Saint Louis University Law Journal

Volume 49
Number 4 *"Feedback Loop": The Civil Rights Act of 1964 and its Progeny (Summer 2005)*

Article 4

2005

Trapped in the Feedback Loop: A Response to Professor Days

Samuel R. Bagenstos

TRAPPED IN THE FEEDBACK LOOP: A RESPONSE TO PROFESSOR DAYS

SAMUEL R. BAGENSTOS*

With his characteristic insight and wise judgment, Professor Days tells a compelling story of the generative force of the Civil Rights Act of 1964 and the Court-Congress "feedback loop" through which that force traveled.[1] Professor Days's argument makes a significant contribution to our understanding of the corpus of antidiscrimination law, and he demonstrates persuasively that, in his words, "[t]he members of the 88th Congress deserve to be proud, indeed."[2] The Civil Rights Act of 1964 was no ordinary piece of legislation. It was, in the words of two distinguished scholars, a "super-statute" that committed this Nation to a set of fundamental principles of equality and inclusion.[3] Over the past forty years, judicial decisions interpreting the statute have sparked a thoughtful dialogue between Congress and the courts regarding just what those fundamental principles entail, both generally and in concrete settings. As the dialogue has proceeded, Congress has incrementally offered ever more expansive visions of the reach of civil rights law, consistent with our nation's historic expansion of the concept of the "We the People" for whom our constitutional government purports to exist.[4]

I have no quarrel with Professor Days's basic account. In this Commentary, however, I want to focus on an aspect of the story that has not been especially favorable for civil rights advocates: The extensive dialogue between Congress and the courts has placed the civil rights lobbying community in what seems like a perpetually defensive role. Caught up in

* Professor of Law, Washington University School of Law. An earlier version of this Commentary was delivered as oral remarks at an October 1, 2004, panel at the Saint Louis University Law School in honor of Drew Days's Childress Lecture. Thanks to Joel Goldstein for organizing such an engaging program and, as always, to Margo Schlanger for being a sounding board.

1. *See generally* Drew Days, *Feedback Loop: The Civil Rights Act of 1964 and Its Progeny*, 49 ST. LOUIS U. L.J. *XX* (2005).

2. Drew Days, Keynote Lecture at the Saint Louis University School of Law's Childress Lecture (Oct. 1, 2004).

3. William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1237–42 (2001).

4. *See* United States v. Virginia, 518 U.S. 515, 557 (1996) (describing historic expansion of "our comprehension of 'We the People'").

fighting off this or that restrictive interpretation of existing statutes, advocates have been unable to focus their efforts on seeking major innovations in civil rights law. Unfortunately, it is precisely such major innovations that are likely to be necessary. In the past forty years, significant changes have occurred—in the nature of work, in the nature of discrimination, and in the nature of civil rights litigation—that have made the model of the 1964 Civil Rights Act insufficient to solve the continuing problem of workplace discrimination.[5] But civil rights advocates have devoted their legislative energies largely to shoring up the existing features of that model and to extending that model to new protective classes. They have not even begun the effort to seek fundamental change. Civil rights advocates are, to use Professor Days's metaphor, trapped in the feedback loop.[6] But breaking free of that trap is essential to assuring that all Americans are treated with equal concern and respect.

My argument proceeds as follows. In Part I, I describe three significant changes that have occurred over the past four decades, and I explain why those changes have limited the ability of the 1964 Civil Rights Act's employment discrimination regime to achieve the goal of workplace equality. In Part II, drawing on Professor Days's account, I show that advocates, rather than attempting to respond to these changes, have largely taken the framework of the 1964 Act as a given and focused on the narrower goals of defending that framework against restrictive judicial decisions and extending that framework to new protected classes. In Part III, I offer brief concluding remarks that point to some emerging efforts in the scholarly literature to propose fundamental changes in civil rights law. Although those efforts have their flaws, they pursue exactly the kind of inquiry that will be necessary to respond to the significant changes that have occurred in the workplace and the world over the past forty years.

I. FOUR DECADES, THREE CHANGES

Four decades after the enactment of the Civil Rights Act of 1964, civil rights advocates confront a set of workplace equality issues that are in many ways very different from the problems that confronted the civil rights movement in the 1960s. In particular, I want to focus on three significant changes that have occurred since 1964: changes in the organization of work, changes in the nature of discrimination, and changes in the contours of employment discrimination litigation. Each of these changes has limited the

5. Although I occasionally refer to developments in other areas of civil rights law, my primary focus here is on the law forbidding discrimination in employment. In particular, I make no effort to discuss developments in voting rights law or hate-crimes enforcement. Those areas are in some ways quite distinct from employment discrimination, and not all of the same analysis would apply to them (though much would).

6. *See generally* Days, *supra* note 1.

effectiveness of the 1964 Act's regime in addressing the continuing problem of workplace discrimination.[7]

First, the organization of work has changed significantly since the mid-1960s.[8] The labor-market structures of that period, in which many employers offered long-term job security and defined promotion ladders to encourage workers to develop firm-specific skills, have declined substantially.[9] Unionization—which often facilitated the creation of such formalized workplace structures—has declined substantially as well.[10] Workplaces are more flexible and porous, organizational hierarchies are flatter, work is more collaborative, and workers are more mobile.[11] As a result, the development of portable, marketable skills is in many cases far more important for workers than is the achievement of a higher position on an organizational chart.[12] Many of the most important workplace interactions occur informally and on a day-to-day basis, rather than formally, at discrete moments of evaluation and promotion.[13]

Second, the nature of discrimination has changed significantly. Intentional discrimination clearly remains an important problem,[14] but there is an emerging consensus that implicit or unconscious bias is becoming a more significant contributor to continuing workplace inequalities.[15] Such implicit

7. Much of this discussion draws, in substantially abridged form, on Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. (forthcoming 2006).

8. For an extensive discussion of these changes, and their implications for labor and employment law, see Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 99–104 (2003); Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1919–28 (2000); Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519 *passim* (2001).

9. *See* Green, *supra* note 8, at 99-100; Schultz, *supra* note 8, at 1920; Stone, *supra* note 8, at 535.

10. *See* Stone, *supra* note 8, at 614-15.

11. *See* Green, *supra* note 8, at 100-02; Schultz, *supra* note 8, at 1920-21.

12. *See* Green, *supra* note 8, at 101-02.

13. *See id.* at 103.

14. *See generally* IAN AYRES, PERVASIVE PREJUDICE? UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION (2001) (citing powerful evidence of the persistence of intentional race and gender discrimination in a number of different markets from a series of innovative studies). *See also* Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, Poverty Action Lab 2-3, *at* http://www.povertyactionlab.org/papers.bertrand_mullainathan.pdf (May 27, 2003) (finding that resumes with stereotypically "white" names (e.g., Emily Walsh) drew fifty percent more callbacks for interviews than otherwise identical resumes with stereotypically "black" names (e.g., Lakisha Washington)).

15. Linda Krieger has made the most important contributions to the legal academic literature on this point. *See generally* Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CAL. L. REV. 1251 (1998); Linda Hamilton Krieger, *The*

bias may be a simple byproduct of the ordinary and essential cognitive processes of categorization that help us to make sense of a complicated world,[16] although social influences necessarily affect the ways in which our minds categorize.[17] Notably, even as people express more and more egalitarian attitudes on issues of race and gender, evidence shows that they continue to hold implicit biases on those issues just as strongly.[18] The increasing gap between more egalitarian explicit attitudes and those persistent implicit biases may itself further entrench inequalities: Whites and males, who want to believe that they treat people equally, experience cognitive dissonance because of the conflict between those explicit desires and their implicit biases. That cognitive dissonance may express itself through the construction of a narrative (such as a narrative of merit) to explain and justify persistent inequalities.[19] Or it may express itself as discomfort in the presence of minorities and women in the workplace. The latter phenomenon, which social psychologists have labeled "aversive racism,"[20] may be particularly difficult for employment discrimination law to solve.

Finally, as Professors John Donohue and Peter Siegelman demonstrated more than a decade ago, the nature of employment discrimination litigation has changed significantly over time.[21] Although early lawsuits challenged discrimination in hiring and often sought systemic change through the class-action device, in recent years the overwhelming majority of employment discrimination suits seek to protect incumbent workers, and class actions have

Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity, 47 STAN. L. REV. 1161 (1995) [hereinafter Krieger, *Content of Our Categories*]; *see also* Green, *supra* note 8, at 95–99; Michael Selmi, *Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate*, 42 UCLA L. REV. 1251, 1283 (1995); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 468–70 (2001).

16. *See, e.g.*, Krieger, *Content of Our Categories*, *supra* note 15, at 1188–98.

17. On the role of social influences on unconscious bias, see Ian F. Haney Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1806–09 (2000).

18. *See generally* Mahzarin R. Banaji et al., *The Social Unconscious*, *in* BLACKWELL HANDBOOK OF SOCIAL PSYCHOLOGY: INTRAINDIVIDUAL PROCESSES 134 (Abraham Tesser & Norbert Schwarz eds., 2001).

19. *See, e.g.*, Sharon Elizabeth Rush, *Sharing Space: Why Racial Goodwill Isn't Enough*, 32 CONN. L. REV. 1, 17 (1999).

20. *See* Samuel L. Gaertner & John F. Dovidio, *The Aversive Form of Racism*, *in* PREJUDICE, DISCRIMINATION, AND RACISM 61, 61 (John F. Dovidio & Samuel L. Gaertner eds., 1986).

21. *See generally* John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983 (1991). *See also* Ian Ayres & Peter Siegelman, *The Q-Word as Red Herring: Why Disparate Impact Liability Does Not Induce Hiring Quotas*, 74 TEX. L. REV. 1487 (1996).

virtually dropped off the map.[22] And as Professor Rutherglen has shown, litigation has shifted from a focus on race and sex discrimination to a focus on age (and now disability) discrimination.[23] That shift, likely actuated by the financial incentives of plaintiffs' civil rights lawyers,[24] has likely had a negative effect on the ability of employment discrimination law to address broad social inequalities. Successful age discrimination plaintiffs, in particular, are likely to be better off socially and economically than successful race or gender discrimination plaintiffs.[25] While civil rights law continues to redress individual injustices in such cases, it is far less likely to solve broader problems of injustice and inequality in the community. The Civil Rights Act of 1991, which Professor Days discusses, accelerated these trends by making compensatory and punitive damages available for violations of the antidiscrimination laws and thereby giving plaintiffs' lawyers an incentive to bring claims that can command large damages awards.[26] As the evidence from the age discrimination context shows, high-value claims may be the ones of relatively well-off workers who suffer significant salary losses rather than the ones of those who face the most pervasive problems of discrimination.[27]

These three changes pose major problems for the employment discrimination regime ushered in by the Civil Rights Act of 1964. That regime is well calibrated to respond to discrete and consequential workplace decisions made by people in positions of authority. But as the foregoing discussion suggests, in the modern-day workplace employment discrimination law must do something more: It must provide some means of monitoring innumerable workplace interactions not just between management and labor but also among employees within and among all levels of a workplace hierarchy. The effects

22. *See* Ayres & Siegelman, *supra* note 21, at 1504–07; Donohue & Siegelman, *supra* note 21, at 1015, 1019. As Dean Willborn notes, litigation under the Americans with Disabilities Act (ADA), which was enacted in 1990, has predominantly focused on discharge cases throughout the life of the statute. *See* Steven L. Willborn, *The Nonevolution of Enforcement under the ADA: Discharge Cases and the Hiring Problem*, *in* EMPLOYMENT, DISABILITY, AND THE AMERICANS WITH DISABILITIES ACT: ISSUES IN LAW, PUBLIC POLICY, AND RESEARCH 103, 103–04 (Peter David Blanck ed., 2000).

23. *See generally* George Rutherglen, *From Race to Age: The Expanding Scope of Employment Discrimination Law*, 24 J. LEGAL STUD. 491 (1995).

24. *See id.* at 516 (concluding that "claims under the ADEA are worth more than other claims").

25. *See id.* at 521 (finding that "those who sue under the ADEA tend to be white males who are relatively well off in status, positions, and pay").

26. On the role of the 1991 Act in spurring employment discrimination suits by private attorneys, see Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401, 1435–38 (1998).

27. On the general divergence between lawyers' incentives and the goals of antidiscrimination law, see generally Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and its Effects*, 81 TEX. L. REV. 1249 (2003).

of any one of these interactions, taken in isolation, may be ambiguous or neutral, and they may not reflect any intentional bias on anyone's part. But considered in the aggregate, these day-to-day workplace interactions, perhaps driven by implicit biases, can seriously drag down the prospects of protected group members.[28]

The focus on discrete management decisions is most evident in the tiered proof structure for disparate treatment cases elaborated by the Supreme Court in cases from *McDonnell Douglas Corporation v. Green*[29] to *Reeves v. Sanderson Plumbing Products Incorporated*.[30] That proof structure is not triggered until some member of management makes a discrete choice with direct consequences for the terms and conditions of an individual's employment, such as a choice to fire someone or a choice not to hire or promote that person into an open position. The consequences of such a choice for the individual plaintiff's employment status are clear and significant; the proof structure seeks only to determine whether management's decision was actuated by an impermissible motive. But when "discriminatory bias operates at multiple stages of interaction and in the context of greater organizational structures of the workplace," that structure is a poor fit.[31]

The disparate impact doctrine, which aims to eliminate the "built-in headwinds" that hinder opportunities for members of protected groups even in the absence of intentional discrimination,[32] could in principle avoid these limitations. But it does not. As codified in the Civil Rights Act of 1991, the disparate impact doctrine—like the disparate treatment doctrine—focuses predominantly on discrete employment practices. Thus, a plaintiff must show that the employer "uses a *particular* employment practice that causes a

28. *See* Sturm, *supra* note 8, at 468 ("Second generation claims frequently involve patterns of interaction among groups within the workplace that, over time, exclude nondominant groups. This exclusion is difficult to trace directly to intentional, discrete actions of particular actors.").

29. 411 U.S. 792 (1973).

30. 530 U.S. 133 (2000).

31. Green, *supra* note 8, at 117. For other discussions of the limitations of existing disparate treatment doctrine in addressing modern-day problems of discrimination, see Stone, *supra* note 8, at 606. Stone argues:

> Today's workplace does not have defined job ladders, and the criteria for advancement are not clearly specified, so that it is difficult for someone to claim that she has been bypassed for advancement because of her gender or race. In the boundaryless workplace, everyone makes lateral movements, but some move in circles while others spiral to the top. The diffuse authority structure of the new psychological contract makes discrimination hard to identify.

Id. *See also* Krieger, *Content of Our Categories*, *supra* note 15, at 1211 ("The assumptions underlying Title VII's disparate treatment theory have been so substantially undermined by social cognition theory that they can no longer be considered valid.").

32. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

disparate impact."[33] If the plaintiff can show "that the elements of [the employer's] decisionmaking process are not capable of separation for analysis, the [entire] decisionmaking process may be analyzed as one employment practice."[34] But that burden has proven difficult for employees to sustain.[35] And even when plaintiffs can sustain their burdens and force courts to consider an employer's decisionmaking process as a whole, discrete *decision* (to hire, to fire, to promote) remains the focus of analysis.[36]

And even the area of employment discrimination law that directly addresses day-to-day interactions between employees—the doctrine of workplace harassment—is insufficient to address the changes that have occurred over the past for decades. Harassment can become actionable only when it becomes "sufficiently severe or pervasive 'to alter the conditions of . . . employment'"[37]—a very difficult standard to satisfy, and one that leaves most daily interactions below the law's radar screen.[38] And the liability structure of harassment law is most effective against discrete, consequential decisions by management. When a supervisor carries out an act of harassment in the course of undertaking what the Court has called a "tangible employment action"—"a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits"—liability will follow.[39]

33. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (1994) (emphasis added). *See* Garcia v. Woman's Hosp. of Texas, 97 F.3d 810, 813 (5th Cir. 1996) (stating that a disparate impact plaintiff must "isolate and identify a particular employment practice which is the cause of the disparity and provide evidence sufficient to raise an inference of causation").

34. 42 U.S.C. § 2000e-2(k)(1)(B)(i).

35. *See, e.g.*, Stout v. Potter, 276 F.3d 1118, 1124 (9th Cir. 2002) ("We doubt that the overall screening process should be treated as one employment practice for purposes of disparate impact analysis.").

36. *See, e.g.*, Meacham v. Knolls Atomic Power Laboratory, 185 F. Supp.2d 193, 208 (N.D.N.Y. 2002) ("various factors and criteria" determining who would be subject to a reduction in force were not reasonably separable for purposes of analysis), *aff'd*, 381 F.3d 56 (2d Cir. 2004); Graffam v. Scott Paper Co., 870 F. Supp. 389, 395 (D. Me. 1994) (same), *aff'd*, 60 F.3d 809 (1st Cir. 1995); Stender v. Lucky Stores, Inc., No. C-88-1467 MHP, 1992 WL 295957, at *2 (N.D. Cal. Apr. 28, 1992) (subjective system for deciding on promotions was not separable into discrete criteria for purposes of analysis). For partial exceptions, see McClain v. Lufkin Indus., Inc., 187 F.R.D. 267, 272–75 (E.D. Tex. 1999) (treating employer's pervasive subjective employment practices as a single, inseparable practice but focusing primarily on use of subjective processes in making hiring, placement, layoff, and rehiring decisions); Butler v. Home Depot, Inc., Nos. C-94-4335 SI, C-95-2182 SI, 1997 WL 605754, at *13 (N.D. Cal. Aug. 29, 1997) (same); *see also* Kozlowski v. Fry, 238 F. Supp.2d 996, 1013–14 (N.D. Ill. 2002) (finding that elements of "entire hiring/promotions/reclassification process" were, at least for summary judgment purposes, "not capable of separation for analysis").

37. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986) (quoting Henson v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

38. *See* Green, *supra* note 8, at 135.

39. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 760–63 (1998).

When a supervisor engages in harassing conduct that does not culminate in such an action, there will be no liability if the employer had a reasonable policy in place to prevent and remedy harassment by its employees and the plaintiff unreasonably failed to take advantage of that policy.[40] Courts have read that defense broadly, so that liability in the absence of a "tangible employment action" is unlikely even if the employer's policy is ineffective in preventing harassment.[41] Where it is not a manager but a co-worker who is engaging in discriminatory conduct, liability will not result unless the plaintiff can affirmatively show that the employer was negligent.[42]

These doctrinal limitations obviously depress the incentive for lawyers to take cases challenging discrimination in day-to-day workplace interactions. And aside from the most overt and outrageous acts of discrimination and harassment, it is difficult to imagine that cases involving discriminatory day-to-day interactions could draw significant damages awards. Although structural relief addressing the problem of low-level discriminatory interactions could plausibly be awarded in large-scale class-action cases involving significant patterns of discrimination at a given employer,[43] Michael Selmi has offered evidence that strongly suggests that such cases do not, in fact, lead to meaningful structural change in employer practices.[44] In an employment discrimination regime driven by attorneys' incentives, it is the big-money acts of discrimination—the acts of discrimination that are overt or easy to prove, affect large numbers of employees, and can plausibly be parlayed into large damages awards—that drive the litigation from start to finish.

II. TRAPPED IN THE FEEDBACK LOOP?

As I have argued, significant changes have occurred in the past forty years that have hampered the ability of 1964-style civil rights legislation to achieve the goal of workplace equality. Yet civil rights advocates have not, by and large, directed their energies toward obtaining the broad-scale legal reforms

40. *See* Pa. State Police v. Suders, 124 S. Ct. 2342, 2353–57 (2004); Faragher v. City of Boca Raton, 524 U.S. 775, 806–08 (1998); *Burlington Indus.*, 524 U.S. at 765.

41. *See* Susan Bisom-Rapp, *An Ounce of Prevention is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 1 (2001); Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law*, 26 HARV. WOMEN'S L.J. 3 (2003); Joanna L. Grossman, *The First Bite is Free: Employer Liability for Sexual Harassment*, 61 U. PITT. L. REV. 671 (2000).

42. *See Faragher*, 524 U.S. at 776 (noting, with apparent approval, that lower courts have "uniformly judg[ed] employer liability for co-worker harassment under a negligence standard").

43. *See generally* Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 FORDHAM L. REV. 659 (2003).

44. *See generally* Selmi, *supra* note 26.

that will be necessary to respond to those changes. Instead, as Professor Days's narrative reveals, they have primarily stood in a defensive posture and sought to overturn the latest restrictive decision from the Supreme Court. On the rare occasions when civil rights advocates have taken the offensive, they have done little more than seek to extend the paradigm of the 1964 Civil Rights Act to new protected classes.

Professor Days tells the story well. When the Court ruled that prevailing plaintiffs could not obtain attorneys' fees simply because they "were performing the services of a 'private attorney general,'"[45] civil rights advocates successfully obtained passage of the Civil Rights Attorney Fees Award Act of 1976.[46] When the Court limited the coverage of Title VI of the 1964 Civil Rights Act in the *Grove City College* case,[47] civil rights advocates successfully obtained passage of the Civil Rights Restoration Act of 1987.[48] When the Court issued a half-dozen decisions in its 1988 Term that seriously restricted the enforcement of a variety of civil rights laws,[49] advocates successfully obtained passage of the Civil Rights Act of 1991, which overturned those decisions at least in part.[50]

Aside from these essentially defensive measures, employment discrimination legislation since 1964 has largely focused on extending old rules to new protected classes. The Age Discrimination in Employment Act of 1967 (ADEA) did little more than extend to age-based discrimination the employment discrimination regime created by Title VII of the 1964 Civil Rights Act.[51] Two other statutes—Title IX of the Education Amendments of 1972 and Section 504 of the Rehabilitation Act of 1973—extended to gender and disability discrimination, respectively, Title VI's prohibition of race

45. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 241 (1975). Note that while this decision had an effect on litigation under Title VI of the 1964 Civil Rights Act, the case did not preclude the award of attorneys' fees under Titles II and VII of that statute, which had always contained express attorneys' fee provisions. *See id.* at 260–62 & n.33.

46. *See* Pub. L. No, 94-559, 90 Stat. 2641 (1976) (codified as amendended at 42 U.S.C. § 1988(b) (2000)).

47. Grove City Coll. v. Bell, 465 U.S. 555 (1984).

48. Pub. L. No. 100–259, 102 Stat. 28 (1988). Around the same time, civil rights advocates also obtained legislation that overturned *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), a decision that had immunized states from suit under, among other statutes, Title VI of the 1964 Civil Rights Act. *See* 42 U.S.C. § 2000d–7(a)(1) (2000) (overturning *Atascadero*).

49. *See* Indep. Fed'n of Flight Attendants v. Zipes, 491 U.S. 754 (1989); Patterson v. McLean Credit Union, 491 U.S. 164 (1989); Lorance v. AT&T Techs., Inc., 490 U.S. 900 (1989); Martin v. Wilks, 490 U.S. 755 (1989); Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642 (1989); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

50. *See* Pub. L. No. 102–166, 105 Stat. 1071 (1991).

51. *See* Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621–34 (2000)).

discrimination by those who receive federal financial assistance.[52] Even the most ambitious of the post-1965 civil rights statutes, the Americans with Disabilities Act of 1990 (ADA), does surprisingly little more than extend the regime of the 1964 Civil Rights Act to disability discrimination in employment, government services, and places of public accommodation.[53] The ADA's principal innovation was the way the statute placed the requirement of "reasonable accommodation" front and center in its definition of discrimination.[54] Under that requirement, discrimination includes not just the failure to provide identical treatment to those who are similarly situated but also the failure to take account of *differences* that make current physical or institutional structures inaccessible to people with particular impairments. That may seem a radically expansive notion of discrimination,[55] but it is not especially different in principle from the long-accepted prohibition of so-called "rational discrimination" under Title VII.[56] Courts have construed the reasonable accommodation requirement in a way that treats it as adding very little to traditional nondiscrimination requirements like that in Title VII.[57]

Today, the major legislative priorities of civil rights advocates—the Employment Non-Discrimination Act ("ENDA") and the FAIRNESS ("Fairness and Individual Rights Necessary to Ensure a Stronger Society") Act—are in the same defensive or mildly extensionist mode. ENDA would simply add another forbidden ground of classification—sexual orientation—to Title VII's employment discrimination regime.[58] The FAIRNESS Act is directed almost entirely at overturning a series of Supreme Court decisions that have limited plaintiffs' ability to bring suit in federal or state court, recover compensatory and punitive damages, and obtain attorneys' fees for violations of various civil rights statutes.[59] Some advocates have also begun to make

52. *See* 20 U.S.C. §§ 1681 (2000); 29 U.S.C. § 794 (2000).

53. *See* Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 12101–213 (2000)).

54. *See* 42 U.S.C. §§ 12112(b)(5)(A), 12131(2), 12182(b)(2)(A)(ii).

55. For a discussion of some of the possibilities inherent in that notion of discrimination, see Samuel R. Bagenstos, *Subordination, Stigma, and "Disability,"* 86 VA. L. REV. 397, 426–36 (2000).

56. *See* Samuel R. Bagenstos, *"Rational Discrimination," Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 837–70 (2003).

57. *See* Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 34–54 (2004).

58. *See* Employment Non-Discrimination Act of 2003, S. 1705, 108th Cong. (2003). Note that ENDA would specifically foreclose disparate impact claims. *See id.* at § 4(f). In that respect, it would do even less than extend the Title VII regime to sexual-orientation-based discrimination.

59. *See* Fairness and Individual Rights Necessary to Ensure a Stronger Society: Civil Rights Act of 2004, S. 2088, 108th Cong. (2004) (overturning, in form or effect, the following decisions: Barnes v. Gorman, 536 U.S. 181 (2002); Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002); Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res., 532 U.S. 598 (2001); Alexander v. Sandoval, 532 U.S. 275 (2001); Circuit City Stores, Inc.

noises about a new statute to update the ADA, but their proposals seem to be largely limited to efforts to overturn a series of Supreme Court decisions that have narrowed the reach of that statute.[60] What seems to be entirely missing from the agenda of civil rights advocates is any effort to make the kind of fundamental changes to the antidiscrimination laws that will be necessary to address the problems of discrimination in today's workplace.

III. CONCLUSION: BREAKING THE FEEDBACK LOOP?

My argument has been a simple (if pessimistic) one: Although significant changes have limited the effectiveness of the model of employment discrimination law inaugurated by the Civil Rights Act of 1964, civil rights advocacy has not kept pace with those changes. Rather, civil rights advocates have devoted their energies to defending, and mildly extending, the same model.

My suggestion that civil rights advocates should do something more may be unsatisfying, however, for at least two reasons. First, in our current political climate, it seems unlikely that civil rights advocates will be able to move off of the defensive in the foreseeable future. With conservative control of all three branches of government, the near-term prospects for working fundamental change that would expand the scope of civil rights law are slim at best. Ironically, however, that is exactly the reason why now is the best time for civil rights advocates to think big. If incremental reform were achievable, civil rights advocates would have to balance the short-term prospect of achieving a small victory against the degree to which that victory would undermine the longer-term project of fundamentally retooling civil rights law. But today's advocates face no such dilemma; virtually no expansions of civil rights law—incremental or otherwise—are likely to be achievable in the near term. In these days when virtually any civil rights advocacy seems like tilting at windmills, it is incumbent on the civil rights community *not* to get bogged down in criticizing the latest restrictive decisions from the Supreme Court (though there are plenty to criticize). Advocates should seek to develop a

v. Adams, 532 U.S. 105 (2001); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); Alden v. Maine, 527 U.S. 706 (1999); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998); W. Va. Univ. Hosp. v. Casey, 499 U.S. 83 (1991).

60. See, for example, the recent speech by Rep. Steny H. Hoyer, principal House sponsor of the ADA. Rep. Steny H. Hoyer, Address at the New York Law School Tony Coelho Lecture in Disability Employment Law and Policy, *available at* http://www.nyls.edu/docs/hoyerremarks.pdf (Oct. 21, 2004). There, Rep. Hoyer urged legislation to overturn the following Supreme Court decisions: Chevron U.S.A., Inc. v. Echazabal, 536 U.S. 73 (2002); Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002);
Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999); Murphy v. United Parcel Serv., Inc., 527 U.S. 516 (1999); Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999). To similar effect, see generally NATIONAL COUNCIL ON DISABILITY, RIGHTING THE ADA (2004).

distinctive vision of civil rights law that meets the problems of the twenty-first century.

The second reason why my argument might be unsatisfying is more serious. My project here has been one of mere diagnosis, not prescription. I have focused on identifying the problem, rather than on proposing solutions. If the problems I highlight are so serious (and I believe they are), it is fair to ask what are possible solutions. Here, of course, is where matters get *really* difficult. In recent years, a number of scholars have begun an effort to sketch the kind of fundamental restructuring of employment discrimination law that would respond to the significant changes that have occurred over the past four decades. For example, Professor Susan Sturm has suggested that employment discrimination law be reoriented to place a greater emphasis on requiring employers to create institutional structures that will themselves operate to identify and respond to problems of inequality in their workplaces. Especially important, in Professor Sturm's view, is the role of "intermediaries"—notably including both plaintiffs' and defendants' lawyers—in provoking and mediating workplace change.[61] Professor Tristin Green has proposed alteration of existing employment discrimination doctrine to make employers liable when they maintain practices that facilitate discriminatory workplace dynamics among employees.[62] She has also proposed that courts awarding relief in employment discrimination cases view their role as akin to that of courts restructuring government agencies in institutional reform cases.[63]

These proposals are a promising start, though they are not without their flaws.[64] In particular, it is difficult to envision pursuing a structural approach to employment discrimination law without having some kind of benchmark for evaluating whether a particular employer's workplace structure is conducive to equality. The most plausible candidate for such a benchmark—and, indeed, the one that seems to have been essential in each of the structural-reform "success stories" identified by Professor Sturm—is a set of numerical goals for hiring, promotion, and the like.[65] But serious political and practical obstacles stand in the way of moving toward an employment discrimination regime that can be so readily described as mandating or encouraging "quotas."[66] Moreover, structural approaches to preventing discrimination—particularly

61. *See* Sturm, *supra* note 15, at 546–53.

62. *See generally* Green, *supra* note 8.

63. *See generally* Green, *supra* note 43.

64. For a more general discussion and critique of these proposals, see generally Bagenstos, *supra* note 7.

65. *See* Sturm, *supra* note 15, at 492–95 (discussing Deloitte & Touche), 499–500, 507–08 (discussing Intel), 513, 515–16 (discussing Home Depot).

66. For an example of skepticism along these lines, see Krieger, *Content of our Categories*, *supra* note 15, at 1245.

those that rely on enlisting intermediaries—have a real potential to become co-opted by the interests of employers and the intermediaries themselves.[67]

Nevertheless, the advocates of a structural approach are posing exactly the right kind of questions. It is only by seeking fundamental change to the existing employment discrimination regime that civil rights advocates can break the "feedback loop" Professor Days identifies and finally achieve the grand promises of the Civil Rights Act of 1964.

67. *See* Green, *supra* note 43, at 705–18. This is a principal message of Professor Selmi's study of employment discrimination class actions as well. *See generally* Selmi, *supra* note 27.