete, immediate relief to working class African Americans while steering clear of protracted, elite-level litigation. Nor is it any surprise that organized labor balked at Senator Taft's proposal. Indeed, the provision requiring revision of union rules that in any way worked to "prevent full employment opportunities for the members of such groups" plainly threatened union seniority systems and so was little different from the "proportional layoffs" idea that the CIO, led by George Weaver himself, had rejected just two years before. Indeed, so exquisitely crafted were the proposal's various provisions that one wonders if a seasoned pol like Senator Taft was deliberately trying to drive a wedge through the liberal fair employment coalition.[338]

Whatever underlay the rejection of Senator Taft's proposal, the episode had enormous consequences for the future of FEPC. Disagreement over the Taft offer revived long-simmering ideological tensions between various segments of the National Council membership, and a reorganization of the leadership structure soon followed, adding the AFL, CIO, and NAACP to the Coun-

336. Memorandum, *supra* note 333, at 1.

337. *Id.* at 2.

338. *Cf.* Paul Frymer & John David Skrentny, *Coalition-Building and the Politics of Electoral Capture During the Nixon Administration: African Americans, Labor, Latinos*, 12 STUD. AM. POL. DEV. 131, 136-37 (1998) (advancing similar theory that Republican support of first affirmative action programs in 1968 was effort to drive wedge through New Deal coalition).

cil's Executive Committee.[339] More importantly, fallout from the Taft episode led to the creation of a special committee to draft a fair employment bill that could win broad support among member groups.[340] In the months that followed, the committee dutifully considered the full range of alternatives, including "four types of bills previously proposed" in legislative campaigns:

> 1. Substitution of a private civil suit for an administrative agency as a means of enforcing the act.
> 2. Establishment of a commission empowered to investigate, hold hearings and make recommendations, relying for enforcement exclusively upon injunction in the Federal Equity Courts.
> 3. Limiting the Commission to the making of recommendations.
> 4. Equipping the Commission with authority to enforce decisions through the Courts.[341]

Soon thereafter, the committee came back with its choice: FEPC.[342]

There were still scuffles between civil rights groups and labor that underscore once more the conflicted role of organized labor and the resulting double bind facing civil rights groups. The NAACP managed to defeat the worst of the AFL's amendments but, noting the need to present a "solid front with labor,"[343] ultimately agreed to other weakening provisions, including mandatory conciliation of complaints, a reduction in the available sanctions for noncompliance with a commission order, and language limiting actionable union discrimination to only those practices affecting "employment opportunities," the latter apparently to preserve black union auxiliaries.[344] Even so, with the unveiling of the bill in January 1947, the National Council could now boast that it had "the

339. *See* GARFINKEL, *supra* note 74, at 151; KESSELMAN, *supra* note 21, at 165; Kevin M. Schultz, *The FEPC and the Legacy of the Labor-Based Civil Rights Movement of the 1940s*, 49 LAB. HIST. 71, 81 (2008).

340. *See* Minutes of Policy Committee Meeting of the National Council for a Permanent FEPC (Jan. 16, 1947) (on file with the McLaurin Papers, Box 7); Minutes of the Meeting of the National Board of Directors of the National Council for a Permanent FEPC (Dec. 30, 1946) (on file with the McLaurin Papers, Box 7); *see also* Letter from A. Philip Randolph & Allan Knight Chalmers to William F. Green (Jan. 27, 1947) (on file with the GMMA, RG09-001, Box 1, Folder 25) (noting "the difficult phases of reorganization and the preparation of a new bill for which agreement and support are wider than ever before").

341. Nat'l Council for Permanent F.E.P.C., A Comparison of the New F.E.P.C. Bill with Earlier Bills 1 (Mar. 27, 1947) (on file with the McLaurin Papers, Box 7).

342. Minutes of a Meeting of the Legal Committee of the National Council for a Permanent F.E.P.C., *supra* note 38.

343. Memorandum from Clarence Mitchell to Roy Wilkins (Jan. 13, 1947) (on file with the NAACP Papers, Part II, Box A258).

344. *See, e.g.*, Minutes of National Board of Directors of the National Council for a Permanent FEPC 2 (Feb. 6, 1947) (on file with the GMMA, RG09-001, Box 1, Folder 26) (noting that "the labor section had been changed to conform to the wishes of the AF of L" and that this was the "best compromise possible").

unqualified public endorsement and support of the Council, members, and affiliated organizations,"[345] including "nearly all of organized labor."[346]

Most important of all, the Taft episode and the changes within the National Council that followed marked a pronounced centralization of the fair employment movement as a whole. Before 1946, as a range of regulatory alternatives flooded Congress and state legislatures, relations between the National Council and state- and local-level groups had "left much to be desired"[347] and "remained a promise rather than a realization."[348] But beginning in 1947, all that changed. The National Council's newly drafted FEPC bill was soon circulated throughout the movement as a model bill, and the year 1949 saw the launch of a National Civil Rights Mobilization, with fifty national organizations participating, followed soon thereafter by a campaign to enact FEPC in critical industrial states like Ohio, Illinois, and Michigan.[349] Not only had the National Council secured buy-in from all groups, it was now actively imposing its FEPC preference on an increasingly professionalized state-level apparatus.[350] FEPC had, as one observer writing in the 1950s put it, "passed through the 'gateway' of popular acceptance" and was now a core programmatic goal of the civil rights establishment.[351]

CONCLUSION

Several months before Title VII's enactment in 1964, a group of scholars and practitioners gathered for a conference on American fair employment law. Looming over the proceedings was a sense that the state FEPCs had been a failure and, worse, a lost opportunity. One participant asserted that FEPC enforcement efforts could and "should have been more decisive,"[352] while a second called for the addition of private rights of action to fortify the scheme.[353] Still another observed that the civil rights movement's more recent turn to the emotive issues of schools and housing was fomenting a "white backlash" and that the movement was facing "much more frequent and better organized oppo-

345. Minutes of Policy Committee Meeting of the National Counsel for a Permanent FEPC, *supra* note 340, at 1.

346. *Id.*; *see also* Nat'l Council for Permanent F.E.P.C., *supra* note 341, at 4.

347. KESSELMAN, *supra* note 21, at 57.

348. *Id.* at 67.

349. *See* Memorandum from Gloster Current to Walter White, Henry Moon & Clarence Mitchell (Oct. 24, 1952) (on file with the NAACP Papers, Part II, Box A264). *See generally* GARFINKEL, *supra* note 74, at 163 (describing the National Civil Rights Mobilization and its motivations).

350. GARFINKEL, *supra* note 74, at 171-73.

351. *Id.* at 174.

352. John G. Field, *Hindsight and Foresight About FEPC*, 14 BUFF. L. REV. 16, 18 (1964).

353. Sol Rabkin, *Enforcement of Laws Against Discrimination in Employment*, 14 BUFF. L. REV. 100, 111 (1964).

sition."[354] This led him to wonder whether civil rights groups' pursuit of a more aggressive approach to job discrimination might have ensured that any backlash was "stimulated and met between 1945 and 1950" thus setting "a different pattern . . . for the administration of anti-bias legislation generally."[355]

Until now, such views have largely been lost to history. In their place, existing accounts of early American employment discrimination law blame Republican opposition and a growing racial reaction in the North for stymieing the FEPC movement and thus creating a "regulatory vacuum" on the job discrimination issue.[356] In turn, scholars assert, it was the lack of a federal FEPC and the inability of the hobbled state FEPCs to move African Americans into labor markets that radicalized civil rights groups and pressured federal judges and bureaucrats to shift from a highly individualized and "color-blind" remedial approach to a pattern-centered and even explicitly "race-conscious" one.[357] The irony, according to these accounts, is that early Republican opposition to fair employment set the stage for later and more polarizing developments: the Nixon Administration's creation of the Philadelphia Plan in 1969 requiring federal construction contractors to establish "goals and timetables" for hiring minority workers and, soon after, the Supreme Court's sanction of a disparate impact standard of discriminatory proof in *Griggs v. Duke Power Co.*[358] If FEPC had been allowed to flourish, the story goes, all this might have been avoided.[359]

My recounting of the FEPC choice, however, points to other, deeper historical ironies. I have argued that it was not necessarily Republicans, but the nascent civil rights movement itself that forestalled available court-centered and even race-conscious approaches. The chief irony, then, is not that Republican opposition to FEPC set the stage for the later emergence of affirmative action. Rather, it is that many pivotal Republicans at the dawn of the movement were willing to support civil rights by enacting a range of potentially effective court-centered alternatives—extending, perhaps, even to quota-based hiring. Had the liberal fair employment coalition embraced these alternatives, the result might have been a far earlier integration of the industrial order and substantial black economic gains long before Title VII's implementation in the late 1960s and the 1970s, by which time the economy was already shifting away from the industrial jobs on which most African Americans depended.[360]

354. Joseph B. Robinson, Comment, 14 BUFF. L. REV. 121, 123 (1964).

355. *Id.*

356. *See supra* notes 16-17 and accompanying text.

357. *See supra* notes 16-17 and accompanying text.

358. 401 U.S. 424, 431-32 (1971).

359. *See, e.g.*, CHEN, *supra* note 8, at 26 ("Had conservatives not been so successful in opposing FEP legislation, affirmative action might have taken on a vastly different legal and political meaning, and job discrimination might have become regulated through a federal administrative agency that sought only to ensure equal treatment.").

360. *See* WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY 39-46 (1987); *see also* JUDITH STEIN, RUNNING STEEL,

More broadly, the FEPC choice was critical because it shaped the political and legal context in which the nation's first experiment with regulating job discrimination went forward. As the first fair employment campaigns got underway, the partisan mantle on civil rights was very much up for grabs. But in their embrace of FEPC, the liberal fair employment coalition asked Republicans to do something that their ideological commitments did not allow: oversee the significant expansion of the New Deal administrative state. The FEPC choice thus assured Republican opposition on fair employment. More importantly, it delivered the fair employment issue, and the early civil rights movement more broadly, into the teeth of a much larger debate about the legitimacy and place of the administrative state in the postwar American legal and political order. As the late 1940s unfolded, early debates about quotas and whether legal coercion was appropriate at all in the delicate area of race relations shifted to very different rhetorical terrain: creeping administrative power.[361] By de-linking civil rights from the broader critique of New Deal state building, the liberal coalition's embrace of the Taft plan or any of the other mostly court-centered alternatives on offer might have fundamentally altered the trajectory of American law and politics around civil rights. Republicans, not Democrats, might have seized the mantle of leadership on the premier civil rights issue of the immediate postwar period, thus denying the bitterly partisan soil in which the later politics of racial backlash would take root and flourish.[362]

Understanding FEPC as part of a menu of regulatory options also opens up a richer set of explanatory possibilities for the later development of American employment discrimination law, particularly the emergence of more pattern-centered and even explicitly race-conscious approaches during the late 1960s and the 1970s. For instance, the FEPC choice meant that the nation's first sustained legal encounter with the difficult conceptual and evidentiary questions that the new fair employment laws raised came in a deeply contested administrative context. The resulting bureaucratic pressures may have critically shaped legal development. In Pennsylvania, to note just one example, legislative oppo-

RUNNING AMERICA: RACE, ECONOMIC POLICY, AND THE DECLINE OF LIBERALISM 314-16 (1998) (discussing early implementation of Title VII alongside declining industrial employment).

361. *See, e.g.*, H. JOURNAL, 1951 Leg., Reg. Sess. 2519 (Pa. 1951) (branding proposed FEPCs as "the opening wedge for the development of a bureaucracy without end"); *Dangerous Precedent*, DET. FREE PRESS, Feb. 5, 1952, at 6 (denouncing administrative body with "quasi-judicial" authority "remote from public control"); Johnson Kanady, *Stevenson Aid Sets Up Illegal 'FEPC' Is Charge*, CHI. TRIB., Feb. 22, 1952, at B7 (raising specter of "government by bureau"). For other examples, see Engstrom, *supra* note 39, at 172-73, 195-98, 212-13, 218-19.

362. *See* Engstrom, *supra* note 326, at 189. *See generally* EDWARD G. CARMINES & JAMES A. STIMSON, ISSUE EVOLUTION: RACE AND THE TRANSFORMATION OF AMERICAN POLITICS (1989) (theorizing about causes and consequences of postwar partisan realignment on race issues).

nents' efforts to slash the state FEPC's budget pressed agency administrators to economize on enforcement costs by adopting a more pattern-centered and systemic regulatory approach to the problem of job discrimination.[363] Years later, when federal courts were asked to sanction a disparate impact standard of proof, leading ultimately to the Supreme Court's 1971 *Griggs* decision, they worked against the backdrop of a growing body of case law and a conception of discrimination and discriminatory proof that had been forged, in Pennsylvania and elsewhere, in the unique, administrative, FEPC context.[364] To that extent, my account of the FEPC choice suggests that the ironies of affirmative action may be even deeper than existing histories of American employment discrimination law acknowledge. Indeed, the agency-centered FEPC approach, designed initially to blunt criticism of a more race-conscious and quota-based approach, may have ultimately helped spur its emergence.[365]

Finally, the story of FEPC makes possible a fresh examination of the forces that produced the current court-centered Title VII regime and, in so doing, offers a case study of the complex relationship of social movement dynamics to the broader shift in recent decades away from administrative governance and toward private litigation as a regulatory tool.[366] As debate heated up in 1964 over what form Title VII should take, the various actors stepped into what should now be familiar roles. Civil rights groups—led by the Leadership Conference on Civil Rights (LCCR), successor to the National Council—sought a

363. *See, e.g.*, PA. HUMAN RELATIONS COMM'N, EIGHTH ANNUAL REPORT 8, 31 (1963) (announcing commission's intention to initiate broad investigations on a "local, regional, or state-wide basis" and to use its subpoena power to identify regulatory targets with gross underrepresentation of black workers and then draw a strong inference of discrimination from any "patterns of discrimination" found); *see also* Hill, *supra* note 11, at 62 (recounting Pennsylvania commission's move against a half dozen major unions alleging patterns of discrimination); Wolfinger, *supra* note 267, at 92-93 (noting budgetary assault on Pennsylvania FEPC).

364. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 434 n.10 (1971) (discussing Illinois FEPC decision in *Myart v. Motorola*, 110 CONG. REC. 5662 (1964)); *see also* Brief for Petitioner at 23, 49, *Griggs*, 401 U.S. 424 (No. 124) (citing published guidelines and decisions of the Pennsylvania, Illinois, California, and Colorado FEPCs); Brief for Respondent at 28, 32, 33, 35, *Griggs*, 401 U.S. 424 (No. 124) (discussing Illinois FEPC decision in *Myart*); Brief of the Attorney General of the State of New York as Amicus Curiae in Support of Reversal at 2-3, *Griggs*, 401 U.S. 424 (No. 124) (discussing decisions of New York's SCAD deploying a disparate-impact approach to job discrimination); Brief Amicus Curiae on Behalf of the Chamber of Commerce of the United States of America at 14-17, *Griggs*, 401 U.S. 424 (No. 124) (discussing Illinois FEPC decision in *Myart*).

365. At least one observer in 1947 predicted as much. *See Antidiscrimination in Employment Hearings*, *supra* note 63, at 745 (statement of Tyre Taylor, General Counsel, Southern States Industrial Council) (noting resource constraints would prevent the proposed FEPC from adjudicating complaints "on a single-shot basis" and would inevitably lead to industry-by-industry enforcement and, with it, "some sort of quota system").

366. *See supra* notes 18-19 and accompanying text.

pure FEPC approach.[367] They were joined in that effort by unions, though labor predicated its support on weakening amendments designed, among other things, to protect seniority schemes.[368] The third bloc was a group of Republicans led by Senator Everett Dirksen of Illinois, who, like Senator Taft before him, successfully opposed any bill that vested the proposed Equal Employment Opportunity Commission (EEOC) with enforcement authority.[369] To that extent, the legislative debate that produced Title VII's court- and litigation-centered approach was just a replay of the coalitional struggles that had bedeviled the drive for fair employment for two decades.

In many ways, however, the pivotal moment was yet to come. As political pressure grew to strengthen Title VII in the years immediately following its enactment, the main question was whether to expand the existing private-right-of-action side of the scheme or, instead, strengthen its administrative side by vesting the EEOC with cease-and-desist authority.[370] The Nixon White House, like Republicans before, initiated a plan to head off any expansion of federal administrative power, this time by denying the EEOC cease-and-desist authority but granting it the ability to initiate lawsuits in court. Labor, conflicted as always, offered support for bills granting the EEOC enforcement authority, but now it conditioned that support on a *weakening* of the private rights of action that were beginning to soak union treasuries.[371]

But the third camp, mainline civil rights groups, soon began to rethink the FEPC approach. The LCCR, which had fought for a pure FEPC approach in 1964, did not take a public position on proposed amendments in 1966 as its civil rights and union members tried to reconcile on the private-right-to-sue issue.[372] Soon, however, the NAACP repudiated any possibility of compromise and staked out new ground: the organization that had for decades rejected various court-centered approaches made clear in 1968 it would only support proposals that in no way diluted Title VII's right of private suit.[373] The end result, in the form of the Equal Employment Opportunity Act of 1972, reflected a compromise between the Nixon Administration's and the NAACP's stances, preserving Title VII's right of action in full and also granting the EEOC the right to sue in court, but once more denying the agency any independent enforcement powers of its own.[374]

367. *See* Sean Farhang, *The Political Development of Job Discrimination Litigation, 1963-1976*, 23 STUD. AM. POL. DEV. 23, 31 (2009).

368. *See* Herbert Hill, *Lichtenstein's Fictions: Meany, Reuther and the 1964 Civil Rights Act*, 7 NEW POL. 82, 86 (1998).

369. *See* Farhang, *supra* note 367, at 36; Rodriguez & Weingast, *supra* note 17, at 1471-85.

370. *See* STEIN, *supra* note 360, at 87; Farhang, *supra* note 367, at 43-45.

371. *See* Farhang, *supra* note 367, at 44; Hill, *supra* note 368, at 91-92.

372. *See* Hill, *supra* note 368, at 91.

373. *See* Farhang, *supra* note 367, at 44-45; Hill, *supra* note 368, at 91-92.

374. *See* Farhang, *supra* note 367, at 44.

What had changed at the NAACP? One possibility is that mainline civil rights groups had simply come to believe that private litigation, enhanced by the 1966 revisions to the class action provisions in Federal Rule of Civil Procedure 23, might be more effective than an administrative scheme.[375] Another is that the regulatory capture concerns that civil rights groups had shrugged off or simply missed at midcentury had by the late 1960s shaken faith in FEPC.[376] Yet we can also locate the NAACP's turnabout in a change in each of the conditions that prevailed at midcentury when civil rights groups first committed to the FEPC approach. First, some commentators at the time noted that Title VII's litigation approach had sanctioned private damages actions as a means of enforcing public law, thereby eroding the initial "public right rationale," as one commentator called it, for FEPC.[377] As Title VII suits proliferated, civil rights groups had grown far more comfortable than they were two decades before with private pursuit of tort-like money damages as a discrimination remedy.[378]

Second, increasingly bitter battles with discriminatory unions had convinced many within the civil rights establishment that a rising plaintiff's bar was a far better and less conflicted ally than organized labor. The final unraveling of the troubled black-labor alliance had begun in 1959 when the NAACP, frustrated by its efforts to change union bureaucracies from within, released a report accusing the entire labor movement, including its more progressive sectors, of institutionalized racism.[379] Soon thereafter, the Association began to act on longtime threats by initiating NLRB proceedings to decertify discriminatory

375. *See, e.g.*, BLUMROSEN, *supra* note 13, at 8-9; Comment, *Enforcement of Fair Employment Under the Civil Rights Act of 1964*, 32 U. CHI. L. REV. 430, 469 (1964). *See generally* Farhang, *supra* note 367, at 48 (noting widened access to class actions under Rule 23).

376. *See* BLUMROSEN, *supra* note 13, at 9-27 (charting reasons for FEPC's inefficacy); Farhang, *supra* note 367, at 46 (noting that performance of EEOC in particular had "given rise to disillusionment and lack of confidence" among civil rights groups); Hill, *supra* note 11, at 23, 40, 68-69 (asserting that individual complaint approach at heart of FEPC was "totally inadequate" and that commissions were "obsolete" if they continued "to operate with timidity and a general reluctance to broadly and rapidly enforce antidiscrimination statutes").

377. Comment, *supra* note 375, at 432, 433 n.19; *see also* Richard K. Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 BROOK. L. REV. 62, 67 (1964) (noting Title VII's shift to a conception of job discrimination "as a private rather than a public wrong").

378. The rumblings of that shift in thinking could be heard as far back as the 1950s when even a stalwart FEPC supporter like the Urban League's Lester Granger published an editorial arguing against handing adjudication of public accommodation suits to New York's SCAD. Lawsuits for damages were "10 times as impressive as a complaint of discrimination placed by a Negro with some state agency," Granger noted, and were the best way to "keep agencies our servants, not our guardians." Lester B. Granger, *Rights Our Business*, N.Y. AMSTERDAM NEWS, Jan. 12, 1952, at 14.

379. *See* Lee, *supra* note 15, at 364-65. On wider frustration with the pace of racial change inside labor, see FRYMER, *supra* note 12, at 63-67. *See also War Declared on Anti-Negro Unions*, CHI. DAILY DEFENDER, Dec. 12, 1966, at 6 (asking whether it was time "to seek aid and comfort outside the labor movement").

unions.[380] In the meantime, plaintiffs' lawyers had begun to see civil rights litigation as providing a potentially large payday. In 1966, Bill Colson, the outgoing president of the American Trial Lawyers Association (ATLA), gave a prominent speech asserting that "pocketbook hurt" was the best way to enforce civil rights and encouraging each ATLA member to bring, "either for profit or for principle," at least one civil rights action.[381]

Most important of all was a shift in the organizational imperatives that mainline civil rights organizations like the NAACP faced as they shifted support to a purely litigation-based approach. As the debate over how to amend Title VII unfolded, the NAACP was on a far firmer footing than it had been in previous decades. McCarthyism had largely eliminated, or driven underground, the left-wing challenge that the NAACP faced in the 1940s and early 1950s.[382] Moreover, the NAACP had become a true national membership organization and was far less financially dependent on downtown business support, white philanthropy, and union donations.[383] Finally, after contentious debates throughout the mid-1960s, a rough-hewn consensus had begun to emerge that a more pattern-centered, race-conscious approach was necessary to counter the increasingly dire economic situation of many African Americans.[384] This gathering consensus would soon gain formal sanction in the form of the Philadelphia Plan in 1968 and the Supreme Court's 1971 *Griggs* decision. In short, message control—and litigation control—had become far less important than it had been in the 1940s when the NAACP and like organizations first guided the movement down the FEPC path. On firmer political, financial, and organizational ground, the NAACP was able to champion a more decentralized, litigation-centered means to combat job discrimination. With private litigation soon to explode as a regulatory tool across a range of policy areas, the NAACP turned away, once and for all, from the FEPC approach.

380. FRYMER, *supra* note 12, at 44, 64-66; Lee, *supra* note 15, at 366-67. The NAACP had sporadically sought decertification against particularly recalcitrant unions during the 1950s, anticipating the more vigorous decertification efforts of the 1960s. *Id.* at 354.

381. *Civil Suits for 'Rights*,*'* L.A. SENTINEL, Aug. 18, 1966, at A6; *see also Miami Lawyer Comes Up with Legal Principal [sic] Which Could Be Secret Weapon in Bias Cases*, PHILA. TRIB., Aug. 9, 1966, at 1.

382. *See, e.g.*, GOLUBOFF, *supra* note 14, at 220 (noting NAACP's anti-Communist commitment and purges throughout the 1940s and 1950s); Sugrue, *supra* note 16, at 149 (noting purge of Communists from NAACP ranks as 1950s "Cold War chill" descended).

383. *See* Meier & Bracey, *supra* note 218, at 27.

384. *See* MORENO, *supra* note 16, at 145-46; SKRENTNY, *supra* note 16, at 222-25; STEIN, *supra* note 360, at 125-26; *see also* Hill, *supra* note 11, at 24 (reviewing FEPC's work and calling for "affirmative action based upon pattern centered approaches instead of the individual complaint procedure" (capitalization omitted)); *To Push Quota Hiring*, N.Y. AMSTERDAM NEWS, Aug. 16, 1969, at 2 (noting Urban League and NAACP approval of quota approach).