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## Equality Law Pluralism

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# EQUALITY LAW PLURALISM

Olatunde C.A. Johnson\*

*This contribution to the Constance Baker Motley Symposium examines the future of civil rights reform at a time in which longstanding limitations of the antidiscrimination law framework, as well as newer pressures such as the rise of economic populism, are placing stress on the traditional antidiscrimination project. This Essay explores the openings that nevertheless remain in public law for confronting persistent forms of exclusion and makes the case for greater pluralism in equality law frameworks. In particular, this Essay examines innovations that widen the range of regulatory levers for promoting inclusion, such as competitive grants, tax incentives, contests for labor agreements and licenses, requirements attached to land-use development, and scoring systems for public contracts that reward entities for pursuing equity goals. Relying on these types of regulatory incentives and levers expands the mechanisms typically employed to advance integration and equity and builds on tools available not just at the federal level but also at the state and local level. Even in the present political environment, this Essay argues there is utility in advancing new regulatory regimes that move beyond the formalist, liberalist assumptions of traditional civil rights regimes and that seek to link questions of identity inclusion to economic inequality and the distribution of public goods.*

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## INTRODUCTION

This Symposium presents an opportunity to honor the legacy of Judge Constance Baker Motley. Inevitably, it also provides an occasion to celebrate the transformative impact of Motley and the NAACP Legal Defense Fund's (LDF) antidiscrimination project while confronting its limitations. The transformative impact is not hard to discern or to celebrate. LDF sought to dismantle segregation through courts, and Motley was important to the successful aspects of that project. As a young lawyer, Motley worked on the key higher education desegregation cases<sup>1</sup> that laid the ground for *Brown v. Board of Education*.<sup>2</sup> Before the Fair Housing Act of 1968, Motley successfully challenged rules barring blacks from accessing certain public housing projects.<sup>3</sup> Prior to the Voting Rights Act of 1965, she litigated early cases challenging whites-only primary elections and other exclusionary voting practices.<sup>4</sup> She thus helped create the foundations that we now understand as civil rights in the years before federal legislation prohibiting discrimination would provide the basis for the civil rights regime. We credit these and other cases with improving the lives of racial minorities in material ways and, more fundamentally, changing constitutional and statutory understandings of equality and citizenship.

The story of the project's limitations, however, is less linear and devoid of heroes; its end is unwritten. Since the establishment in the 1960s of constitutional rules barring state-sponsored segregation and of a statutory civil rights framework that prohibits discrimination in education, public accommodations, housing, voting, and other areas of public life, the narrative has shifted to the messier work of implementation, or

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1. E.g., *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Sipuel v. Bd. of Regents*, 332 U.S. 631 (1948).

2. 347 U.S. 483 (1954).

3. See Jack Greenberg, *Crusaders in the Courts: Legal Battles of the Civil Rights Movement* 468 (2004).

4. See, e.g., Constance Baker Motley, *Equal Justice Under Law* 66, 259 (1998) (describing her involvement in cases challenging exclusionary voting practices). For examples of such cases litigated by Motley, see *Baskin v. Brown*, 174 F.2d 391, 392-93 (4th Cir. 1949) (challenging exclusionary voting practices in South Carolina); *Rice v. Elmore*, 165 F.2d 387, 388-89 (4th Cir. 1947) (challenging whites-only primary elections).

of removing structural rather than formal limitations. Much of contemporary civil rights scholarship is occupied not only with highlighting the limitations of this first phase of the desegregation and antidiscrimination project, now characterized as unfinished business (because courts and other social institutions abandoned meaningful implementation),<sup>5</sup> but also fundamentally with exposing the limitations of the original faith that prohibitions on discrimination could transform institutions or lead to substantive equality.<sup>6</sup> There is a risk of overstating the binary between old forms of discrimination and new, between the litigation project and strategies that de-center courts, and between formal and structural forms of discrimination.<sup>7</sup> But it is hard to avoid confronting the reality that shifting political and institutional terrains pose challenges to the antidiscrimination framework represented by Motley and LDF. Today, courts are less likely to be at the center of affirmative civil rights strategy, at least around questions of race and gender inclusion.<sup>8</sup> Courts remain important, but increasingly as forums of defensive contestation rather than affirmative-rights creation. Today, civil rights groups are often

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5. See, e.g., Myron Orfield, *Milliken, Meredith, and Metropolitan Segregation*, 62 UCLA L. Rev. 364, 406–16 (2015) (discussing the Supreme Court’s narrow view of state complicity and the judiciary’s remedial power in the *Milliken* litigation).

6. See Glenn C. Loury, *The Anatomy of Racial Inequality* 94–95 (2002) [hereinafter Loury, *Anatomy of Racial Inequality*] (arguing that while discrimination is a recognized moral problem, the problem of entrenched racial disparity is often neglected); Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 Calif. L. Rev. 1, 20–26, 40–47 (2006) (describing a turn in antidiscrimination scholarship toward addressing structural inequalities and expressing a lack of faith that this structural turn will find resonance in antidiscrimination law); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 Colum. L. Rev. 458, 465–78 (2001) [hereinafter Sturm, *Second Generation*] (describing how explicit bias now operates alongside, or has been supplanted by, “subtle, interactive, and structural bias”).

7. See, e.g., Olatunde Johnson, *Leveraging Antidiscrimination*, in *A Nation of Widening Opportunities: The Civil Rights Act at 50*, at 211, 222–23 (Ellen D. Katz & Samuel R. Bagenstos eds., 2015) [hereinafter Johnson, *Leveraging Antidiscrimination*] (detailing how antidiscrimination law provided a mechanism for leveraging broader, structural reforms within and outside courts). Pragmatic and problem-solving approaches often emerge after the establishment of rights in courts. See Charles F. Sabel & William H. Simon, *The Duty of Responsible Administration and the Problem of Police Accountability* 6–42 (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Grp., Paper No. 14-420, 2015), <http://ssrn.com/abstract=2507280> (on file with the *Columbia Law Review*) (describing the trajectory of civil rights litigation against police departments and showing how litigation prompted divergent reforms in two cities). Regulatory expansions often emerge after rights establishment through litigation. See *Affirmatively Furthering Fair Housing*, 80 Fed. Reg. 42,272, 42,272 (July 16, 2015) (codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903) (strengthening a fair housing rule after successful litigation was brought to enforce a prior rule).

8. See Russell K. Robinson, *Unequal Protection*, 68 Stan. L. Rev. 151, 153–55 (2016) (arguing that the Supreme Court has become less vigorous in protecting the rights of racial minorities and women under the Equal Protection Clause).

working to preserve longstanding interpretations<sup>9</sup> or thwart new efforts to undermine rights.<sup>10</sup>

In many respects, Motley anticipated this shift away from affirmative-rights elaboration in courts. Leaving LDF in 1963, before the passage of the landmark Civil Rights Act of 1964, her belief was that most of the major legal constitutional battles had ended, and that what remained was the implementation of *Brown*.<sup>11</sup> Tellingly, before Motley's appointment to federal court, her "civil rights" work shifted to state and city government policymaking, realized in her efforts to promote community revitalization and enhance availability of affordable housing in New York.<sup>12</sup>

Motley's move to state and city government resonates with an account of why the antidiscrimination project in some respects has stalled. First is the limitation of discrimination (at least in its judicial formulations) as an explanation for persistent inequality—its dependence on the notion that removing formal barriers could alter the underlying institutional frameworks, or remedy centuries of disinvestment in communities. We can call this the formalist assumption underlying antidiscrimination law. The second and related assumption is the antidiscrimination framework's dependence on courts for norm implementation. By some accounts, courts were reluctant to advance effective remedies (such as in the area of housing and school integration), and one can debate whether this is a limitation of the judiciary's institutional competence, or reflects a failure of imagination by litigators. This reliance on courts is often embedded in a much broader critique of legal liberalism: the emphasis on "rights establishment" by organizations like LDF and the American Civil Liberties Union (ACLU).<sup>13</sup> No doubt, one might welcome legal liberalism's court-

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9. See *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project*, 135 S. Ct. 2507, 2507 (2015) (preserving the disparate impact theory under the Fair Housing Act, consistent with four decades of lower court jurisprudence).

10. See *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 206–07 (4th Cir. 2016) (challenging a North Carolina law imposing voter identification requirements and repealing ballot-access measures); *Veasey v. Abbott*, 830 F.3d 216, 216–17 (5th Cir. 2016) (en banc) (challenging a Texas voter identification law). It is important not to overstate the distinction between the current defensive posture and the quest to establish affirmative rights. It may be that affirmative rights emerge from defensive cases. The cases defending voting rights might, for instance, provide a mechanism for establishing a more robust conception of the right to vote. In addition, the effect of some of these voting rights cases has been to revive notions of equal protection claims against state legislatures. See *McCrory*, 831 F.3d at 207 (finding proof of discriminatory intent).

11. See Motley, *supra* note 4, at 205.

12. See *id.*

13. See William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 *Wm. & Mary L. Rev.* 127, 130 (2004) (defining "Legal Liberalism" as "the positions and ideas conventionally associated with the Warren Court, the ACLU, the NAACP Legal Defense Fund, Ralph Nader, and the legal aid and public defender movements"); *id.* at 136 (describing legal liberalism as a "commitment to formulating certain fundamental norms as rights, and to insisting on the priority of these

centered, lawyer-directed approach for battling incipient authoritarianism or securing basic democratic rights,<sup>14</sup> but it seems less suited to the multidimensional work of implementing social and economic inclusion.

The limitations of the antidiscrimination project have been bare for several decades, and additional challenges loom today. Economic populism (from both the right and left) often seeks to sublimate or exploit questions of race, ethnic, and gender difference.<sup>15</sup> Battles for political and social inclusion of historically disadvantaged groups are now subject to critiques of “identity liberalism.”<sup>16</sup> At the same time, social movements such as Black Lives Matter are increasingly disavowing forms of organizing and advocacy associated with old and “neo” liberalism.<sup>17</sup> Groups such as “Fight for 15,” while built on antiracism, are focused on economic inclusion through grassroots mobilization, not rights attainment in courts.<sup>18</sup> In other words, the winds may not be behind the sails of traditional rights-centered antidiscrimination reform.

Legal scholarship’s answer to the antidiscrimination framework’s limitation is often to advocate some form of exit. Scholars such as Professor Richard Ford have at times suggested abandoning the antidiscrimination framework and instead relying on social welfare inter-

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norms over other values” and as dependent on a vision of rights as “analytical, individualistic, categorical, judicially enforceable, and corrective”).

14. See Press Release, NAACP LDF, Joint Statement of Seven Civil Rights Leaders: Vow to Oppose Threats to Racial Justice Under Trump (Nov. 14, 2016), <http://www.naacpldf.org/press-release/discriminatory-voting-laws-voter-intimidation-appear-have-taken-toll> [<http://perma.cc/Y3LR-9FPZ>] (vowing to fight voter suppression, hate crimes, and other attacks on minority rights after the November 2016 election).

15. See Benjamin L. McKean, Is It Possible to Have Populism Without Racism?, Wash. Post (May 18, 2016), <http://www.washingtonpost.com/news/monkey-cage/wp/2016/05/18/is-it-po> (on file with the *Columbia Law Review*) (describing how populist movements often rely on racial resentment and xenophobia); Jedediah Purdy, Tomorrow’s Fight, Dissent: Blog (Nov. 9, 2016), <http://www.dissentmagazine.org/blog/donald-trump-victory-tomorrow-fight-socialism> [<http://perma.cc/NQZ6-QZXH>] (noting that “[s]ome good-faith critics on the left found [Bernie] Sanders’s treatment of gender and race less persuasive than his class politics” but concluding that “those generational and regional differences should not limit the movement that grew up around him”).

16. See, e.g., Mark Lilla, Opinion, The End of Identity Liberalism, N.Y. Times (Nov. 18, 2016), [http://www.nytimes.com/2016/11/20/opinion/sunday/the-end-of-identity-liberalism.html?\\_r=0](http://www.nytimes.com/2016/11/20/opinion/sunday/the-end-of-identity-liberalism.html?_r=0) (on file with the *Columbia Law Review*).

17. See Frederick C. Harris, The Next Civil Rights Movement, Dissent Mag., Summer 2015, at 34, 35–40 (attributing the novelty of the Black Lives Matter movement not only to its reliance on social media and avoidance of the charismatic-leadership model, but also to the advancement of bottom-up participatory models of democracy and eschewal of civil rights language in favor of a broader “humanity” framework).

18. See Steven Greenhouse, How to Get Low-Wage Workers into the Middle-Class, Atlantic (Aug. 19, 2015), <http://www.theatlantic.com/business/archive/2015/08/fifteen-dollars-minimum-wage/401540/> [<http://perma.cc/M425-AR6Q>] (describing the campaigns of the Fight for 15 movement that focused on direct mobilization to spur wage increases in particular labor-market sectors and legislative changes at the state and municipal levels).

ventions to reach shared societal goals.<sup>19</sup> My colleague Professor Susan Sturm has noted the limits of court-ordered remedies and emphasized the potential of institutional-level interventions operating outside of formal government regulation or lawsuits.<sup>20</sup> As I discuss below, these alternatives are appealing but have their own constraints. Generalized social welfare approaches—like today’s economic populism—often struggle to recognize distributional and resource differences affecting particular groups. They fail to recognize, for example, the effect of racial segregation in schools and housing on economic and social mobility. An emphasis on reforms at the institutional level also risks sidelining public law tools that can spur inclusion through coercion and incentives.

In this Symposium contribution, I explore the openings in public law for confronting persistent forms of exclusion at a moment in which antidiscrimination frameworks are under challenge.<sup>21</sup> My interest in particular is in expanding the regulatory mechanisms that governments utilize to spur and require inclusion. My broad suggestion in this Essay is for the development, within the equality framework, of a greater range of regulatory tools to promote inclusion. The Essay specifically explores the use of regulatory levers including competitive grants, tax incentives, contests for labor agreements and licenses, requirements attached to land-use development, and scoring systems for public contracts that reward entities for promoting inclusion. Relying on these types of regulatory incentives and levers expands the tools typically employed to advance integration and equity. It also has the advantage of building not just on tools available at the federal level, but on power that lies in the domain of state and local governments—a turn that is critical in this political moment. These regulatory regimes have the potential of moving beyond the formalist, liberalist assumptions of traditional civil rights regimes by linking questions of “identity” inclusion to economic inequality and the distribution of social and public goods. Finally, these new regulatory regimes might prove more responsive to contemporary social movements that increasingly frame their claims not around antidiscrimination, but through the lens of economic inclusion. The goal is not to offer the adoption of these regimes as a single way, but to explore new sites of innovation that are spurred by the sense of vision and possibility akin to the one that propelled Motley and LDF’s litigation in the 1950s and ’60s.

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19. See generally Richard Thompson Ford, *Rights Gone Wrong: How Law Corrupts the Struggle for Equality* (2011) (analyzing the limitations of civil rights laws).

20. See Sturm, *Second Generation*, *supra* note 6, at 489–92 (2001) (describing this new institutional-level approach in efforts by employers to remedy gender disparities and discrimination).

21. I define public law as the constitutional, statutory, and regulatory law that emerges from courts, legislatures, and administrative agencies.

Part I of this Essay explores some of the prevalent critiques of the antidiscrimination lawyering model. It argues that these critiques call into question equality law's heavy dependence on a prohibitory antidiscrimination approach. Part II offers an argument for using a broader range of regulatory levers to induce inclusion. It considers the advantages and limitations of this approach as a conceptual framework. Part III explores this broader model in the specific context of community benefits agreements and first-source hiring programs that leverage government power over contracting, tax, and zoning to promote inclusion in housing, employment, and environmental well-being.

### I. LEGACY AND LIMITS

Two debates have been central to defining the future of civil rights in the aftermath of LDF's victories in the 1960s. One is on the future of legal liberalism—the role of litigation, lawyer-driven change, and courts in addressing exclusion and inequality—and of its attendant conception of rights as the path to inclusion. The second debate concerns the continued salience of antidiscrimination law as an explanation for persisting inequality or exclusion, and as a strategic and normative framework for advancing inclusion. Critiques of legal liberalism and antidiscrimination law have been present ever since the inception of the civil rights revolution—by which I mean the post-*Brown* equality framework and the statutory antidiscrimination laws of the 1960s.<sup>22</sup> Questioning the adequacy of the framework has perhaps become more salient as economic inequality, rather than racial inequality, has come to dominate public discourse on inequality. More pointed is the emergence of a new economic populism that implicitly and explicitly questions whether “discrimination,” and particularly “race,” defines the real problem of inequality and whether racial or identity-based discourse thwarts the coalition building and organizing necessary to advance economic inclusion.<sup>23</sup>

This Part begins by exploring the doctrinal limits of the current civil rights regime and then examines the more fundamental limits of the antidiscrimination paradigm during a time of deep concern about economic exclusion. This Part ends by inviting new public law frameworks to supplement the traditional approach.

#### A. *The Limits of Legal Liberalism and a Prohibitory Enforcement Regime*

The legal liberalism critique prevalent since the 1980s and 1990s questions the lawyer-driven model of social change, characterized most

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22. See Johnson, *Leveraging Antidiscrimination*, supra note 7, at 213 (detailing the framework of the Civil Rights Act of 1964).

23. See supra note 15 and accompanying text.

prominently by the LDF model, for being too determined by elite lawyers and insufficiently connected to social movements. Another related critique is that the LDF model depends too much on courts for implementing remedies or is insufficiently attentive to how to design remedies that might produce actual change in policy domains.<sup>24</sup> Related to this critique is a questioning of the specific approach taken by LDF as too driven by the integrationist and insufficiently redistributive priorities of the elite.<sup>25</sup> Commentators have charted the paths not taken by LDF, which presumably would have been more transformative by addressing economic inequality as well as integration.<sup>26</sup>

Even when one accepts that the failure lay not in lawyerly imagination, one might argue that courts failed. Cases like *San Antonio Independent School District v. Rodriguez*<sup>27</sup> and *Milliken v. Bradley*<sup>28</sup> sought to take the antidiscrimination approach further, challenging in constitutional terms the ways in which government decisions, boundaries, and resource allocations cemented both racial and economic inequality, but each failed in court.<sup>29</sup>

Beyond constitutional law, courts thwart statutory antidiscrimination enforcement. The dominant approach in antidiscrimination law is to prohibit discrimination on the basis of an identity—i.e., disability, race, color, ethnicity, gender—and to provide remedies in court or administrative agencies for violations of that behavior. At the federal level, this is the primary structure of civil rights statutes, and it is the structure followed at the state and local levels at which statutes often prohibit a

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24. See, e.g., Stuart A. Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Social Change* 6–9 (2d ed. 2004) (“The legal perspective encourages concentration on the implementation of judicial decrees alone. The courts are, however, only modestly endowed with coercive capabilities—adequate, perhaps, for dealing with recalcitrant individuals but probably insufficient for bringing large groups or powerful institutions into line.”).

25. See, e.g., Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 *Yale L.J.* 470, 516 (1976) (questioning whether the integration focus of civil rights lawyers properly served the interests of clients or the goal of educational equity).

26. See generally Risa L. Goluboff, *The Lost Promise of Civil Rights* 10–13 (2007) (uncovering the work of lawyers in the pre-*Brown* era to address the economic exploitation of black workers in the South and arguing that the subsequent focus on *Brown* later contributed to the marginalization of claims for economic justice).

27. 411 U.S. 1 (1973) (rejecting an equal protection challenge to inequalities in the system of financing public education in Texas).

28. 418 U.S. 717 (1974) (finding that courts lack the power to issue an interdistrict desegregation remedy that sought to address school segregation between majority-black Detroit and the surrounding majority-white suburbs).

29. For an account of the *Milliken* case, see generally Orfield, *supra* note 5, at 390–416.

wider range of activity.<sup>30</sup> This form of regulation can be consistent with spurring innovation in civil rights and social-inclusion law. Government actors can expand the categories of activities or identities protected in ways that address new and emerging social problems. For instance, many states and localities—though not the federal government—prohibit discrimination on the basis of sexual orientation and gender identity.<sup>31</sup> In recent years, statutes that protect the economically vulnerable have been the particular focus of state and local innovation. In this regard, several states and localities have adopted statutes prohibiting discrimination on the basis of unemployment status, credit history, source of income, and arrest or conviction status.<sup>32</sup> These innovations are important, but as shown below, the structure of the prohibitory approach in antidiscrimination law has attendant limits. These limits arise from the judicial doctrine and the way in which the enforcement and litigation regime shapes the types of cases pursued.

1. *Doctrinal Limits.* — This prohibitory antidiscrimination approach creates important incentives for compliance. For instance, civil rights statutes frequently provide not just injunctive relief, but also attorney’s fees, compensatory damages, and even punitive damages.<sup>33</sup> Institutions that want to avoid lawsuits, administrative enforcement action, and paying attorney’s fees and damages will likely conform their behavior

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30. See Olatunde C.A. Johnson, *The Local Turn; Innovation and Diffusion in Civil Rights Law*, 79 *Law & Contemp. Probs.*, no. 3, 2016, at 115, 119–22 [hereinafter Johnson, *Local Turn*] (describing subnational statutes addressing discrimination based on source of income, credit history, arrest record, and other areas).

31. Twenty-three states have some form of protection against discrimination on the basis of sexual orientation in employment, housing, or public accommodations. See Past LGBT Nondiscrimination and Anti-LGBT Bills Across the Country, ACLU, <http://www.aclu.org/maps/non-discrimination-laws-state-state-information-map> [<http://perma.cc/UD37-6UYE>] (last visited July 31, 2017). The majority of these states have protections against discrimination based on gender identity. Non-Discrimination Laws, Movement Advancement Project, [http://www.lgbtmap.org/equality-maps/non\\_discrimination\\_laws](http://www.lgbtmap.org/equality-maps/non_discrimination_laws) [<http://perma.cc/DY7M-3SA6>] (last updated Sept. 26, 2017).

32. See Nat’l Emp’t Law Project, *Ban the Box: Major U.S. Cities and Counties Adopt Fair Hiring Policies to Remove Unfair Barriers to Employment of People with Criminal Records 1* (2013), [http://nelp.3cdn.net/495b1d813cadb030d\\_qxm6b9zbt.pdf](http://nelp.3cdn.net/495b1d813cadb030d_qxm6b9zbt.pdf) [<http://perma.cc/L8RY-VT4H>] (listing fifty cities and counties that have “banned the box,” the practice of removing arrest or conviction history questions from job applications); Molly M. Scott et al., *Poverty & Race Research Action Council, Expanding Choice: Practical Strategies for Building a Successful Housing Mobility Program 5–69* (2017), <http://www.pprac.org/pdf/AppendixB.pdf> [<http://perma.cc/T5NN-CLSM>] (compiling state statutes and local ordinances forbidding discrimination in the housing market on the basis of source of income); Amy Traub, *Ending Unjust Employment Credit Checks*, Demos (Feb. 7, 2012), <http://www.demos.org/publication/ending-unjust-employment-credit-checks> [<http://perma.cc/4U3H-6SHE>] (reporting that seven states—Washington, Connecticut, Hawaii, Illinois, California, Maryland, and Oregon—have passed laws prohibiting credit checks in employment).

33. See, e.g., Civil Rights Act of 1964, Title VII, 42 U.S.C. §§ 2000e-2(a)(2), 2000e-5 (2012).

accordingly. There is some evidence of this dynamic at play in the area of Title VII litigation. Researchers have shown that Title VII litigation can spur change not just by those subject to the litigation, but that it can have broader effects on increasing the hiring of women and minorities.<sup>34</sup> Studies have similarly shown that regions with strong fair-housing enforcement have decreased incidences of discrimination in housing rental and sales (though particularly in rental markets).<sup>35</sup>

The success of this type of regime primarily depends on the strength of private and administrative enforcement, and one key problem derives from recent constraints in litigation enforcement. This account is most clearly manifest in the area of Title VII. The volume of Title VII litigation has risen steadily over the past five decades since the passage of the Civil Rights Act of 1964, with the biggest spike occurring after passage of the Civil Rights Act of 1991, which created a damages remedy and a right to jury trial.<sup>36</sup> There is evidence that these incentives work: The 1991 Act spurred more litigation and—while it is hard to nail down all the causal mechanisms—there is evidence that it led to increased hiring of particular groups of women and minorities.<sup>37</sup> Yet there is also evidence of a countertrend in that the volume of cases does not necessarily lead to better implementation of the statutory goals. In recent years, studies have found that plaintiffs are not typically victorious, and decisions favorable to plaintiffs are eight times more likely to be reversed on appeal than decisions favoring employers.<sup>38</sup> By some accounts, the amount of Title VII litigation may make judges more hostile to those claims.<sup>39</sup> Commentators have noted that federal judges find Title VII claims to be unmeritorious, “brought by whining plaintiffs who have been given too many, not too few breaks along the way.”<sup>40</sup>

Besides potential judicial hostility rooted in the volume of Title VII litigation, the doctrinal landscape makes it hard for plaintiffs to win.

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34. See Sean Farhang, *The Litigation State: Public Regulation and Private Lawsuits in the U.S.* 201–02 (2010) (collecting research on the positive effects of Title VII litigation).

35. See Stephen L. Ross & George C. Galster, *Fair Housing Enforcement and Changes in Discrimination Between 1989 and 2000: An Exploratory Study*, in *Fragile Rights Within Cities: Government, Housing and Fairness* 177, 177–78 (John Goering ed., 2007).

36. See Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1073 (1991) (providing compensatory and punitive damages for cases of intentional discrimination and allowing demand for jury trial in such cases); Farhang, *supra* note 34, at 198–99 (showing increased litigation after the passage of the Civil Rights Act of 1991).

37. See Farhang, *supra* note 34, at 200–01.

38. See Deborah L. Rhode, *Litigating Discrimination: Lessons from the Front Lines*, 20 *J.L. & Pol’y* 325, 326 (2012).

39. See, e.g., Margaret H. Lemos, *Special Incentives to Sue*, 95 *Minn. L. Rev.* 782, 823–40 (2011) (finding that damages, fee-shifting, and other incentives to sue may have the counterproductive effect of generating judicial backlash).

40. Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 *La. L. Rev.* 555, 556 (2001).

Legal scholars have well documented these limitations. The doctrine emphasizes conscious, explicit discrimination—the idea of the individual bad actor—when discrimination in fact is often implicit, hidden in organizational practices, subtle, and complex,<sup>41</sup> the result of institutional indifference or negligence, or the result of subjective practices.<sup>42</sup> The requirement that a plaintiff identify a comparator to succeed in discrimination claims poses barriers—because comparators do not always exist—and thus renders only a narrow set of potentially discriminatory workplace practices actionable.<sup>43</sup> Even disparate impact claims often depend on the identification of a specific objective policy and practice, but these practices are often not formalized and are instead embedded in workplaces.<sup>44</sup>

This account is not to suggest that litigation enforcement of Title VII is irretrievably broken. Title VII lawyers continue to bring important cases and win.<sup>45</sup> Observers often claim that even plaintiff losses in high-profile cases have power to spur changes in institutional behavior—witness the recent conversations in Silicon Valley surrounding the potential

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41. See Sandra F. Sperino, *Rethinking Discrimination Law*, 110 Mich. L. Rev. 69, 85 (2011) (“[C]ourts largely seem to view discrimination as being motivated by an individual who possesses a bad motive.”); Sturm, *Second Generation*, supra note 6, at 468–69 (describing organizational practices that are difficult to trace “directly to intentional discrete actions of particular actors” such as harassment claims between coworkers and exclusion caused by patterns of interaction, informal norms, networking, and mentoring); Deborah M. Weiss, *A Grudging Defense of Wal-Mart v. Dukes*, 24 Yale J.L. & Feminism 119, 124–25 (2012) (discussing how the sharp division between disparate impact and disparate treatment prevents plaintiffs from addressing “structural” workplace practices that fit neither the fault-based disparate treatment model nor the strict-liability-based disparate impact model); Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 Colum. L. Rev. 1357, 1366 (2009) (referring to the disparate treatment–disparate impact framework of Title VII as a “theoretical straitjacket with two arms”).

42. See Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 Ala. L. Rev. 741, 745 (2005) (“Extensive social psychological literature documents the ways in which unconscious racism and sexism, and the consequent stereotyping, operate in employment decisionmaking.”).

43. See Suzanne B. Goldberg, *Discrimination by Comparison*, 120 Yale L.J. 728, 731, 750 (2011) (describing the tendency of judges in antidiscrimination cases to rely on comparisons between plaintiffs and majority groups in order to find discrimination).

44. See Sperino, supra note 41, at 84–86 (detailing difficulties facing plaintiffs in disparate impact cases).

45. See, e.g., *Lewis v. City of Chicago*, 560 U.S. 205, 212 (2010) (holding written tests for admission into the Chicago Fire Department disparately impacted black applicants in violation of Title VII); *United States v. City of New York*, 717 F.3d 72, 99 (2d Cir. 2013) (finding selection practices of the New York City Fire Department to have an unjustified disparate impact on Latino and black applicants); *Wright v. Stern*, 553 F. Supp. 2d 337, 339 (S.D.N.Y. 2008) (settling claims of systemic discrimination against the New York City Department of Parks and Recreation for racially segregated job assignments and discrimination in pay and promotion); *Settlement Agreement and Joint Stipulation, Cogdell v. Wet Seal, Inc.*, No. SACV 12-01138 AG (C.D. Cal. June 11, 2013), ECF No. 78-1 (settling claims of systemic discrimination in hiring and promotion by a large retailer).

of a plaintiff's unsuccessful employment discrimination litigation to "disrupt" the gender practices of venture capital and tech firms.<sup>46</sup> In addition, litigation enforcement by administrative agencies can circumvent some of the constraints that attend enforcement by private actors. In the employment area, for instance, the Equal Employment Opportunity Commission (EEOC) can maintain systemic litigation without first surmounting the procedural hurdles set out in Rule 23 of the Federal Rules of Civil Procedure.<sup>47</sup> The EEOC can also pursue investigations without an actual complainant by filing a commissioner's charge.<sup>48</sup>

Nor is this to suggest that the problem is simply too much litigation. Particularly in areas outside of Title VII, such as fair housing, one might diagnose the problem as too little litigation. There is evidence that private enforcement is scant and penalties are too low to curb discriminatory behavior in housing practices.<sup>49</sup> As a result, one might imagine a set of changes within this prohibitory litigation enforcement regime that would make it more effective, like increased government enforcement and more litigation by plaintiffs. Yet, even if one were to pursue improvements within the litigation realm, the limitations of the existing approach should lead us to explore whether we might gain more from alternative approaches.

2. *Varying Litigation Incentives.* — A second set of problems stems from variation in the incentives for litigation, which inherently limit efficacy in a complaint-driven enforcement regime. Lawyers will have incentives to bring cases that they are able to win (or to extract a settlement from) and that yield higher damages. In the employment context with the difficult doctrinal environment detailed above, there is some

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46. See Farhad Manjoo, *Ellen Pao Disrupts How Silicon Valley Does Business*, N.Y. Times (Mar. 27, 2015), <http://www.nytimes.com/2015/03/28/technology/ellen-pao-disrupts-how-silicon-valley-does-business.html> (on file with the *Columbia Law Review*). Of course, whether this will produce meaningful change remains to be seen.

47. See Leslie E. Silverman et al., *Systemic Task Force Report to the Chair of the Equal Employment Opportunity Commission 2* (2006), [http://www.eeoc.gov/eeoc/task\\_reports/upload/systemic.pdf](http://www.eeoc.gov/eeoc/task_reports/upload/systemic.pdf) [<http://perma.cc/K99V-BGFW>] (noting that the EEOC was well positioned to tackle systemic discrimination because "unlike private litigants, EEOC need not meet the stringent requirements of Rule 23 of the Federal Rules of Civil Procedure in order to maintain a class suit in federal court").

48. See *id.* at 1 ("Title VII [of the Civil Rights Act of 1964] also gave EEOC Commissioners the authority to issue charges on their own initiative.").

49. See Ross & Galster, *supra* note 35, at 179 (arguing that antidiscrimination enforcement efforts are "unlikely to create an effective deterrent against housing discrimination so long as the system relies almost exclusively on individual[s] . . . recognizing that they have been victimized and then filing suit"); Robert G. Schwemm, *Private Enforcement and the Fair Housing Act*, 6 *Yale L. & Pol'y Rev.* 375, 379–81 (2015) (finding that the costs of litigation and low penalties limit the efficacy of private enforcement).

evidence that this means avoiding Title VII cases entirely.<sup>50</sup> And even in the domain of Title VII litigation, cases involving firing and promotion dominate over cases involving hiring.<sup>51</sup>

In general, front-end discrimination is harder to remedy in a prohibitory, complaint-driven enforcement regime, particularly when the plaintiff's stakes are low. In the area of housing, for instance, high levels of documented discrimination in rental markets have not produced high levels of enforcement litigation.<sup>52</sup> This is likely because discrimination is hard for victims to identify (particularly when it involves steering to particular neighborhoods), and the stakes in rental housing may be lower for a victim who eventually finds housing elsewhere.<sup>53</sup>

Here again, one might address these limitations in part by sharpening current enforcement strategies. In housing, greater reliance on litigation arising from housing testers would mean that actual, injured plaintiffs would not need to come forward.<sup>54</sup> In the area of employment, the EEOC has in past years indicated that it will “[e]xplore [the] [u]se of [m]atched-[p]air [t]esting,” but it currently operates no testing program.<sup>55</sup> While courts are not settled on the ability of employment testers to recover damages and injunctive relief,<sup>56</sup> the results of audit studies might

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50. See Federal Judicial Caseload Statistics 2014, U.S. Courts, <http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2014> [<http://perma.cc/Z97F-FXTJ>] (last visited July 31, 2017). In 1994 there were 1,545 Fair Labor Standards Act cases filed in federal court; in 2004 there were 3,426; and, in 2014 there were 8,126. Seyfarth Shaw LLP, FLSA Cases 1990, 1993–99, 2000–14 (2014), <http://www.wagehourlitigation.com/wp-content/uploads/sites/215/2014/05/FLSA-Cases-20141.pdf> [<http://perma.cc/S5KE-ERMA>].

51. See Statutes by Issue (Charges Filed with EEOC): FY2010–FY2016, EEOC, [http://www.eeoc.gov/eeoc/statistics/enforcement/statutes\\_by\\_issue.cfm](http://www.eeoc.gov/eeoc/statistics/enforcement/statutes_by_issue.cfm) [<http://perma.cc/SST2-UYZX>] (last visited July 31, 2017); see also John J. Donohue III & Peter Siegelman, The Changing Nature of Employment Discrimination Litigation, 43 *Stan. L. Rev.* 983, 1015–17 (1991) (noting that, while hiring cases dominated EEOC and court dockets in 1966, by 1985 wrongful termination charges significantly outnumbered hiring cases).

52. See Schwemm, *supra* note 49, at 379–80 (describing a range of barriers to effective private enforcement).

53. See Olatunde Johnson, The Last Plank: Rethinking Public and Private Power to Advance Fair Housing, 13 *U. Pa. J. Const. L.* 1191, 1202 (2011) (describing disincentives to litigation by victims of housing discrimination). This is of course why the ability to bring cases by fair housing testers is such an important component of that regulatory regime. See Schwemm, *supra* note 49, at 381–83 (explaining the importance of tester litigation in the housing context).

54. See Schwemm, *supra* note 49, at 381–83 (describing uses of testers in fair housing litigation).

55. See E-RACE Goals and Objectives, EEOC, <http://www.eeoc.gov/eeoc/initiatives/e-race/goals.cfm> [<http://perma.cc/6NZW-GH64>] (last visited July 31, 2017).

56. The Supreme Court has not ruled on the question of whether Title VII grants standing for employment testers (Title VII has language different from that in the Fair Housing Act (FHA)), and lower courts are split on the question. Compare *Fair Emp't Council of Greater Wash., Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1281 (D.C. Cir. 1994) (finding that employment testers lacked standing to sue because they did not actually

still prove useful for conducting investigations and for providing insight into industry practices.<sup>57</sup> These tweaks would be important but likely inadequate to address the fundamental problem for the category of low-damages, front-end discrimination cases.

These limits therefore invite us to consider how much of the future of inclusionary law can depend on lawyers and courts.

B. *Limits of the Antidiscrimination Paradigm in the Era of Economic Populism*

The second critique of the civil rights paradigm relates to the more fundamental limits of the antidiscrimination approach and its capacity to address group-based subordination and economic inequality. In many respects, this critique is also longstanding: that the antidiscrimination framework emphasizes formal inclusion at the expense of substantive inclusion, thus leaving behind those who lack the economic means and capital to make use of opportunities.<sup>58</sup> More recently, legal and social science commentators have observed that discrimination is at most a partial explanation for inequality, and that antidiscrimination law is in fact increasingly irrelevant.<sup>59</sup> Even if one does not accept that anti-

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intend to form an employment contract with the employer, though allowing organizational standing for the group that sponsored the testers), with *Kyles v. J.K. Guardian Sec. Servs., Inc.*, 222 F.3d 289, 297 (7th Cir. 2000) (finding that employment testers had standing to sue under Title VII, reasoning that the FHA and Title VII both take “broad aim at discrimination in their respective sectors and in that sense are the functional equivalents of one another”). In regulatory guidance, the EEOC has taken the position that testers can file charges and litigate claims of employment discrimination. See Notice No. 915.002, Enforcement Guidance: Whether “Testers” Can File Charges and Litigate Claims of Employment Discrimination, EEOC (May 22, 1996), <http://www.eeoc.gov/policy/docs/testers.html> [<http://perma.cc/C8WA-NPYV>].

57. The EEOC has tried to initiate matched-pair testing over the past several decades but has abandoned the project in the face of opposition from some members of Congress. See Michael J. Yelnosky, *Employment Testers Revisited*, in *Labor and Employment Law Initiatives and Proposals Under the Obama Administration: Proceedings of the New York University 62nd Annual Conference on Labor* 685, 687 (Zev J. Eigen & Samuel Estreicher eds., 2011) (describing how in 1998 Congress conditioned a budgetary increase for the EEOC upon the Agency’s abandonment of its request for funding for testers). The EEOC has directed funding to private groups to conduct such testing. See *id.* (noting that after Congress blocked the EEOC’s testing program, the Agency provided \$200,000 to private groups to carry out a testing program).

58. For an account of this early critique of Title VII of the 1964 Civil Rights Act, see generally Johnson, *Leveraging Antidiscrimination*, *supra* note 7, at 213–17.

59. See Ford, *supra* note 19, at 10–14 (arguing that “civil rights litigation and activism don’t do enough to redress today’s most serious social injustices, many of which aren’t caused by overt prejudice or simple discrimination”); Loury, *Anatomy of Racial Inequality*, *supra* note 6, at 92–93 (arguing that discrimination should be “demoted, dislodged from its current prominent place in the conceptual discourse on racial inequality in American life”); Ralph Richard Banks & Richard Thompson Ford, (How) Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality, 58 *Emory L.J.* 1053, 1120 (2009) (arguing that if “we are legitimately concerned about substantive disparities” then the “goal of eliminating discrimination is too modest, not ambitious enough”).

discrimination law is irrelevant (which as I explain below, I do not<sup>60</sup>), it is not hard to discern a mismatch between antidiscrimination law and the complex problems of exclusion today. To some extent legal scholars have recognized this mismatch: Modern day discrimination is often characterized as subtle, implicit, and the result of “favoritism” rather than of simple bias.<sup>61</sup> Yet, the problem extends further. Discrimination, even if we incorporate notions of implicit bias, is but one phenomenon that generates forms of racial or gender exclusion. Discrimination interacts with other mechanisms, many of which are rooted in longstanding patterns of economic exclusion including affordability of housing and social services, segregation, access to training and education, and social capital networks.<sup>62</sup> The mismatch occurs because antidiscrimination frameworks often assume a type of formal equality among individuals or groups.<sup>63</sup> In the area of employment, for instance, the antidiscrimination model takes workers where it finds them, and thus it fails to provide training or address other barriers to inclusion such as transportation or childcare.

Similarly, Professor Sam Issacharoff has advanced the notion of a mismatch between the antidiscrimination model and contemporary problems in the domain of voting.<sup>64</sup> There is a relation between Professor Issacharoff’s mismatch notion and the one invoked here: a realization that discrimination remedies are too limited to address the full range of barriers to participation and inclusion. For my part, the end result of a mismatch analysis is not to claim that race and ethnicity are irrelevant today. Rather, it is to recognize the complex ways, beyond and including discrimination, in which race and ethnicity might remain relevant. This could include accounting for the role that place, networks, institutional practice, and political and social capital play in shaping opportunity.

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60. See *infra* notes 72–82 and accompanying text (rejecting a binary approach to antidiscrimination law and discussing the merits of antidiscrimination litigation).

61. See, e.g., Sturm, *Second Generation*, *supra* note 6, at 468–69 (describing complex factors that generate exclusion); see also *supra* notes 41–44 and accompanying text (discussing the limitations of doctrine that emphasizes explicit discrimination as well as the realities of implicit discrimination).

62. See, e.g., Derek A. Neal & William R. Johnson, *The Role of Premarket Factors in Black-White Wage Differences*, 104 *J. Pol. Econ.* 869, 873–74 (1996) (finding that differences in educational achievement among fifteen- to eighteen-year-olds explains a substantial percentage of the black–white gap in wages among young men).

63. This is manifest, for instance, in the reliance on comparators for proof of employment discrimination, which Professor Suzanne Goldberg has described in her work. See, e.g., Goldberg, *supra* note 43, at 764–70 (arguing that reliance on comparators displaces thicker, more contextual understandings of discrimination).

64. Samuel Issacharoff, *Comment, Beyond the Discrimination Model on Voting*, 127 *Harv. L. Rev.* 95, 120 (2013) (urging a move beyond race-based antidiscrimination remedies to address barriers to voter access).

One consequence of this mismatch may be a disconnect between the antidiscrimination law framework and what appears to motivate individuals and groups on the ground. The availability of jobs at all, as well as pay and job conditions (for instance, payment of living wages and availability of sick leave), may seem more important from the perspective of advocates and workers than antidiscrimination law. With lower-wage workers concentrated in poorly paid retail jobs, reformers today concentrate on the strategy of “raising the floor” of wages and protections on which many workers (including women and people of color) find themselves reliant.<sup>65</sup>

Again, I do not believe that antidiscrimination law is wholly irrelevant. Along with others, I have devoted time to thinking about how the current litigation regime might be strengthened.<sup>66</sup> Yet, I think there are inherent limitations to the current antidiscrimination approach. As indicated above, it is a framework skewed against less-resourced victims of exclusion, and one that struggles to deal with current complexities.<sup>67</sup> Beyond that, part of the implication of the preceding analysis is that the current system seems a rather circuitous way of reaching regulatory goals. In order to get entities to incorporate practices of inclusion at the front end, it requires private initiation by relatively weak parties at the back end, or *ex post*, after the alleged discrimination has occurred.

In addition to these internal critiques, the marginalization of anti-discrimination law in recent discourse to advance economic inequality has also become a problem. Major academic pieces on economic inclusion may assume a baseline of civil rights law, but civil rights are often not featured in contemporary strategies to achieve economic equality, whether centered around courts or policy domains.<sup>68</sup>

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65. Reformers and low-wage-worker groups currently organize around the strategy of “raising the floor,” which refers primarily to efforts to raise the minimum wage, combat wage theft, and address occupational hazards. See, e.g., Ctr. on Wis. Strategy, *Raising the Floor Milwaukee: Toward Better Wages and Labor Standards for Low-Wage Workers* 10 (2013), [http://www.cows.org/\\_data/documents/1491.pdf](http://www.cows.org/_data/documents/1491.pdf) [<http://perma.cc/YDH3-V5GT>]; Fiscal Policy Inst., *Raising the Floor: How Wage Standards Protect Workers, Build Communities and Strengthen Our City* 5 (2014), <http://fiscalpolicy.org/wp-content/uploads/2014/12/Raising-the-Floor-Wage-Standards-12-16-2014.pdf> [<http://perma.cc/Q2UT-AKBP>]. Increasingly groups are emphasizing concepts of economic mobility and including the notion of “building ladders” along with raising the floor. See, e.g., Maureen Conway & Steven L. Dawson, Aspen Inst., *Raise the Floor and Build Ladders: Workforce Strategies Supporting Mobility and Stability for Low-Income Workers* 6, 8 (2016), <http://assets.aspeninstitute.org/content/uploads/2016/04/Raise-the-Floor-and-Build-Ladders-The-Aspen-Institute-2016.pdf> [<http://perma.cc/A76G-RNCJ>].

66. See Johnson, *Leveraging Antidiscrimination*, *supra* note 7, at 217–22 (describing promising administrative law interventions on the basis of Title VII and Title VI of the 1964 Civil Rights Act).

67. See *supra* notes 35–40 and accompanying text.

68. See K. Sabeel Rahman, *Democracy Against Domination* 24 (2017) (proposing as a method of checking economic domination a renewed emphasis on the “tradition of administrative law that emphasizes interest representation, participation, and contestation

In part, this omission might reflect a tendency to sideline race when addressing economic inequality.<sup>69</sup> Or it may be the result of an empirical debate that assumes discrimination is not a meaningful contributor to economic inequality.<sup>70</sup> But the exclusion likely also reflects a normative political choice in which discussion of antidiscrimination law (“race”) may subvert the purportedly broader strategies needed to address economic inequality. This choice is manifest in contemporary discourse, which disconnects what one might call economic inequality from antidiscrimination remedies. For example, social movements often direct their momentum to policy reforms to help low-wage workers, such as minimum wage increases and paid sick leave, rather than to civil rights remedies. Indeed, as Professor Kate Andrias and others have observed, law—at least its judicially enforced strand—is not central to social movement organizing on economic inequality.<sup>71</sup>

### C. *Beyond the Binaries*

Given these critiques it is easy to then construct a binary. On one side we have antidiscrimination law, associated with courts, divorced from social movements, concerned with formal equality, and, perhaps above all, a relic of the past.<sup>72</sup> On the other side we have at least the aspiration of something newer, more dynamic, and responsive to contemporary social and economic inequality, with normative goals that go beyond exclusion and inequality and that resonate with social movements.<sup>73</sup>

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in the regulatory process”); Joseph Fishkin & William Forbath, Reclaiming Constitutional Political Economy: An Introduction to the Symposium on the Constitution and Economic Inequality, 94 Tex. L. Rev. 1287, 1289 (2016) (explaining that the conventions of contemporary constitutional discourse have invoked civil rights only to limit policymaking, rather than to draw from them policy goals, such as economic equality); Olatunde C.A. Johnson, Inclusion, Exclusion, and the “New” Economic Inequality, 94 Tex. L. Rev. 1647, 1649–50 (2016) [hereinafter Johnson, Inclusion, Exclusion] (explaining that contemporary strategies to achieve economic equality largely do not rely on antidiscrimination law).

69. See Johnson, Inclusion, Exclusion, *supra* note 68, at 1647–48 (asking whether race is an “unwelcome intruder” in the “new” discourse on economic inequality).

70. See, e.g., Glenn C. Loury, Discrimination in the Post-Civil Rights Era: Beyond Market Interactions, J. Econ. Persp., Spring 1998, at 117, 121 (arguing that “market discrimination is only one small part of” contemporary racial disparities).

71. See Kate Andrias, Building Labor’s Constitution, 94 Tex. L. Rev. 1591, 1621 (2016) (arguing that “common law courts—faithful to precedent, incremental in approach, drawn from the elite—will adopt the constitutional arguments that progressive constitutional law scholars urge”).

72. See *supra* notes 58–60 (citing the work of Richard Thompson Ford, Glenn Loury, Susan Sturm, and others that see civil rights remedies as “first-generation” or outmoded).

73. See *supra* note 65 (providing examples of contemporary organizing to advance economic inclusion); see also Andrias, *supra* note 71, at 1603–05 (discussing the efforts of the Fight for 15, Domestic Workers Alliance, and other low-wage worker campaigns as examples of contemporary organizing to advance economic inclusion).

It is important not to overstate this binary, particularly now when litigation to address state-sponsored discrimination has renewed importance.<sup>74</sup> The current moment makes plain the continued salience of litigation and it bears emphasis that civil rights litigation, as discussed below, is much more rich and varied than the literature allows.

For one, much of the critique of the limits of lawyer-driven antidiscrimination law may be overstated. Even as to the paradigmatic LDF strategy to dismantle formal segregation in education, critics may inadequately capture the ways in which law interacted with groups and social movements.<sup>75</sup> Commentators have offered accounts of contemporary civil rights legal campaigns to address transportation, environmental, and housing inequities in which civil rights legal strategies are deeply enmeshed with social movements and groups.<sup>76</sup>

Most recently, litigation has become resurgent in efforts to address inequality and violations of civil rights and civil liberties, with the courts emerging as a bulwark against potential government excesses. With some success, advocates are litigating in courts to address voter identification laws, changes to voter access provisions, and partisan and racially discriminatory gerrymanders, as well as equal protection and other claims arising out of the Trump Administration's actions tightening restrictions on immigration, asylum, and visitation to the United States.<sup>77</sup>

Nor is it true that litigation aimed at antidiscrimination and litigation to address economic inclusion are irreconcilable. Early Title VII cases that LDF pursued after the enactment of the 1964 Civil Rights Act sought to open up semiskilled industries to lower-wage workers, thereby

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74. See *infra* note 77 (providing examples of litigation).

75. See, e.g., Ann Southworth, *Taking the Lawyer Out of Progressive Lawyering*, 46 *Stan. L. Rev.* 213, 228–31 (1993) (reviewing Gerald P. López, *Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice* (1992)) (describing ways in which lawyers engage with community-based organizations).

76. See Penda D. Hair, *Rockefeller Found., Louder than Words: Lawyers, Communities and the Struggle for Justice* 85–140 (2001), <http://www.racialequitytools.org/resourcefiles/hair.pdf> [<http://perma.cc/V7P9-HC3T>] (describing the work of civil rights litigators who worked with community-based organizations to advance racial equity in transportation, the environment, and other domains).

77. See, e.g., *Cooper v. Harris*, 137 S. Ct. 1455, 1481–82 (2017) (affirming the trial court's conclusion that race was the predominant rationale for the redrawing of two congressional districts after the 2010 census in violation of the Voting Rights Act); *County of Santa Clara v. Trump*, Nos. 17-cv-00574-WHO & 17-cv-00485-WHO, 2017 WL 1459081, at \*29 (N.D. Cal. Apr. 25, 2017) (granting Santa Clara's and San Francisco's motions for a preliminary injunction against enforcement of the Trump Administration's Executive Order threatening to terminate federal funding for jurisdictions that it deemed out of compliance with particular immigration enforcement provisions); Plaintiff's Original Complaint at 2, *Veasey v. Perry*, 71 F. Supp. 3d 627 (S.D. Tex. 2014) (No. 2:13-cv-193 (NGR)) (challenging a Texas voter identification law).

using antidiscrimination law as a lever to expand economic opportunity.<sup>78</sup> Efforts to address public housing segregation and siting practices that concentrate low-income housing in urban areas have relied on equal protection and fair housing law.<sup>79</sup> The remedies that the public housing desegregation cases launched—including the famous *Gautreaux* program in which low-income minority residents in public housing were given the opportunity to live in low-poverty neighborhoods,<sup>80</sup> and its progeny, the modern choice voucher programs<sup>81</sup>—have their genesis in the civil rights framework of desegregation but are effectively antipoverty strategies.<sup>82</sup>

But even as one avoids creating a sharp binary that casts courts and antidiscrimination law as irrelevant to address racial, ethnic, and economic inequities, the limitations of past litigation and public law strategies would seem to demand supplemental approaches. The limits of antidiscrimination law should lead us to examine (1) the possibilities of strategies that extend beyond the prohibitory antidiscrimination regime as a framework to advance inclusion, attending to substantive and resource disparities that do not fit well within the formal equality model; (2) a broader range of strategies that, while not sidelining courts, incorporate other levers to prompt inclusion; and (3) models that engage social movements and local groups, including those not organized around antidiscrimination.

Scholarly responses to the limitations of the antidiscrimination framework often turn to strategies that exit the framework of public law as it operates in courts or regulation. Professor Ford argues that social reformers and advocates should focus less on civil rights claims in courts as a way of addressing contemporary racial inequality, and more on policy reforms and social welfare programs that take place outside of courts and that more directly address the skills and resource gaps that

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78. See Johnson, *Leveraging Antidiscrimination*, *supra* note 7, at 217 (explaining that antidiscrimination reformers' strategies were cognizant of social and economic inequality, as shown by their targeting of discrimination among blue-collar workers in the manufacturing and construction industries).

79. See, e.g., *Thompson v. HUD*, 348 F. Supp. 2d 398, 411 (D. Md. 2005) (finding the Department of Housing and Urban Development to have concentrated public and low-income housing in Baltimore City in violation of the Fair Housing Act of 1968).

80. For an account of the *Gautreaux* program, see generally Alexander Polikoff, *Waiting for Gautreaux: A Story of Segregation, Housing, and the Black Ghetto* 219–69 (2006).

81. See Housing Choice Voucher Program, HUD, [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/public\\_indian\\_housing/programs/hcv/about/fact\\_sheet](http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/hcv/about/fact_sheet) [<http://perma.cc/UH5U-LFHB>] (last visited July 31, 2017).

82. See Raj Chetty et al., *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*, 106 *Am. Econ. Rev.* 855, 859–60 (2016) (finding positive earnings and education effects for children who, through housing voucher programs, moved to lower-poverty neighborhoods before the age of thirteen).

contribute to resource inequities.<sup>83</sup> This is in many ways the approach that Constance Baker Motley herself adopted after working at LDF, through which she sought to advance equality through policy reform in state and local government.<sup>84</sup>

Professor Sturm has emphasized the importance of intervening at the institutional level, shifting from court-ordered remedial approaches to approaches that emphasize institutional redesign—in education, employment, and other areas—toward goals of “full and fair participation.”<sup>85</sup>

These social welfare approaches and institutional problem-solving approaches are part of a necessary continuum of responses, but they also should not delimit the range of responses. The importance of public law is its ability to encourage institutions and governments to adopt the types of statutory, judicial, and regulatory mechanisms that can promote inclusion. One virtue of the antidiscrimination framework is its emphasis on public law tools—which operate through coercion, penalties, incentives, and rewards—grounded in a normative concern about distributional fairness. The challenge, it seems, is to attend to the limitations of the civil rights paradigm while harnessing some of its helpful attributes. In the next Part, I consider the possibility of a broader set of approaches, grounded in regulatory public law, that seek to promote inclusion across a range of dimensions. This next Part offers an argument for broadening the public law and regulatory architecture that we associate with equality law.<sup>86</sup>

## II. REGULATING FOR INCLUSION: INNOVATION AND PLURALISM

Examining the potential and limitations of the existing regime invites consideration of regulatory mechanisms that might induce governments and private actors to promote inclusion.

As indicated in Part I, this exploration emphasizes regulatory tools that (1) move beyond the prohibitory antidiscrimination approach by prompting more front-end change by public and private institutions, (2) use a broader range of leverage points, and (3) have the possibility of engaging social movement actors and local groups. This Part explores potential new models and then grapples with the potential limits or critiques of these approaches.

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83. See Ford, *supra* note 19, at 9–14.

84. See Motley, *supra* note 4, at 205.

85. Susan Sturm, *The Architecture of Inclusion: Advancing Workplace Equity in Higher Education*, 29 *Harv. J.L. & Gender* 247, 250 (2006).

86. See *id.* at 250–52 (advancing a notion of an “architecture” necessary to build full participation within institutions).

A. *Exploring Paradigms*

This section argues that the equality law regulatory model relies on an insufficiently broad set of enforcement and inducement tools. Many contexts of public regulation outside of equality law engage a fuller range of public law and private law regulatory tools, moving from “hard” forms of regulation—such as in command-and-control regulation and prohibitions enforced by administrative enforcement and litigation—to “softer” approaches—such as incentives, grants, disclosure, and even private rating systems.<sup>87</sup> Regulations that invoke the full continuum are not entirely absent in the equality law regime. For instance, the EEOC has long required employers to submit data on the race, ethnicity, and gender of their workforce<sup>88</sup> and recently extended this requirement to gender pay data.<sup>89</sup> Conditional spending programs, particularly in the area of housing and transportation, have become sites of new regulatory forms that move beyond the prohibitory approach to require the development of front-end rules of inclusion self-assessment as well as specific interventions that go beyond discrimination.<sup>90</sup>

A first possibility builds on the insights of conditioned spending, which rewards entities and institutions that adopt inclusionary practices

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87. See, e.g., Florencia Marotta-Wurgler, *Understanding Privacy Policies: Content, Self-Regulation, and Markets* 6–16 (N.Y. Univ. Law Sch. Law & Econ. Research Paper Series, Working Paper No. 16-18, 2016), <http://papers.ssrn.com/abstract=2736513> (on file with the *Columbia Law Review*) (describing a self-regulatory approach that relies on disclosure in consumer protection and privacy regulation). There is a broad and rich literature on the potential benefits as well as limitations of various incentive-based approaches on individual and firm behavior. See generally Ian Ayres, *Carrots and Sticks: Unlock the Power of Incentives to Get Things Done* (2010) (relying on behavioral economics literature to advance ideas for personal well-being); Richard H. Thaler & Cass Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* 6–8 (2008) (making the case that attention to the architecture of choice, including the use of seemingly less intrusive “nudges,” can advance regulatory goals); Terry F. Buss, *The Effect of State Tax Incentives on Economic Growth and Firm Location Decisions: An Overview of the Literature*, 15 *Econ. Dev. Q.* 90 (2001) (reviewing the literature on use of tax incentives to promote economic growth); Kristen Underhill, *When Extrinsic Incentives Displace Intrinsic Motivation: Designing Legal Carrots and Sticks to Confront the Challenge of Motivational Crowding-Out*, 33 *Yale J. on Reg.* 213 (2016) (exploring literature on the potential effect of incentives on intrinsic motivation (motivational crowding-out), but concluding that attention to the design of these incentives can minimize crowding-out effects).

88. See EEO-1 Frequently Asked Questions and Answers, EEOC, <http://www.eeoc.gov/employers/eo1survey/faq.cfm> [<http://perma.cc/BJB9-735M>] (last visited July 31, 2017) (explaining the submission requirements for employers under EEOC regulations).

89. Questions and Answers: The Revised EEO-1 and Summary Pay Data, EEOC, <http://www.eeoc.gov/employers/eo1survey/2017survey-qanda.cfm> [<http://perma.cc/6N87-Y2MW>] (last visited July 31, 2017).

90. See Olatunde C.A. Johnson, *Overreach and Innovation in Equality Regulation*, 66 *Duke L.J.* 1771, 1800–04 (2017) [hereinafter Johnson, *Overreach and Innovation*] (describing new regulatory approaches that have emerged from conditioned spending programs).

that go further than baseline requirements of antidiscrimination. One framework is publicly funded competitive grant programs. This approach builds on conditioned spending's baseline of requirements to reward entities that develop innovative strategies to meet equity goals. Competitive grants have the potential benefit of spurring new programs and can leverage government funds in areas typically outside the reach of current equality directives (particularly the private, nongovernmental sector). Federal educational law has relied on this model, many would say with mixed success,<sup>91</sup> and other federal agencies began to rely on this grant incentive approach in the Obama Administration.<sup>92</sup> In addition to leveraging government funds to develop new strategies for inclusion, the approach has the advantage of combining agency resources to meet multiple goals.<sup>93</sup> For instance, in the area of employment, governments could provide skills training for workers while also being attentive to removing discriminatory barriers to advance inclusion of particular groups. In the area of housing, governments could develop grant programs that would require building affordable housing while also advancing civil rights goals of nondiscrimination and integration. While this grant-making approach has been used in a handful of contexts at the

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91. This "race to the top" model has of course been used to mixed success in the area of education, hampered by political conflict over the policy approach. See Valerie Strauss, *Obama's Race to the Top Loses All Funding in 2015 Omnibus Spending Bill*, *Wash. Post* (Dec. 10, 2014), <http://www.washingtonpost.com/blogs/answer-sheet/wp/2014/12/10/obamas-race-to-the-top-loses-all-funding-in-2015-omnibus-spending-bill/> (on file with the *Columbia Law Review*).

92. Three federal departments—HUD, the Department of Transportation, and the Environmental Protection Agency—have initiated a "partnership for sustainable communities," which awards money to support state and local efforts to build affordable housing, redesign transportation infrastructure, and promote environmental efficiency. See About Us, P'ship for Sustainable Cmty., <http://www.sustainablecommunities.gov/mission/about-us> [<http://perma.cc/G387-X8VY>] (last visited July 31, 2017) (describing 2015 goals as promoting using "agency resources to advance Ladders of Opportunity for every American and every community . . . helping communities adapt to a changing climate, while mitigating future disaster losses . . . [and] supporting implementation of community-based development priorities"); see also Apprenticeship USA Investments, DOL, <http://www.dol.gov/featured/apprenticeship/grants> [<http://perma.cc/8YNP-UTCX>] (last visited Aug. 11, 2017) (describing up to \$100 million in grants financed by a user fee generated by the H-1B nonimmigrant visa program). The grants competition will "focus on public-private partnerships between employers, business associations, joint labor-management organizations, labor organizations, training providers, community colleges, local and state governments, the workforce system, non-profits and faith-based organizations." *Id.*; see also TechHire, DOL (Nov. 9, 2015), <http://www.dol.gov/dol/grants/funding-ops.htm> [<http://perma.cc/64LU-SS7Q>] (last updated Jan. 17, 2017) (announcing \$100 million in grants to support innovative approaches to moving low-skilled workers onto the fastest paths to well-paying information technology and high-growth jobs in in-demand industries such as healthcare, advanced manufacturing, and financial services).

93. See Johnson, *Overreach and Innovation*, *supra* note 90, at 1794–98 (describing emergent grant programs at the federal level).

federal level, it might be used more broadly by governments at every level to advance inclusion. For instance, states or localities could use their resources to advance a similar approach—placing inclusionary requirements on grants for workforce development or rewarding land-use redevelopment grants to entities that promote inclusionary housing policies.

Beyond the competitive grant model, another approach would be to attach a set of mandates or goals to a more expansive swath of government benefits or programs. Governments design tax programs and issue tax incentives, make zoning decisions, issue permits and licenses, and purchase services. Any of these might be areas for leveraging inclusion. Many regions currently use tax incentives to spur affordable housing development.<sup>94</sup> The question is whether this approach could be undertaken more widely and in ways that cut across traditional categories. For instance, localities could rezone land or provide tax incentives to entities that engage in partnerships to train and hire traditionally excluded workers. They could also fast-track permits or licenses for businesses that engage in inclusive hiring practices. The general principle is that entities interact with government in a range of settings—and many of those settings might become leverage points for inclusion.

In the context of employment, these regulatory leverage points might include procurement and other mechanisms such as zoning, tax credits, licensing, and negotiated labor agreements. For instance, local governments can enact a set of regulatory requirements and incentives for hiring and training minority and traditionally excluded workers, and for encouraging linkages between credentialing institutions (high schools, trade schools, community-based organizations, and community colleges) and employers. To address the skills, social capital, and network deficits, the regulatory tools must do more than create hiring requirements; they must also create linkages between those entities that help workers develop skills and capacity and those that hire workers. The specific regulatory tools and industries targeted would depend on the local and regional context.

For example, contractors and labor unions working on major, multiyear public projects could be directed to agree to a workplace equity and inclusion component. The inclusionary agreement may require the hiring and training of graduates from particular training schools or community workforce programs that train and support historically excluded groups, or of a certain percentage of local workers on a craft-by-

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94. See, e.g., 80/20 Housing Program, N.Y. State Homes & Cmty. Renewal, <http://www.nyshcr.org/Topics/Developers/MultifamilyDevelopment/8020HousingProgram.htm> [<http://perma.cc/3JWD-MAMR>] (last updated Mar. 30, 2011) (offering tax-exempt financing to multifamily rental developments in which at least twenty percent of the units are set aside for low-income residents).

craft basis to the extent allowable by local law. Furthermore, race, ethnicity, and gender hiring goals could be set as allowed by law and local conditions. Monitoring and accountability by the government actor and by community stakeholders would be built into the agreement at its inception.

Another more challenging example would involve a legal and regulatory structure to require or incentivize hiring and training of underrepresented workers in private-sector workplaces that do not have government contracts, and in which the jobs require high levels of skills or training. A case in point may be offered by a technology or health services company that seeks to expand or relocate in a city neighborhood. In another scenario, a company might seek to move into an industrial area that requires land use rezoning. Certain hiring, training, or workforce investment requirements might be attached to this rezoning that would help provide entry for workers of color or historically excluded groups. This could involve partnering with community or technical colleges that engage in industry-specific training programs. It is worth noting that these suggested approaches build on a full range of institutional incentives that motivate inclusion. Unions might seek to enhance their membership and power (recognizing changing demographics) and to limit the expansion of non-union labor. Unions are also often repeat players with cities or regions so they are likely to have incentives to meaningfully implement inclusionary goals that are placed in bargaining agreements.<sup>95</sup> Cities or regions might adopt these plans to achieve more meaningful community revitalization; leverage bond, state, or federal money to train and develop the local workforce; and mollify community groups. In turn, companies might want to relocate or expand services in a particular neighborhood or in an emerging downtown, they might see training workers as important to their future growth, or they may want to advance a corporate image that is consistent with diversity and inclusion.<sup>96</sup>

There are a range of challenges that influence the choice of regulatory inducements, and some inducement structures might require legal changes. For instance, local procurement laws often require awarding contracts to the lowest bidder, and some localities do not have

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95. See generally Ester R. Fuchs, Dorian Warren & Kimberly Bayer, *Expanding Opportunity for Middle Class Jobs in New York City: Minority Youth Employment in the Building and Construction Trades* (2014), <http://www.constructionskills.org/ColumbiaSIPA03-14.pdf> [<http://perma.cc/7X4B-7FA5>] (describing a union-city partnership to train workers in apprenticeship programs).

96. I developed some of these ideas in the area of employment in prior work. See generally Olatunde Johnson, *Promoting Racial and Ethnic Inclusion in Employment Through Regulatory Mandates and Incentives*, Roosevelt Inst. (2015), <http://rooseveltinstitute.org/wp-content/uploads/2015/10/Promoting-Racial-and-Ethnic-Inclusion-1.pdf> [<http://perma.cc/8JXH-GXA5>] (exploring a broad range of regulatory solutions for addressing occupational segregation among low-wage workers).

power to change the laws governing procurement or zoning at the local level.<sup>97</sup> Tax incentives raise an additional set of challenges as they must be calibrated to avoid giving away more than they return to communities in terms of tax revenue and economic development gains, and because any hiring mandates or requirements attached to these incentives may have the opposite effect of discouraging businesses. These concerns are not fatal to the general framework, but they do mean that the precise structure will differ among regions.

B. *Addressing Limits*

A regime that relies so heavily on these types of regulatory inducements might be faulted for giving up on direct mandates, sticks, and prohibitions that seem to form the current civil rights regime. To the extent that many of the suggested interventions operate at the state and local levels, such a regime provides benefits of experimentation but at the expense of baseline requirements of citizenship or inclusion that apply nationally. One might argue that it renders our goals of equity and inclusion subject to the vagaries of institutional incentives and regional variation.

As a general concern, this is likely overdetermined. Current civil rights regimes also depend on incentives and inducements that take place in the shadow of the regulatory framework, as suggested earlier in Part I. Further, the motivations behind thinking about a new set of regulatory designs for inclusion are the inadequacies of the existing mechanisms, particularly in dealing with complex problems at the intersection of group-based and economic exclusion. To the extent that these mechanisms might rely on government incentives and inducement, one might substitute the term regulatory “catalysts” or “levers.” What I mean to capture in this framework is the need to develop public law regimes that build on the complex motivations that individuals, institutions, and governments have to work toward inclusion, which are not easily or properly captured by an assessment of economic costs and benefits.<sup>98</sup> In simpler terms, governments, nonprofits, and private actors might seek to advance inclusion to benefit their economic bottom line and avoid sanctions, as well as to include historically excluded communities, revitalize low-income communities, promote economic development, provide better education and housing, and express public values.

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97. See Ruthann Robinson, *Dressing Constitutionally: Hierarchy, Sexuality and Democracy from Our Hairstyles to Our Shoes* 179 (2013) (describing how local anti-sweatshop procurement rules deviated from local laws that typically required procurement from the lowest bidder).

98. Cf. Issacharoff, *supra* note 64, at 120 (noting that “[p]ublic law enforcement does not yield an easy cost-benefit calculus of the sort that has driven the economic analyses of private law enforcement”).

Regions might have different appetites for adopting inclusionary incentives. But it is worth noting that a region that adopts a pervasive set of regulatory mechanisms for inclusion might entrench a norm that runs deeper than current antidiscrimination frameworks: that tax, zoning, and procurement—all government benefits—are also potential areas to advance inclusion. In addition, local or regional programs have potential to “diffuse” nationally, through networks and competition.<sup>99</sup>

A related concern is that any potential mechanisms outside of the prohibitory mandates of antidiscrimination law might be insufficiently coercive or too “soft.” To some extent, this will depend on design. Mechanisms need not operate solely on the “goals and timetables” framework that is of mixed efficacy in the area of affirmative action, but can also depend on quite specific requirements. Race- or gender-based quotas are a nonstarter in the American context—generating judicial and political skepticism for reasons that one might not find fully persuasive.<sup>100</sup> But specific goals can be set that are not delineated on the basis of identity. Current rules that govern developing affordable housing and local hiring requirements often rely on the attainment of specific numerical goals.<sup>101</sup>

Still, the design of both the mandate and incentive mechanisms will have implications for the ability to achieve goals of inclusion. Such regulatory mechanisms should be designed to reach the most disadvantaged or consistently excluded populations. There is also the risk of underspecifying or having conflicting goals. This is a problem, for instance, that has plagued the low-income housing tax credit program—the largest source of affordable rental housing—which by regulation prioritizes developing housing in racially segregated areas in ways that can be in tension with requirements that federally funded housing programs promote integration.<sup>102</sup>

These challenges, however, are not fatal to the core project of expanding the range of regulatory mechanisms that may induce inclusion. They are ultimately questions of how a specific inducement or regulatory leverage point is designed and of the accountability structure in place.

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99. Johnson, *Local Turn*, *supra* note 30, at 135.

100. See Julie C. Suk, *Quotas and Consequences: A Transnational Re-Evaluation*, in *Philosophical Foundations of Discrimination Law* 228, 229–30 (Deborah Hellman & Sophia Moreau eds., 2013) (detailing jurisprudential history of American law’s prohibition of racial quotas).

101. See, e.g., *infra* note 112 and accompanying text (describing first-source hiring programs).

102. See Poverty & Race Research Action Council, *Civil Rights Mandates in the Low Income Housing Tax Credit (LIHTC) Program* (2004), <http://www.prrac.org/pdf/crmandates.pdf> [<http://perma.cc/DR6S-CY32>] (describing a tax credit statute’s conflicting requirements on siting of low-income housing).

## III. LOCATIONS OF INNOVATION

Part II considered a range of mechanisms to broaden regulatory inducements to promote identity and socioeconomic inclusion by public and private actors. That Part sought to explore these models in a general sense and to theorize the political economy that might make them more or less effective or likely to be adopted by particular jurisdictions. This Part now presents contemporary examples of regulation to promote inclusion that deploy local levers of procurement, tax, and zoning. Many of these are spurred by cities seeking to leverage the return of business and employers, while avoiding or diminishing the effects of housing displacement and inequality. The examples below reveal the potential benefits of exploring new regulatory frameworks that broaden the levers of inducement, emphasize front-end requirements, address economic as well as identity inclusion, and engage local stakeholders. As noted below, any specific example also has its limitations, particularly on questions of accountability and the expansiveness of its goals.

A. *Examples: Levers, Requirements, and Accountability*

Localities have begun using a range of regulatory levers to address spatial and occupational segregation and exclusion in growing urban areas. Cities employ a variety of strategies to encourage employers to train and hire employees in local communities and from traditionally excluded groups, improve labor market and wage conditions, prevent displacement, and provide affordable housing.<sup>103</sup> The use of these regulatory levers has expanded in recent years.<sup>104</sup>

Specifically, jurisdictions are using city contracts, tax incentives, and land-zoning approvals as leverage points to require inclusive development by companies. Most typical is the use of procurement—which cities have long harnessed to place hiring, wage, and other conditions on recipients of city contracts—to promote economic inclusion.<sup>105</sup> The City of Oakland's labor agreement for the redevelopment of its port provides an example, expanding uses of procurement from affirmative action and wage conditions to mandate the development of training, hiring, and

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103. For a discussion of Community Benefits Agreements (CBAs), first-source hiring, and procurement conditions, see *infra* notes 104–120.

104. See Policy & Tools: Community Benefits Toolkit, P'ship for Working Families, <http://www.forworkingfamilies.org/resources/policy-tools-community-benefits-agreements-and-policies> [<http://perma.cc/PHT2-UFNA>] (last visited Aug. 11, 2017) (discussing CBAs and providing examples of cities' involvement in equitable development and community empowerment).

105. See, e.g., Jason Parkin, Note, Constructing Meaningful Access to Work: Lessons from the Port of Oakland Project Labor Agreement, 35 Colum. Hum. Rts. L. Rev. 375, 390–403 (2004) (providing a case study of the City of Oakland's labor agreement that sought to address hiring of local residents, training, support, and wage conditions).

support initiatives for local residents, such as childcare programs.<sup>106</sup> Jurisdictions also leverage public funding and the use of public lands. For instance, the City of Oakland in 2013, after prolonged advocacy by organized community groups, instituted a redevelopment plan for public waterfront property that created a training and referral pathway to employment for local, predominantly minority residents in the city.<sup>107</sup> The redevelopment plan also required employers participating in the redevelopment to remove barriers to the employment of certain categories of previously incarcerated job seekers.<sup>108</sup>

State and local contracts, public land, and public spending provide straightforward examples of public goods that may be seamlessly marshaled as regulatory levers to advance equality and inclusionary goals. A recent innovation has involved the broadening of the leverage points to include land-use rezonings, zoning approvals, and tax benefits, implicitly framing these economic inducements as public goods to which inclusionary conditions might be attached.<sup>109</sup>

As a matter of regulatory design, some jurisdictions have introduced these inclusionary inducements as a set of across-the-board requirements on entities that receive public goods, including tax credits. For instance, the City of San Francisco has for several years required entities that receive city funds or city leases, or whose projects require planning approval, to engage in “first source” hiring of local residents from particular training centers with the goal of connecting economically

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106. See *id.*

107. See P’ship for Working Families, *Paving the Path to Opportunity: How Revive Oakland Innovated a New Model for Inclusive Economic Development*, P’ship for Working Families, <http://www.forworkingfamilies.org/sites/pwf/files/publications/Revive%20Oakland%202015.pdf> [<http://perma.cc/TV4V-QC9T>] (last visited July 31, 2017) (describing “[t]wo major points of leverage,” the need for public funding and the use of public land, that supported the community’s demands).

108. *Id.*

109. For examples of use of land rezoning, see *Community Benefit Agreement 2015–2018 Memorandum of Understanding Between City and County of San Francisco City Administrator and Twitter, Inc.* (Jan. 1, 2015), <http://sfgsa.org/sites/default/files/FileCenter/Documents/12590-TwitterCBA.pdf> [<http://perma.cc/FVC7-F3RZ>]; *Cent. Mkt. Citizen’s Advisory Comm., Framework for Community Benefit Agreements*, SFGov.org (June 21, 2012), <http://sfgov.org/centralmarketcac/sites/default/files/FileCenter/Documents/10356-2012%20-%20CAC%20Central%20Market%20-%20CBA%20Framework%206-21-12.pdf> [<http://perma.cc/BVU8-EPP6>]; *Policy & Tools: Community Benefits Agreements and Policies in Effect*, P’ship for Working Families, <http://www.forworkingfamilies.org/page/policy-tools-community-benefits-agreements-and-policies-effect> [<http://perma.cc/B66E-D9F5>] (last visited July 31, 2017); see also *Community Benefit Agreements, Citizen’s Advisory Comm. for Cent. Mkt. & Tenderloin Area* (2013), <http://sfgov.org/centralmarketcac/community-benefit-agreements-2013> [<http://perma.cc/2Z9C-DQU7>] (last visited July 31, 2017) (listing CBAs signed in 2013 between the City of San Francisco and six technology companies when the Tenderloin community was rezoned, which provided tax benefits to employers).

disadvantaged local residents to employment in growing sectors.<sup>110</sup> The City of Detroit recently enacted an ordinance that requires developers with projects valued at more than \$75 million, and who are receiving more than \$1 million in tax benefits from the city, to negotiate a community benefits agreement.<sup>111</sup>

The range of requirements placed on businesses and employers extends to a broader set of categories and supports than the first-generation procurement contracts that required the hiring of minorities or women. As to employment, the requirements are generally more targeted to local communities or specific groups of disadvantaged job seekers. For instance, they may be hyperlocal, requiring the hiring of residents from local communities or of employees who are trained and linked to employers by local community-based organizations.<sup>112</sup> These requirements also address barriers that are typically outside the scope of antidiscrimination law's formal equality model, by providing supports that address the full range of barriers that workers face such as exclusion from race- and gender-delineated networks,<sup>113</sup> lack of adequate training, and lack of access to childcare services. This is achieved by connecting employers to specific training centers, providing employer-based training, and linking with community-based organizations to provide childcare and other support.

These regulatory interventions also encompass more than employment, often extending to areas such as green space, education, and hous-

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110. See S.F., Cal., Admin. Code § 83.3 (2017); City & Cty. of S.F., First Source Hiring Program, SFGov.org, [http://mission.sfgov.org/oca\\_bid\\_attachments/fa22336.pdf](http://mission.sfgov.org/oca_bid_attachments/fa22336.pdf) [<http://perma.cc/EUU2-LZ3V>] (last visited July 31, 2017) (requiring employers who meet the code definition to make a good-faith effort to hire from designated community-based organizations that train local workers).

111. Erick Trickey, *The Test Just Began for the Community Benefits Movement*, Next City (Feb. 20, 2017), <http://nextcity.org/features/view/detroit-test-began-community-benefit-agreements-movement> [<http://perma.cc/6AAP-XG2Y>].

112. See, e.g., City & Cty. of S.F., *supra* note 110 (delineating the requirements of San Francisco's First Source Hiring Program).

113. For an account of race-based hiring and referral networks in blue-collar sectors, see Kris Paap, *How Good Men of the Union Justify Inequality: Dilemmas of Race and Labor in the Building Trades*, 33 *Lab. Stud. J.* 371, 376 (2008) (reviewing literature showing that unionized construction workplaces display practices and preferences that reproduce race and gender privilege beyond the scope of the law). Earlier studies of the construction trades found that despite the considerable enforcement attention directed at them, informal hiring and training practices and the political power of unions limited the access of black and Latino workers to jobs. See Deidre A. Royster, *Race and the Invisible Hand: How White Networks Exclude Black Men from Blue-Collar Jobs* 176–77 (2003); Mercer L. Sullivan, "Getting Paid": Youth Crime and Work in the Inner City 60, 231 (1989) (providing an ethnography of young black, Latino, and white males and finding that, through kin and social networks, white males were able to monopolize the few higher-paying jobs in the studied urban area); Roger Waldinger & Thomas Bailey, *The Continuing Significance of Race: Racial Conflict and Racial Discrimination in Construction*, 19 *Pol. & Soc'y* 291, 293 (1991).

ing. When San Francisco rezoned the Tenderloin District to make room for technology companies who sought to move into the city, area residents raised concerns about the lack of affordable housing and potential displacement of residents through increased housing prices.<sup>114</sup> One feature of the benefits agreements ultimately negotiated with community groups was the inclusion of measures to mitigate housing displacement.<sup>115</sup>

Effective inducement strategies build in accountability and monitoring as general practices and provide judicial review and penalties for noncompliance.<sup>116</sup> As many fall short of that goal,<sup>117</sup> accountability and enforcement will remain the biggest challenges. The agreements that result from these regulatory interventions do not always set clear goals, allowing employers to simply engage in “good faith” efforts to achieve them.<sup>118</sup>

This raises more fundamental questions about the use of regulatory inducements that depend on luring businesses and employers to underserved areas and communities. Localities may have untapped regulatory power to tax and set conditions on contracts and land use. But cities are also engaged in an inevitable dance in which they do not want

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114. Oscar Perry Abello, S.F. Tax Break Tapped by Twitter Intended to Help Struggling Neighborhoods, *Next City* (May 31, 2017), <http://nextcity.org/daily/entry/san-francisco-tax-breaks-twitter-community-benefits-agreement> [<http://perma.cc/R4BH-UXCX>].

115. See, e.g., Community Benefit Agreement 2017 Memorandum of Understanding Between City and County of San Francisco City Administrator and Fitness SF Mid Market, Inc. (2017), <http://sfgov.org/centralmarketcac/sites/default/files/Documents/FitnessSFMidMarketCBA2017.pdf> [<http://perma.cc/EH5V-776G>] [hereinafter Fitness SF Mid Market CBA]; Community Benefit Agreement 2017 Memorandum of Understanding Between City and County of San Francisco City Administrator and Market on Market, LLC. (2017), [http://sfgov.org/centralmarketcac/sites/default/files/Documents/MarketonMarketLLC\\_CBA2017.pdf](http://sfgov.org/centralmarketcac/sites/default/files/Documents/MarketonMarketLLC_CBA2017.pdf) [<http://perma.cc/HGC6-BUXZ>]; Community Benefit Agreement 2017 Memorandum of Understanding Between City and County of San Francisco City Administrator and Spotify USA, Inc. (2017), <http://sfgov.org/centralmarketcac/sites/default/files/Documents/SpotifyUSAIncCBA2017.pdf> [<http://perma.cc/5MW3-SABT>]; Community Benefit Agreement 2017 Memorandum of Understanding Between City and County of San Francisco City Administrator and Zoosk, Inc. (2016), <http://sfgov.org/centralmarketcac/sites/default/files/Documents/ZooskIncCBA2017.pdf> [<http://perma.cc/QWB8-94XP>].

116. See, e.g., Parkin, *supra* note 105, at 401 (detailing accountability and enforcement requirements for an Oakland port redevelopment project).

117. See, e.g., Fitness SF Mid Market CBA, *supra* note 115 (failing to provide for judicial review or penalties for noncompliance).

118. This was a critique of early versions of community benefit agreements signed by Twitter in San Francisco. See Yoona Ha, Twitter, Other Tech Companies Get S.F. Tax Breaks but Show Little Progress Hiring in Neighborhood, *S.F. Pub. Press* (Nov. 11, 2013), <http://sfpublicpress.org/news/2013-11/twitter-other-tech-companies-get-sf-tax-breaks-but-show-little-progress-hiring-in-neighborhood> [<http://perma.cc/E5PQ-PZES>] (finding that the agreements were “vaguely worded” and that the companies have been “slow to report their progress” to the city).

to set conditions that pose the risk of driving out businesses and thus diminishing their potential employment and tax base.

B. *Community Benefits as Equality Law*

In the end, the point is less to put forward any specific initiative as a perfect model than to encourage fresh discussion of new avenues for public law innovations that advance equality. The community benefit agreements discussed above have generated interest from scholars of labor and community economic development,<sup>119</sup> and there is evidence that they are benefiting local communities.<sup>120</sup> Labor scholars have cast these initiatives as part of a “new accountable development” movement in which employers and residents seek full participation in the development that is shaping their communities.<sup>121</sup> But these types of agreements are not included within the framework of equality law, which is generally confined to antidiscrimination law. My suggestion is that we also understand these regulatory inducements as an equality law intervention—part of a continuum of regulation that begins with traditional antidiscrimination law but that should ultimately include a broader range of mechanisms as well as a broader range of equality and inclusionary goals.

#### CONCLUSION

This may be an inopportune time to look forward. Many bedrock principles of equal protection and civil rights gains seem threatened in

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119. See, e.g., Virginia Parks et al., *The Mobility Agenda, Community Benefits Agreements: Policy for the Twenty-First Century Economy* 4 (2008), <http://www.mobilityagenda.org/home/file.axd?file=2008%2F12%2FCBApaperfortheinternet.pdf> [<http://perma.cc/7KUJ-8XBR>]; Virginia Parks & Dorian Warren, *The Politics and Practice of Economic Justice: Community Benefits Agreements as Tactic of the New Accountable Development Movement*, 17 *J. Community Prac.* 88, 89 (2009); Patricia E. Salkin & Amy Lavine, *Negotiating for Social Justice and the Promise of Community Benefits Agreements: Case Studies of Current and Developing Agreements*, 17 *J. Affordable Housing & Community Dev. L.* 113, 113–14 (2008).

120. See, e.g., Edward W. De Barbieri, *Do Community Benefits Agreements Benefit Communities?*, Fed. Reserve Bank of Bos. (Apr. 13, 2017), <http://www.bostonfed.org/publications/communities-and-banking/2017/spring/do-community-benefits-agreements-benefit-communities.aspx> [<http://perma.cc/HBJ4-H7H4>] (describing the benefits of the Kingsbridge National Ice Center CBA case study, in which an “inclusive and representative community coalition” negotiated with a developer to reach a binding CBA).

121. See Parks & Warren, *supra* note 119, at 89.

areas such as political participation,<sup>122</sup> employment, and housing.<sup>123</sup> In such a climate, one can be excused for adopting a defensive crouch, for concentrating efforts on preserving the foundations of what Motley and the lawyers at LDF built. And yet, this Symposium also invites us to think more imaginatively about possibilities. The risk of spending too much time defending, and not enough constructing, is that civil rights goals and strategies will be seen as outmoded, insufficient, and disconnected from contemporary social movements. The intervention offered here is in the spirit of spurring new thinking about equality law's next chapters.

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122. See Vanita Gupta, Opinion, *The Voter Purges Are Coming*, N.Y. Times (July 19, 2017), [http://www.nytimes.com/2017/07/19/opinion/donald-trump-voting-rights-purge.html?\\_r=0](http://www.nytimes.com/2017/07/19/opinion/donald-trump-voting-rights-purge.html?_r=0) (on file with the *Columbia Law Review*) (raising concern that President Trump's election integrity commission represents an effort to purge and repress minority voters).

123. See Mark Lungariello, Astorino: 'Vindication' for Westchester in Affordable Housing Deal, *lohud* (July 18, 2017), <http://www.lohud.com/story/news/local/westchester/2017/07/18/westchester-gets-closer-finishing-affordable-housing-deal/486229001/> [<http://perma.cc/DT8P-HAHD>] (last updated July 21, 2017) (detailing HUD's settlement of a housing civil rights case against a county over the objections of plaintiffs and affordable-housing advocates).