

Book Review

Law, Liberalism, and the New History of the Civil Rights Movement

SWEET LAND OF LIBERTY: THE FORGOTTEN STRUGGLE FOR CIVIL RIGHTS IN
THE NORTH. By *Thomas J. Sugrue*. New York: Random House. 2008.
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INTRODUCTION: WATCHING *RAVEN* IN THE SUBURBS

I'm watching an episode of *That's So Raven*, a sitcom produced by the Disney Corporation. This is a rather unusual undertaking for me, but I'm stuck on an exercycle at a suburban health club and it's what happens to be on the giant, flat-screen T.V. that is positioned directly in front of me. The title character, Raven, is the older of two children in a middle-class African American family. In this particular episode, Raven has been the victim of employment discrimination.¹ She and her best friend, a white girl named Chelsea, have applied for jobs at a fancy clothing store. Raven is brilliant in her job interview, while Chelsea is a bumbling incompetent. Yet Chelsea is offered the job. Furious at the disparate treatment, the two friends hatch a plot to catch the racist store manager. Chelsea accepts the job, and brings a camera to work, hidden in her hat. After much hilarity, she records the manager admitting that she "doesn't hire black people."

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1. *That's So Raven: True Colors* (Disney Corp. television broadcast Feb. 4, 2005), available at <http://www.youtube.com/watch?v=dTGKW1LjLSo&feature=Playlist&p=078EB027D4F2930B&index=26> (part 1); <http://www.youtube.com/watch?v=qDZga8am6Xs&feature=Playlist&p=078EB027D4F2930B&index=27> (part 2); <http://www.youtube.com/watch?v=Pa8pXQOyaRM&feature=Playlist&p=078EB027D4F2930B&index=28> (part 3).

While *That's So Raven* is hardly the best that television has to offer, this episode has something to say about race in contemporary America. It is a fantasy of liberal integrationism in which a mixed-race group of friends successfully conquers racism. Racism itself is portrayed as deviant. Indeed, the racist store manager appears to be barely human—her blonde hair tightly pulled back to reveal a skeletal face, her head cocked with bizarrely flapping lips spouting racist platitudes. While racism exists in the society that Raven and her friends inhabit, it is clearly an abnormal thing, a disease that can be conquered. “Normal” in Raven’s world is racially egalitarian: schools are integrated, friendships mixed-race.

I was reflecting—happily, I must say—on the fact that this was the vision of society on which an enormous media conglomerate would put its imprimatur, when I happened to take a look around me. The space was enormous and packed. There must have been several dozen pieces of exercise equipment, and each one was in use. Yet, there was not a single African American in the room. How, I wondered, have we gotten here: to a point where racism is portrayed in our mainstream culture as a disgusting, deviant disorder, yet not enough African Americans live in a middle-class suburb to generate even a token presence at the gym?

Thomas J. Sugrue’s wonderful, invaluable, and deeply melancholy book, *Sweet Land of Liberty: The Forgotten Struggle for Civil Rights in the North*,² helps to answer this question. Sugrue begins with the premise that the history of the Civil Rights Movement that most of us have internalized as a uniquely American tale of morality is devastatingly incomplete, both geographically and temporally. To remedy this deficiency, he proceeds to complete the story, recounting the neglected history of civil rights activism outside of the South throughout the twentieth century. In doing so he shows that while the ideology of racism that permeated American society since the country’s founding has been driven to the margins of belief in the years since World War II, the social reality of our country remains one of deep, persistent racial inequality. This story, expertly told, should be of particular interest to lawyers and other scholars of the law. His narrative is steeped in legal history, unearthing largely unknown tales of lawyers and laws. Sugrue has written a valuable new history of the Civil Rights Movement that legal historians should pay close attention to as they write the Movement’s new legal history.

The history of the Civil Rights Movement in the United States is typically portrayed as a triumphant, inspiring narrative, its outline

2. THOMAS J. SUGRUE, *SWEET LAND OF LIBERTY: THE FORGOTTEN STRUGGLE FOR CIVIL RIGHTS IN THE NORTH* (2008).

familiar to every literate American.³ As the story goes, in the early 1950s, southern African Americans, fed up with the oppressive indignities of Jim Crow, rose up. Their demands were simply to be treated equally with respect to the most basic attributes of American citizenship: the right to vote, to have access to public accommodations, and to attend quality schools. What followed was a series of peaceful protests—the Montgomery Bus Boycott, lunch counter sit-ins, the Freedom Rides, the Birmingham Campaign, the march across the Edmund Pettus Bridge—each met with brutal violence perpetrated by the forces of white, southern reaction. The nation recoiled in horror as peaceful civil rights advocates, some of them children dressed in their Sunday best, were beaten, hosed down, and set upon by dogs. In response, the federal government came to the aid of southern African Americans. Landmark pieces of legislation, the Civil Rights Act of 1964 and the Voting Rights Act of 1965, at last enshrined in the law that which should have been self-evident to all: that Americans were to be judged “not by the color of their skin but by the content of their character.”⁴

Surely this narrative resonates with most every American. Not only does it pit good against evil, but there is little ambiguity in the moral lines it draws. The good are genuinely good: they are peaceful and their cause is unquestionably just. The evil are, without a doubt, evil: stupid, violent, bigoted. Furthermore, the correct side wins. The moral vision of Martin Luther King, Rosa Parks, and Thurgood Marshall is vindicated, while their opponents are not only defeated, but revealed to be entirely on the wrong side of history. Who wouldn't take pleasure in the humiliating defeat of the Bull Connors, the Orville Faubuses, and the Theodore Bilbos of the world? Finally, the story has many compelling images: Black and white civil rights marchers with hands joined, vicious dogs attacking peaceful protesters, troops leading children into school past a hate-filled, screaming mob, King addressing thousands in Washington, D.C. For lawyers, of course, there is the image of an

3. The following two paragraphs are based on the way the Civil Rights Movement is portrayed in the leading college-level American history textbooks. See, e.g., DANIEL J. BOORSTIN ET AL., *A HISTORY OF THE UNITED STATES* 738–41, 790–92, 804–08 (2005); PAUL BOYER, *BOYER'S AMERICAN NATION* (teacher's ed. 2001); ALAN BRINKLEY, *AMERICAN HISTORY: A SURVEY* 799–802, 816–23 (13th ed. 2009); ANDREW CLAYTON ET AL., *AMERICA: PATHWAYS TO THE PRESENT* 936–59 (2005); JAMES WEST DAVIDSON ET AL., *NATION OF NATIONS: A NARRATIVE HISTORY OF THE AMERICAN REPUBLIC* 859–70 (6th ed. 2008); ROBERT A. DIVINE ET AL., *AMERICA: PAST AND PRESENT* 851–56, 868–73 (8th ed. 2007); JOHN MACK FARAGHER, *OUT OF MANY* 870–901, 915–17, 920–22 (4th ed. 2003); GARY B. NASH ET AL., *THE AMERICAN PEOPLE: CREATING A NATION AND A SOCIETY* 809–14, 858–61, 865–69 (concise 6th ed. 2008); JAMES L. ROARK ET AL., *THE AMERICAN PROMISE: A HISTORY OF THE UNITED STATES* 1009–15, 1031–39 (4th ed. 2009). For a list of the most frequently adopted American history textbooks, see Daniel J. Cohen, *By the Book: Assessing the Place of Textbooks in U.S. Survey Courses*, 91 J. AM. HIST. 1405, 1410 tbl.2 (2005).

4. Martin Luther King, Jr., Address at the Washington D.C. Civil Rights March: I Have A Dream (Aug. 28, 1963), available at <http://www.americanrhetoric.com/speeches/mlkihavedream.htm>.

African American woman and her young daughter sitting on the steps of the United States Supreme Court holding a newspaper with a headline announcing, “High Court Bans Segregation in Public Schools.” Indeed, for lawyers, the traditional narrative of the Civil Rights Movement has a special resonance. The Supreme Court’s holding in *Brown v. Board of Education*⁵ not only symbolized the inherent lawfulness of the Movement, it also placed lawyers at its center.

While this version of the civil rights narrative may seem like a bit of a caricature, it has withstood a generation of historical revisionism. To be sure, we’ve learned that northern politicians were a bit more cowardly than they appeared at first blush,⁶ that civil rights advocates in the South differed over tactics,⁷ and that perhaps *Brown* was not quite as important as we lawyers would like to think.⁸ But even a brief perusal of popular college history textbooks reveals that the story of the Civil Rights Movement is still seen as a morality play acted out in the 1950s and 1960s in the southeastern quadrant of the United States.⁹

Yet this story can’t possibly be a complete one. Common sense dictates that African Americans did not wake up one day in 1953 and decide that they should begin to fight for their rights. It’s preposterous to think that people subject to the oppression of Jim Crow would not have always engaged in some sort of resistance to it.¹⁰ It is similarly hard to believe that, unlike their southern neighbors, northern whites were deeply committed to racial egalitarianism, obviating the need for civil rights activism in the North. Six-and-a-half million African Americans migrated to northern states between 1910 and 1970.¹¹ It can’t possibly be true that they did not need to fight for their own rights as part of a broader Civil Rights Movement, a movement not defined by region.

5. 347 U.S. 483 (1954).

6. See, for example, HARVARD SITKOFF, *THE STRUGGLE FOR BLACK EQUALITY* 96–101 (1993), for the Kennedy Administration’s response to the Freedom Rides, and TAYLOR BRANCH, *PILLAR OF FIRE: AMERICA IN THE KING YEARS, 1963–1965*, at 456–76 (1998), for the Johnson Administration’s response to the Mississippi Freedom Democratic Party. For the Kennedy Administration’s tentativeness with respect to civil rights generally, see NICK BRYANT, *THE BYSTANDER: JOHN F. KENNEDY AND THE STRUGGLE FOR BLACK EQUALITY* (2006). Sugrue’s portrayal of Kennedy is decidedly more sympathetic. See SUGRUE, *supra* note 2, at 256–85.

7. For example, there were disputes over the extent to which children should be used in civil rights demonstrations. See BRANCH, *supra* note 6, at 74–78; SITKOFF, *supra* note 6, at 126–27.

8. See GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 42–63 (1991); Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7 (1994).

9. See sources cited *supra* note 3.

10. Indeed, African Americans have resisted their unjust treatment since they arrived on the North American continent as slaves. See generally EUGENE GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* (1976).

11. In Motion: The African-American Migration Experience, <http://www.inmotionaame.org/home.cfm?sessionid=f8301807271263159417111?bhcp=1> (last visited Apr. 27, 2010).

It is this broader Civil Rights Movement, this Movement expanded in space and time, that is the subject of *Sweet Land of Liberty*.¹² Using both original research and the wealth of secondary literature on the black freedom struggle both prior to the 1950s and in the North, Sugrue offers us a very different image of the Civil Rights Movement. Sugrue's Civil Rights Movement is one that is ferociously complicated, with less moral clarity, less strategic coherence, and, most significantly, a much less happy ending than the traditional narrative. He tells us a host of new stories—the fight to desegregate schools in Hillburn, New York in the 1940s, the campaign to integrate housing in Levittown, Pennsylvania in the 1950s, and the struggle for tenants rights in Harlem during the 1960s, for example—that are no less important than Birmingham, Selma, or Albany. He also introduces us to new characters—open housing advocate and “militant integrationist” Charles Funnye; June Shagaloff, the “Johnny Appleseed of northern school desegregation”;¹³ and Henry Lee Moon, the architect of African American political strategy in the North, among others—whose contributions to the black freedom struggle are at least as significant as those of civil rights leaders in the South. Finally, and most importantly, Sugrue shows us that the ideological foundation of the southern Civil Rights Movement, which placed the fight for civil rights firmly on religious and moral terms, was but one of many beliefs used to justify the struggle for racial equality, from racial uplift to Black Power, from interracial socialism to nationalistic black capitalism. Thus, Sugrue has written a more complete narrative of the Civil Rights Movement. In doing so, he has created history that is not only more accurate, it is also more usable. After all, to understand contemporary America, it is crucial to understand the struggle over race in American society. To understand that struggle, our understanding must transcend the confines of the traditional civil rights narrative; specifically, we must direct our attention northwards.

In Part I of this Review, I will summarize *Sweet Land of Liberty*, briefly describing Sugrue's narrative and highlighting some of his key themes. In Part II, I will place *Sweet Land of Liberty* in a broader context, demonstrating how nicely it fits with contemporary accounts of postwar American political history generally. Finally, in Part III, I will discuss what *Sweet Land of Liberty* has to offer legal historians. I will argue that Sugrue has a subtle understanding of the relationship between law and society, but that he leaves several holes in his narrative that suggest areas of further study for legal historians who wish to join Sugrue in constructing a new history of the Civil Rights Movement.

12. Sugrue is not the first historian to recognize that the traditional narrative of the Civil Rights Movement is a flawed one. Cf. Jacquelyn Dowd Hall, *The Long Civil Rights Movement and the Political Uses of the Past*, 91 J. AM. HIST. 1233 (2005).

13. SUGRUE, *supra* note 2, at 412, 459.

I. A NEW HISTORY OF THE CIVIL RIGHTS MOVEMENT

Sweet Land of Liberty is not a short book, but its narrative strategy is simple. Sugrue moves chronologically, from the 1930s, where he places the birth of the modern Civil Rights Movement, through the 1980s, where he marks its demise. Within this chronological framework, Sugrue describes the main battles that northern civil rights activists fought. The subjects of some of these battles (desegregation of public accommodations and public schools), will be familiar to students of the southern Civil Rights Movement, though their contours differed considerably in the North. The other areas of the struggle (housing segregation, employment discrimination, and the fight for other economic rights) do not form a part of the traditional civil rights narrative. It is his focus on the fight for these economically-oriented rights that most differentiates Sugrue's narrative from the traditional approach.¹⁴

Indeed, *Sweet Land of Liberty* starts with a focus on these rights. According to Sugrue, the modern Movement began in the 1930s with an interracial alliance of African Americans and white radicals, including groups as divergent as the Communist Party and the Quakers, whose politics found a congenial environment during the Great Depression and the New Deal.¹⁵ The primary goal of these groups was the economic empowerment of the African American community. Consequently, they chose to focus on eradicating employment discrimination, increasing black union membership, and promoting full-employment initiatives that would expand the employment opportunities for workers of all races. Sugrue recounts how this phase of the northern Movement placed racial discrimination in the context of the more general economic inequalities that were so painfully obvious during the Depression. The Depression-era leaders of the Movement, most famously A. Philip Randolph, argued "that the problem of racial inequality was fundamentally economic and that the solution required addressing the impoverishment and exploitation of black and white workers alike."¹⁶ Thus, the modern Civil Rights Movement began as a critique of capitalism as much as a critique

14. For other historians who have argued that economic rights were a crucial component of the early Civil Rights Movement, see ROBIN D.G. KELLY, *HAMMER AND HOE: ALABAMA COMMUNISTS DURING THE GREAT DEPRESSION* (1990); PATRICIA SULLIVAN, *DAYS OF HOPE: RACE AND DEMOCRACY IN THE NEW DEAL ERA* (1996); Hall, *supra* note 12, at 1245–50; and Robert Korstad & Nelson Lichtenstein, *Opportunities Found and Lost: Labor, Radicals, and the Early Civil Rights Movement*, 75 J. AM. HIST. 786 (1988). For other historians who, like Sugrue, have examined these economic issues in the 1970s and 1980s, see KEVIN M. KRUSE, *WHITE FLIGHT: ATLANTA AND THE MAKING OF MODERN CONSERVATISM* (2007); and MATTHEW D. LASSITER, *THE SILENT MAJORITY: SUBURBAN POLITICS OF THE SUNBELT SOUTH* (2007).

15. See generally SUGRUE, *supra* note 2, at xxi, 6–58.

16. *Id.* at 34.

of racism. Racism was “the natural outgrowth of an economic system that depended on the exploitation of people of color.”¹⁷

This fusion of racial and economic egalitarianism weakened considerably in the years following the Second World War. The wave of anticommunism that swept the country after the War caused civil rights groups to disassociate themselves from the attack on American capitalism that radicals had brought to the Movement in the 1930s.¹⁸ At the same time, a new ideological basis for the fight for civil rights emerged. In the context of the global fight against racist fascism, Americans of all races came to view racism as a curable, psychological disorder. The most influential proponent of this view was the Swedish sociologist Gunnar Myrdal. In his influential 1944 book, *The American Dilemma*, Myrdal portrayed American racism as an individual pathology, to be cured through integration, rather than a product of inequalities structurally embedded in American society.¹⁹ Thus, the antiracist beliefs that the American government had deployed so successfully in fighting Nazi Germany could be used to combat domestic racial discrimination:

The key to racial equality was capturing that moral fervor and using it as a call to judgment against the sinful remnant in America, a pathological, immoral minority of whites whose racial views violated American ideals. In this view, America was an imperfect—but perfectible—nation whose core principles embodied universal ideals of individual liberty and freedom. Racial inequality and segregation were anomalous features of the republic that needed to be eradicated—and were not, as radicals had contended, a constitutive part of the nation’s economic and political institutions.²⁰

According to Sugrue, this changed ideological basis for the Civil Rights Movement had a profoundly debilitating effect. In this new ideological environment, the fight for economic rights could continue only in its most diluted form. Thus, while the postwar period saw the passage of many state fair-employment-practices laws and, of course, federal legislation prohibiting employment discrimination, this legislation was only marginally successful in lifting many blacks out of the crushing poverty of rapidly decaying, deindustrializing cities.²¹ Even in the 1960s, when the more radical critique of capitalism crept back into the thinking of some civil rights activists, it was unable to generate policies that had a meaningful impact on the lives of the multitude of African Americans who lived in urban poverty.

Primary among these policies, Sugrue believes, was open housing. Indeed, *Sweet Land of Liberty’s* detailed, dismaying description of the

17. *Id.* at 73.

18. *Id.* at 104–17.

19. *Id.* at 59–63, 213–14.

20. *Id.* at 82.

21. *Id.* at 90–95, 113–24, 360–64.

fight to integrate housing in northern suburbs is one of its singular contributions.²² Had African Americans been able to join other Americans in their move to the suburbs in the years following the Second World War, they, too, would have gained access to the enormous benefits that came with postwar suburbia: quality public education and accommodations, jobs, and the social networks that helped generate America's postwar boom. Instead, blacks were systematically excluded from the suburbs. Sugrue recounts the legal, social, and economic barriers to residential integration: restrictive covenants, violent intimidation, racist lending practices that were backed by the Federal Housing Administration, exclusionary zoning ordinances, and public housing policies that required racial segregation.²³ For Sugrue, the failure of the open housing movement is the quintessential example of how psychological explanations of, and solutions to, racism were insufficient to address the structural problems that faced African Americans. By the end of the 1960s, white Americans' attitudes towards integrated housing had changed. The vast majority said they would not mind having African American neighbors. None of them, however, did.²⁴ Even as the legal barriers to black entry into quality housing fell, allegedly neutral market mechanisms kept the vast majority of whites and blacks living in separate and decidedly unequal neighborhoods. Lost to the Civil Rights Movement were the tools to critique those mechanisms, to demonstrate how they were not neutral but were instead shaped by decades of racist public policy, and to demand solutions that addressed these flaws in the market.

Of course, the problems that plagued the fight for the desegregation of schools in the North were intimately linked to segregated housing patterns. Sugrue recounts a previously untold prehistory of northern school desegregation. Litigation and political protest desegregated schools in northern cities starting in the early 1940s.²⁵ After *Brown*, local branches of the NAACP brought lawsuits in northern communities despite the national organization's desire to focus on the South.²⁶ As the 1960s dawned, a more familiar story emerged. Litigants fought over whether courts had the power to remedy segregated schooling in the absence of laws requiring it.²⁷ By the early 1970s, the Supreme Court had held that without actual discrimination by the school district, the Constitution did not require desegregation.²⁸ Thus, courts could not

22. *See id.* at 200–52, 400–48.

23. *See id.* at 202–04.

24. *Id.* at 248–50.

25. *Id.* at 163–81.

26. *Id.* at 181–89.

27. *See id.* at 447–92.

28. *Id.* at 480–88.

require states to reach across district lines to desegregate schools whose segregation was caused by the rise of all-white suburbs and abandonment of the urban core to African American families. This decision, writes Sugrue, marked the death of the school desegregation movement in the North. As with open housing, politicians and courts were unwilling to recognize the links between past racialized policymaking and social phenomena that were facially neutral, such as the absence of whites from inner-city school districts. This cramped view of state-sanctioned segregation placed limits on desegregation orders that rendered them essentially useless. It was impossible to desegregate schools in a school district in which no white people lived.

Sugrue's telling of the fights against employment discrimination, and for housing and school desegregation, are typical of his narrative in that they cover a much broader span of time than the traditional account. That said, Sugrue still views the 1960s as a key decade in the history of the Civil Rights Movement, though for different reasons than those emphasized by the traditional story. In that story, the decade begins with sit-ins and hits its acme with the passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965. The Movement then "moves north" where its story is "bleaker and briefer," full of violent riots, racial separatism, and white backlash: "the tragic denouement of the otherwise triumphant civil rights struggle."²⁹

One of the key points of *Sweet Land of Liberty* is, of course, that the Civil Rights Movement did not need to "move north" in the 1960s or in any other decade. It was always there. Similarly, Sugrue demonstrates that racial separatism had long been an important strand of African American thought. It was not invented by Malcolm X or Stokely Carmichael. Nonetheless, he shows that the 1960s saw some dramatic changes in the Movement. Like the New Deal, the Kennedy and Johnson Administrations created a congenial political environment for advocates of civil rights by focusing public policy on issues of poverty and race.³⁰ This focus, when combined with small successes in the North and larger successes in the South, raised the expectations of African Americans dramatically. According to Sugrue, when these expectations were combined with deteriorating conditions in urban America, the result was not only rioting, but also the increasing popularity of racial separatism.³¹

Again, racial separatism was hardly something new to the black freedom struggle. However, in the 1960s, it took on attributes that were not only unique to that political and social context, but were also, in Sugrue's opinion, deeply damaging to the Civil Rights Movement in

29. *Id.* at xiv.

30. *Id.* at 265–71, 356–57.

31. *See id.* at 354–55.

general. First of all, Sugrue notes that, for the most part, the advocates of racial separatism in general, and of Black Power in particular, accepted Myrdal's psychological basis for racism in America. Thus, while they differed from Myrdal and other liberals in their solution to the problem (they had no particular desire to "cure" white Americans of their disease, they simply wished to have nothing to do with them), they did not pick up the more radical, structural-economic critique of the causes of racism and African American disadvantage.³² Instead, they focused on solutions to the psychological problems that they associated with white racism, such as low black self-esteem, the deemphasis of African American culture,³³ and the displacement of black men from their "traditional," dominant role in the family.³⁴

Second, according to Sugrue, the Black Power Movement's focus on local community organizing and its disinclination to interact with white-dominated organizations set the Civil Rights Movement as a whole on a trajectory that emphasized local solutions to the problems of racism. If African Americans could control the local institutions that affected them most directly, such as school boards, police departments, city governments, and local businesses, they could then solve the problems associated with living in a racist society. Thus, an all-black school board could establish an esteem-building, Afro-centric curriculum for African American students; or black-owned banks could lend money to African American businesses that would spur economic development in inner cities.³⁵ According to Sugrue, this focus on localism led not only to poisonous schisms within the Movement,³⁶ it also led to the enervation of nation-wide civil rights organizations as local civil rights advocates turned inwards, looking solely to their own communities and eschewing the regional and national connections and institutions that Sugrue believes were critical to whatever successes the Civil Rights Movement had achieved.³⁷

Thus, Sugrue ends *Sweet Land of Liberty* on a decidedly dismal note. While he acknowledges some successes—the growth of the black middle class, the increased political power of African Americans, the dramatic change in hiring practices, particularly in white-collar professions—the overall picture is one of failure. Disparities in health, life expectancy, and infant mortality between the races are stark.

32. *Id.* at 338–39.

33. Did I mention that the episode of *That's So Raven* I saw had a subplot in which Raven's little brother had to write a report on a famous African American for Black History Month? See *That's So Raven: True Colors*, *supra* note 1.

34. SUGRUE, *supra* note 2, at 379–81.

35. *Id.* at 427–44, 447–76.

36. See *id.* at 425, 429, 472, 489.

37. See *id.* at 494–97, 527, 541.

Housing and school segregation is as prevalent as it was fifty years ago. African Americans make up disproportionate numbers of the poor, and even middle-class blacks are more likely to sink back into poverty than are middle-class whites.³⁸ In the face of these dramatic problems, Sugrue sees a Civil Rights Movement that is essentially incapable of addressing these issues. Its leaders are “prophet[s] howling in the void,” and “generals without armies.”³⁹ The broad-based social movement that characterized the Civil Rights Movement, both North and South, from the 1930s through the 1960s, has been replaced by local, single-issue, ad hoc organizations that are ill-equipped to address what Sugrue believes are the real causes of African American disadvantage in the United States: the flight of capital from inner cities, the dramatically growing gap between rich and poor people of all races, and the dismemberment of America’s already vestigial welfare state.⁴⁰

This thumbnail sketch of *Sweet Land of Liberty* does not do justice to its sweeping narrative. The book is replete with wonderful characters and detailed, sympathetic descriptions of every permutation of the black freedom struggle in the North; from the delicate political calculations of Henry Moon, to the revolutionary racial separatism of Robert Williams, to the hardball political idealism of welfare recipient-turned-state-assemblywoman Roxanne Jones. The book, though sprawling, is a genuine narrative in the best sense of the word. Though it has important thematic points, Sugrue knows that he has uncovered some wonderful stories and he does not let his desire to highlight broad themes interfere with his telling of the often heartbreaking stories of people who, in a staggering variety of ways, sought to better American society by fighting for racial justice.

Indeed, one of Sugrue’s singular accomplishments is to tell these stories in a manner that nonetheless highlights certain critical themes. As my brief summary of *Sweet Land of Liberty* reveals, the theme most central to his narrative is the conflict between people who viewed racism as an individual, psychological failing that could be remedied through a form of societal psychoanalysis (integration, diversity training, multiculturalism), and those who saw it as embedded within economic and political institutions. This conflict is related to another theme Sugrue touches on repeatedly: that there were many strands of thought within the black community with respect to how to achieve civil rights. Integrationism sat side-by-side with separatism; economic conceptions of racial oppression sat with psychological conceptions of it; those who strove for racial uplift and respectability sat with radicals who demanded

38. *Id.* at 537–40.

39. *Id.* at 526.

40. *See id.* at 527, 540–43.

revolutionary change; nonviolent protestors rubbed elbows with those who advocated violence. Even more significantly, these various strategies, though sometimes contradictory, were not mutually exclusive. Sugrue's Civil Rights Movement is pragmatic, not dogmatic, "moving fluidly" among these strategies and beliefs as was dictated by "changing political circumstances."⁴¹ Thus, one of the chief accomplishments of *Sweet Land of Liberty* is to dethrone the reigning historiographical assumption that the ideological and strategic content of the Civil Rights Movement was defined by a simple, chronologically situated dichotomy: the peaceful interracialism of King followed by the violent separatism of Malcolm X. Instead, these two strands, plus all the others, existed throughout the history of the black freedom struggle.

Another of Sugrue's themes is his convincing argument that the geographical dichotomy that underlies the traditional narrative of the Civil Rights Movement is in error. The Movement did not "begin" in the South and then "move north" sometime in the 1960s. Instead, Sugrue demonstrates that in both regions African Americans and their allies fought for civil rights throughout the twentieth century. Furthermore, the regional struggles fed off each other. Sugrue catalogues many examples of how the goals and tactics of northern civil rights activists were brought to the South: "Don't Buy Where You Can't Work" campaigns that began in Philadelphia, New York, and Gary, Indiana inspired the Southern Christian Leadership Conference to try similar tactics in the South;⁴² the protests and litigation to end segregated public accommodations in the North that began in the 1930s and 1940s provided models for similar actions in the South in the 1950s;⁴³ parents fought for school desegregation using both civil disobedience and litigation in northern states decades before *Brown*.⁴⁴ Similarly, Sugrue demonstrates the way in which events emanating from the South affected the movement in the North: how *Brown* inspired northern parents to increase the intensity of their fight to desegregate schools,⁴⁵ or how the message that many northern African Americans took from the events in Birmingham was that nonviolent tactics were a failure that needed to be replaced with defiant demands for "self-defense, self-determination, and militancy."⁴⁶

Sugrue's story also takes aim at the component of the standard civil rights narrative that blames the decline of the Movement on a white "backlash" in the late 1960s. According to this argument, the collapse of the Civil Rights Movement can be attributed to the increasing militancy

41. *Id.* at xxv.

42. *Id.* at 126–29.

43. *Id.* at 159–60.

44. *Id.* at 163–70.

45. *Id.* at 180–99.

46. *Id.* at 291.

of the demands of African Americans in the late 1960s and early 1970s. Affirmative action, busing, and the racial separatism of the Black Power Movement alienated white northerners who had previously supported civil rights, thereby bringing the Movement to a grinding halt.⁴⁷ As Sugrue's narrative demonstrates, however, there never was a time when most white northerners embraced the goals of the Civil Rights Movement. Instead, they only supported the Movement when it was demanding changes in the South. Throughout the entire twentieth century, most northern whites were relentlessly hostile to the civil rights issues that affected them most: prohibitions on employment and housing discrimination, and desegregation of northern public schools. William and Daisy Meyers, the first African American family to move into Levittown, Pennsylvania in 1957, would have been surprised to hear that the white backlash was still more than a decade away when white protestors smashed the windows of their suburban home.⁴⁸ Presumably the group of black seminary students who were driven out of a roadside diner in Maple Shade, New Jersey by its gun-toting proprietor in 1950, would have been similarly nonplussed.⁴⁹ By recounting stories like these, Sugrue demonstrates that it was not the more "radical" demands of the Civil Rights Movement, such as affirmative action and busing, that alienated northern whites. It was any demand that might impact the economic and social privileges that came with being white in postwar America.

Sugrue's final theme—the importance of women to the Civil Rights Movement—does not so much correct an aspect of the traditional story as it fills a gaping hole. The traditional narrative has almost no role for women. Rosa Parks refuses to stand up, but that's about it. *Sweet Land of Liberty* corrects this omission, placing women at the center of the struggle for civil rights. Sugrue does this in two ways. First, he describes in great detail the accomplishments of a number of women who played instrumental roles in the northern Civil Rights Movement. He frames an entire chapter of *Sweet Land of Liberty* around the remarkable life of Anna Arnold Hedgeman, who, as the executive director of the Brooklyn YMCA during the 1930s and 1940s, helped create the brand of class-based, interracial civil rights activism that Sugrue places at the center of his narrative.⁵⁰ He gives similarly detailed descriptions of the work of

47. For the most influential statements of this thesis, see THOMAS EDSALL & MARY EDSALL, *CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS* (1992); and JONATHAN RIEDER, *CANARSIE: THE JEWS AND ITALIANS OF BROOKLYN AGAINST LIBERALISM* (1985). I have also used this thesis in my own work. See Reuel E. Schiller, *The Emporium Capwell Case: Race, Labor Law, and the Crisis of Postwar Liberalism*, 25 *BERKELEY J. EMP. & LAB. L.* 129, 140–41 (2004).

48. SUGRUE, *supra* note 2, at 225.

49. *Id.* at 130. One of these students was the young Martin Luther King, Jr.

50. *Id.* at 4–31.

other female civil rights activists, including June Shagaloff, a sociologist on the staff of the NAACP, who was instrumental in that organization's northern school desegregation cases,⁵¹ and Roxanne Jones, the Philadelphia community activist and state legislator, who struggled to protect her inner-city constituents from the worst excesses of welfare reform during the 1980s and 1990s.⁵²

Perhaps more important than telling the stories of these individual women (and many others like them), is Sugrue's recognition that it was women who both led and were the primary participants in several of the most important northern civil rights battles. In particular, the northern school desegregation movement and the welfare rights movement were both female-dominated mass movements whose impetus and strategies were largely defined by women.⁵³ Indeed, Sugrue convincingly argues that much of the hyper-macho sexism that infected the Black Power Movement was a response to the fact that so much of the Civil Rights Movement was planned and carried out by women. As Black Power advocate Alvin Brooks complained, "women have been pretty much running the show" and that the Movement needed to "move beyond the matriarchal."⁵⁴ Histories of the Civil Rights Movement have recounted the presence of misogyny within the Black Power Movement,⁵⁵ but only Sugrue has recognized this sexism for what it was: a response to the fact that the black freedom struggle was in large part a struggle by African American women.

II. LIBERALISM AND THE NEW HISTORY OF THE CIVIL RIGHTS MOVEMENT

Sweet Land of Liberty should reorient the way the modern Civil Rights Movement is studied: away from the South and towards a national conception of the Movement; away from the 1950s and 1960s and towards a century-long narrative; away from a narrow focus on the religiously-centered, nonviolent movement of King and the Southern Christian Leadership Conference and towards a recognition of the ideological and tactical diversity that suffused the Movement. While this reorientation will shake up the traditional narrative of the Movement, it will also have the effect of bringing the history of the Civil Rights Movement into line with the way that historians have portrayed postwar liberalism in general. In updating the narrative of the Civil Rights

51. *Id.* at 457-67.

52. *Id.* at 493-531.

53. *Id.* at 189-95, 381-90, 398-99, 450, 456.

54. *Id.* at 379-81.

55. See, e.g., SARA M. EVANS, *PERSONAL POLITICS: THE ROOTS OF WOMEN'S LIBERATION IN THE CIVIL RIGHTS MOVEMENT AND THE NEW LEFT* 83-101 (1979); WILLIAM L. VAN DEBURG, *NEW DAY IN BABYLON: THE BLACK POWER MOVEMENT AND AMERICAN CULTURE* 296-97 (1992).

Movement, Sugrue has uncovered a story that fits perfectly with contemporary understandings of American politics since the New Deal.

Postwar American liberalism has certain specific attributes: the creation of mildly redistributive economic policies without the creation of a European-style welfare state; a commitment to racial, ethnic, and religious pluralism; and the expansion of the administrative state, particularly at the federal level.⁵⁶ In the years since the Second World War, three generations of historians have offered explanations for the emergence of this particular form of liberalism.⁵⁷ Immediately after the War, so-called “consensus” historians argued that the postwar order reflected the desires of a society dominated by middle class, liberal values that eschewed radical solutions to social problems typified by fascism and communism.⁵⁸ The result, they argued, was a stable political order that balanced the need for moderate state action in some areas, with a recognition of the importance of civil liberties and the need to protect individuals from overreaching state power. By the 1960s, this sunshine and morning glory vision of American political culture had been replaced with a much more critical picture. Revisionist historians portrayed the postwar period as a time of enforced consensus.⁵⁹ Postwar “liberalism” was nothing more than a façade behind which elites manipulated the government to enrich themselves, all the while suppressing the views of those who dissented from the postwar, capitalist order.

More recently, historians of the United States have come to a more nuanced story of the development of postwar liberalism. Like the revisionists, they recognize how the statist, economic radicalism of the New Deal era dissipated during the postwar period. However, unlike the revisionists, they do not attribute this to the specific desire of industrial elites to cripple the American left. They acknowledge that there is some truth to the consensus historians’ assertions that postwar Americans were wary of the more extreme statist solutions to social problems. They

56. See LAWRENCE FRIEDMAN, *AMERICAN LAW IN THE TWENTIETH CENTURY 1–12* (2002); see also Eileen Boris, *Labor’s Welfare State: Defining Workers, Constructing Citizens*, in 3 *THE CAMBRIDGE HISTORY OF LAW IN AMERICA, THE TWENTIETH CENTURY AND AFTER (1920–)*, at 319 (Michael Grossberg & Christopher Tomlins eds., 2008) [hereinafter 3 *CAMBRIDGE HISTORY*]; Daniel R. Ernst, *Law and the State, 1920–2000: Institutional Growth and Structural Change*, in 3 *CAMBRIDGE HISTORY, supra*, at 1; Michael J. Klarman, *Race and Rights*, in 3 *CAMBRIDGE HISTORY, supra*, at 403, 403–21; Gwendolyn Mink et al., *Poverty Law and Income Support: From the Progressive Era to the War on Welfare*, in 3 *CAMBRIDGE HISTORY, supra*, at 359; Mark Tushnet, *The Rights Revolution in the Twentieth Century*, in 3 *CAMBRIDGE HISTORY, supra*, at 377.

57. See PETER NOVICK, *THAT NOBLE DREAM: THE “OBJECTIVITY QUESTION” AND THE AMERICAN HISTORICAL PROFESSION* 320–60, 415–68 (1988); Reuel E. Schiller, *Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945–1970*, 53 *VAND. L. REV.* 1398, 1398–1416 (2000).

58. NOVICK, *supra* note 57, at 320–60; Schiller, *supra* note 57, at 1399–1400.

59. NOVICK, *supra* note 57, at 415–68; Schiller, *supra* note 57, at 1410–13.

attribute this wariness to America's encounters with totalitarianism, both at home and abroad. For example, Alan Brinkley has demonstrated that the fight against European fascism soured many liberal American policymakers on government control of the economy through regulation and government planning, and turned them into eager acolytes of the lighter touch of Keynesian fiscal policy.⁶⁰ Similarly, historians of the Cold War and McCarthyism have shown how anticommunism had an ironic effect on American politics. Obviously, it marginalized class-based critiques of American capitalism by punishing such thought.⁶¹ However, it also had the effect of increasingly committing the nation to policies that promoted racial pluralism and civil liberties. Many on the political left adopted an increasingly libertarian view of civil liberties when faced with the right-wing manifestations of state power brought about by McCarthyism.⁶² Similarly, the Cold War forced politicians across the political spectrum to acknowledge the importance of eliminating the crassest manifestations of Jim Crow as the Soviet Union used the unequal treatment of African Americans as a potent weapon in their propaganda arsenal.⁶³

Sweet Land of Liberty fits perfectly into this contemporary understanding of the development of postwar liberalism. It was not just the Civil Rights Movement that was put through the ringer of World War II, the Cold War, and McCarthyism to emerge in a form that emphasized cultural pluralism and deemphasized statist solutions to economic inequalities. Rather, that is what happened to every aspect of postwar politics. Thus, one of Sugrue's major accomplishments is to recount a history of the Civil Rights Movement that does not look like a strange outcast from the new history of postwar liberalism. It was not a singular triumph of liberalism in a time marked by compromise with anti-statism and accommodation of individualist libertarian values in American politics. Instead, it was a perfect representative of those processes.

60. See ALAN BRINKLEY, *THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR* 231–35, 265–71 (1995); ALAN BRINKLEY, *LIBERALISM AND ITS DISCONTENTS* 58–59, 90–92 (1998); Reuel E. Schiller, *Reining in the Administrative State: World War II and the Decline of Expert Administration*, in *TOTAL WAR AND THE LAW: THE AMERICAN HOME FRONT IN WORLD WAR II*, at 185, 195–96 (Daniel R. Ernst & Victor Jew eds., 2002).

61. See SUGRUE, *supra* note 2, at 102–11; see also RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* 217–37 (2007); ELLEN SCHRECKER, *MANY ARE THE CRIMES: MCCATHRYISM IN AMERICA* 369–95 (1998); SULLIVAN, *supra* note 14, at 225–47 (1996).

62. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 240–46 (1992); Karen M. Tani, *Flemming v. Nestor: Anticommunism, the Welfare State, and the Making of “New Property,”* 26 *LAW & HIST. REV.* 379 (2008).

63. See generally MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2000).

III. LAW AND THE NEW HISTORY OF THE CIVIL RIGHTS MOVEMENT

Law and lawyers play a large role in the traditional story of the Civil Rights Movement. Indeed, the litigation campaign that resulted in *Brown* and the aftermath of that campaign are canonical parts of the narrative.⁶⁴ Similarly, the standard story dictates that major pieces of federal legislation—the Civil Rights Act of 1964 and the Voting Rights Act of 1965—were two of the triumphs of the Movement. *Sweet Land of Liberty* confirms the importance of litigation and legislation to the story of the Civil Rights Movement. However, by changing the focus to the North and looking before *Brown*, Sugrue provides his readers with a series of new stories about the relationship between law and the Movement. Some of these stories have a more ironic twist than those in the original narrative.

Much of the discussion of litigation in *Sweet Land of Liberty* springs from the signature premise of the book: the need to expand the story of the Civil Rights Movement in both space and time. Thus, readers learn about school and housing desegregation litigation in northern cities during the 1940s and 1950s. Sugrue then links these pre-*Brown* campaigns to the open housing and school desegregation movements of the 1960s and 1970s. Similarly, he chronicles the litigation campaign of the National Welfare Rights Organization in the 1960s and 1970s. As with the other areas of civil rights history he explores, Sugrue introduces his readers to new marquee actors that have been left out of the story of the Movement, most notably Paul Zuber. Zuber was a veritable Thurgood Marshall of northern school desegregation cases, litigating cases in small towns and large cities throughout the 1960s, much to the dismay of the NAACP's leaders, who wished to focus on southern school districts.⁶⁵ Indeed, one of the themes that Sugrue returns to repeatedly in his discussions of northern litigation campaigns is how local activists successfully forced the NAACP to change its legal agenda to focus increasingly on the North.⁶⁶ Litigation and popular activism reinforced each other in a manner that radicalized the sometimes staid organization.⁶⁷

While Sugrue's description of civil rights litigation parallels the traditional story (though on a wider canvas), his discussion of the legislation that sprang from the Movement is quite different. *Sweet Land of Liberty* does an excellent job of recounting the emergence of

64. See MICHAEL J. KLARMAN, *BROWN V. BOARD OF EDUCATION AND THE CIVIL RIGHTS MOVEMENT* (2007); RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (1975); MARK TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950* (2d ed. 2005).

65. See SUGRUE, *supra* note 2, at 192-99, 450-57.

66. *Id.* at 178, 199, 457.

67. *Id.* at 166, 169-70, 199, 293.

ineffective state fair-employment-practices legislation in the 1940s and 1950s.⁶⁸ Similarly, like any history of the Civil Rights Movement, it discusses the Civil Rights Act of 1964.⁶⁹ Sugrue's take on all of this legislation was that it did more to raise the expectations of African Americans than it did to improve their lives.⁷⁰ Much more important to the evolution of the black freedom struggle was legislation not specifically aimed at African Americans that nonetheless addressed issues of economic inequality. Anti-poverty legislation originating in both the New Deal and Great Society not only created expectations among impoverished blacks, it also helped them materially, even if many of these programs, particularly during the New Deal, were riddled with discriminatory provisions.⁷¹ At the same time, Great Society legislation that sought to increase community participation in anti-poverty policy had the ironic (and, for Sugrue, profoundly pernicious) effect of furthering the Civil Rights Movement's tendency towards local, piecemeal, and often separatist solutions to racial inequality at the expense of "large-scale, integrationist, region-wide solutions."⁷²

While Sugrue is not a legal historian, his understanding of the role law plays in American history is quite subtle. Like most historians who address issues of legal history, Sugrue demonstrates how law reflects the social and political beliefs of the time. As social movements arise, they generate legal components. Thus, when Sugrue discusses the development of the open housing movement, or the northern school desegregation movement, or the welfare rights movement, he spends considerable time demonstrating how each of these movements used courts to further its goals. Similarly, he shows how law and legislation reflected the political temper of the times. For example, as the postwar Civil Rights Movement had its radical critique of capitalism diluted by anticommunism and Myrdalian ideology, so the law that sprang from the Movement, such as anemic fair-employment-practices legislation or the Supreme Court's refusal to acknowledge the state's role in creating housing segregation, reflected that fact.

However, Sugrue does not limit his discussion of law by portraying it as nothing more than an epiphenomenon of more general social and political trends. Law, according to Sugrue, is not simply a reflection of the context in which it sits. Law also shapes that context; it causes changes in society. Sugrue repeatedly emphasizes the fact that litigation campaigns do not simply respond to social movements; they also

68. *See id.* at 113–24.

69. *See id.* at 358–64.

70. *Id.* at 129, 271, 362–64.

71. *Id.* at 50–55, 357–74, 383–85.

72. *Id.* at 367–78, 399.

generate and abet them.⁷³ Similarly, he notes how the opportunities provided by legislation and litigation channeled the Civil Rights Movement in particular directions. The Community Action Programs of the War on Poverty increased the focus of the Movement on local solutions to racism and economic inequality.⁷⁴ If the Supreme Court was going to reject interdistrict solutions to school desegregation, then some activists would reject calls for integration and replace them with demands for local, autonomous control over school districts.⁷⁵ *Sweet Land of Liberty* thus reflects an understanding of legal history that every historian should embrace: to truly integrate legal history into broader historical narratives, historians must recognize not only how law reflects the society around it, but also how it shapes that society.

This is not to say that *Sweet Land of Liberty* leaves legal historians with nothing left to contribute to the new history of the Civil Rights Movement. To the contrary, Sugrue's work builds on that of historians such as Michael Klarman,⁷⁶ Risa Goluboff,⁷⁷ Kenneth Mack,⁷⁸ Felicia Kornbluh,⁷⁹ Tomiko Brown-Nagin,⁸⁰ Nancy MacLean,⁸¹ and Sophia Lee,⁸² whose work has expanded the legal history of the Civil Rights Movement outside of the traditional narrative. Like Sugrue, these authors have demonstrated how a close examination of the legal aspects of the Civil Rights Movement reveals ideological, temporal, and geographic complexity: litigation campaigns in every corner of the country; civil rights lawyers active not just in the 1950s and 1960s but throughout the twentieth century; lawyers with ideological commitments that encompassed the economic critique of racism that Sugrue discusses in such detail. Similarly, for too long, historians have focused on the federal government at the expense of state courts and state and local legislatures. They have also neglected the role that administrative agencies at all

73. *Id.* at 166, 169–70, 182–83, 188–89, 392, 396, 452–56.

74. *Id.* at 367–78, 399.

75. *Id.* at 489–90.

76. See MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004).

77. See GOLUBOFF, *supra* note 61.

78. See Kenneth Mack, *Law and Mass Politics in the Making of the Civil Rights Lawyer, 1931–1941*, 93 J. AM. HIST. 37 (2006); Kenneth Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before Brown*, 115 YALE L.J. 256 (2005).

79. See FELICIA KORNBLUH, *THE BATTLE FOR WELFARE RIGHTS: POLITICS AND POVERTY IN MODERN AMERICA* (2007).

80. See Tomiko Brown-Nagin, *Race as Identity Caricature: A Local Legal History Lesson in the Salience of Intra-racial Conflict*, 151 U. PA. L. REV. 1913 (2003); Tomiko Brown-Nagin, *An Historical Note on the Significance of the Stigma Rationale for a Civil Rights Landmark*, 48 ST. LOUIS U. L.J. 991 (2004).

81. See NANCY MACLEAN, *FREEDOM IS NOT ENOUGH: THE OPENING OF THE AMERICAN WORKPLACE* (2006).

82. See Sophia Lee, *Hotspots in a Cold War: The NAACP's Postwar Workplace Constitutionalism, 1948–1964*, 26 LAW & HIST. REV. 327 (2008).

levels of government have played in the legal history of the Civil Rights Movement.⁸³ Thus, the strands of legal history that Sugrue uses in *Sweet Land of Liberty*, as well as the works of other historians more directly focused on creating a deeply textured legal history of the Civil Rights Movement, suggest many new avenues of exploration for those who wish to join in the creation of that history. By looking across time and space, by uncovering the vast variety of beliefs that drove the lawyers involved in the Civil Rights Movement, and by examining the involvement of the plethora of governmental institutions that confronted issues of civil rights, legal historians can create as nuanced a legal history of the Civil Rights Movement as Sugrue has created of the Movement in general.

These suggestions expand on what Sugrue has done so well in *Sweet Land of Liberty*. However, there are also opportunities for legal historians in the lacunae that Sugrue leaves in his narrative. For example, legal historians can explore in more depth the relationship between law and the division that people frequently make between racism and “rational,” market-based behaviors that have a negative impact on African Americans.⁸⁴ Sugrue frequently notes that one of the problems with the Myrdalian, psychological explanation for African American disadvantage is that it obscures certain systemic problems that disproportionately affect black people. If a given problem is not caused by the pathology of individual racism, society should not attempt to remedy it. For example, to the extent that residential segregation was caused by racially restrictive covenants, such covenants could be outlawed. However, when residential segregation is caused by the market (African Americans simply can’t afford houses in certain neighborhoods), it can’t be. One cause of segregation is “pathological,” the other is “natural.” Of course, Sugrue demonstrates that the way the market disadvantages African Americans is not “natural” at all. It is the product of decades of public and private decisionmaking: discriminatory lending, employment discrimination, exclusionary unions, and inferior educational opportunities, for example. Yet it is a staple of American law and politics that disadvantageous outcomes resulting from market forces,

83. Cf. Reuel E. Schiller, *The Administrative State Front and Center: Studying Law and Administration in Postwar America*, 26 LAW & HIST. REV. 415, 419–21 (2008). A few scholars have started the process of integrating the administrative state into the study of the Civil Rights Movement. See, e.g., PAUL FRYMER, *BLACK AND BLUE: AFRICAN AMERICANS, THE LABOR MOVEMENT, AND THE DECLINE OF THE DEMOCRATIC PARTY 70–97* (2008); STEVEN M. GILLON, “THAT’S NOT WHAT WE MEANT TO DO”: REFORM AND ITS UNINTENDED CONSEQUENCES IN TWENTIETH-CENTURY AMERICA 120–62 (2000); BARBARA YOUNG WELKE, *RECASTING AMERICAN LIBERTY: GENDER, RACE, LAW, AND THE RAILROAD REVOLUTION 280–322* (2001); Anthony Chen, *The Party of Lincoln and the Politics of State Fair Employment Practices Legislation in the North, 1945–1965*, 112 AM. J. SOC. 1713 (2007); Lee, *supra* note 82.

84. These two paragraphs are based on a suggestion that Mark Tushnet made at the panel on *Sweet Land of Liberty* at the 2009 annual meeting of the American Society for Legal History.

however unfortunate, cannot be remedied by the state. This notion underlies the extremely successful attacks on school desegregation and affirmative action during the 1970s and 1980s, and has served as the basis for the more recent evisceration of welfare.

According to Sugrue, most Americans, regardless of race, accept this division for two reasons: postwar anticommunism marginalized political thought that critiqued markets, and the psychological explanation of racism and racial disadvantage was a seductive replacement. These are convincing arguments, but I'm not sure they are sufficient. Legal historians of a critical bent have long suggested that law itself has a way of convincing people that market-driven outcomes are natural, or, at the very least, "legal," and thus "fair."⁸⁵ By turning their attention to the way law justified these outcomes in the context of race discrimination, legal historians would help complete the story that Sugrue has started to tell. An obvious place to begin would be with the concept of state action that infuses civil rights law. As Sugrue's narrative demonstrates, discriminatory state action permeates the history of American race relations. Yet in school desegregation cases and affirmative action cases, courts have drawn essentially arbitrary lines in which some state actions violate the Constitution (drawing school district boundaries based on the racial makeup of communities,⁸⁶ for example), while others do not (exclusionary zoning ordinances,⁸⁷ for example). Further exploration of this phenomenon could not only tell us what caused courts to make these distinctions, but also could demonstrate how constructing such divisions in the law can harden them, serving as the basis for peoples' belief that the distinction drawn between the market-driven acts that disadvantage African Americans and intentional racism is a real one.

Legal historians also have something to add to the story of what Sugrue believes is the central tragedy of the Civil Rights Movement: its failure to adopt a class-based, economic critique of American racism. Once again, Sugrue places the blame for this at the feet of anticommunism and Myrdalian conceptions of racism. To these factors he adds the persistent localism and separatism that gained strength within the Movement during the 1960s. As with his discussion of the relationship between racism and the market, Sugrue's story is incomplete. While all the factors he discusses are important parts of the

85. See GENOVESE, *supra* note 10, at 25–48; HORWITZ, *supra* note 62, at 269–72; MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860*, at 253–66 (1977); DUNCAN KENNEDY, *THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT* 1–8 (2d ed. 2006); E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGINS OF THE BLACK ACT* 626–63 (1975).

86. See *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189 (1973); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

87. See *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

explanation for the declining power of the interracial left, legal historians will complete the picture when they look more carefully at the way that American legal institutions made interracial alliances difficult to maintain. An excellent place to start this inquiry is with an examination of the interaction between the traditional regime of labor law, created during the 1930s and 1940s, and the law of fair employment practices, created during the 1950s and 1960s.⁸⁸

Substantively, both regimes sought to limit employer discretion. However, the specifics of how employer discretion was to be reduced were quite different and, in many ways, antithetical. Labor law, as embodied in the National Labor Relations Act, empowered unions that were supported by a majority of workers at a job site to negotiate collective bargaining agreements that contained limitations on managerial autonomy.⁸⁹ Thus, labor law depended on an almost unalloyed form of workplace majoritarianism to set the boundaries of employer discretion. The law of employment discrimination, on the other hand, was profoundly antimajoritarian in nature. Title VII of the Civil Rights Act of 1964 and a variety of similar state statutes directly prohibited employers from taking race, sex, religion, or national origin into account when making employment decisions.⁹⁰ The desires of the majority of the employees in the workplace were irrelevant to the implementation of employment discrimination law.

The policymakers who designed these two systems may not have intended to create regimes based on antithetical premises, but the effect of their doing so was to limit the ability of political actors, be they unions, civil rights organizations, or politicians, to find compromises.⁹¹ Thus, the conflict between white and black workers developed into a clash between groups that possessed absolute legal entitlements—the sanctity of collectively bargained seniority systems and the prohibition against racially motivated employment decisions, for example. By creating these two sets of expectations, the authors of both legal regimes not only created few incentives to compromise, they also fostered expectations within both groups that would be difficult to meet without undermining each other's expectations.⁹²

88. Congress created modern labor law in the 1930s and 1940s by enacting the Norris LaGuardia Act, Pub. L. No. 72-65, 47 Stat. 70 (1932), the National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935), and the Labor Management Relations Act, Pub. L. No. 101, 61 Stat. 136 (1947). The modern law of fair employment practices was created through the passage of twenty-five state fair employment statutes between 1945 and 1963. See Chen, *supra* note 83, at 1719–20; Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253.

89. National Labor Relations Act § 9(a).

90. Title VII of the Civil Rights Act, § 703(a)–(c). For state laws, see Chen, *supra* note 83, at 1718.

91. See e.g., Schiller, *supra* note 47, at 160–65; NELSON LICHTENSTEIN, STATE OF THE UNION: A CENTURY OF AMERICAN LABOR 178–211 (2002).

92. See Schiller, *supra* note 47, at 160–65; LICHTENSTEIN, *supra* note 91, at 174–75.

A similar problem existed with respect to the institutional mechanisms that were used to enforce the rights that each regime created.⁹³ Labor law was designed to resolve conflicts between employers and employees outside of the courts. Claims that employers or unions violated the substantive requirements of the NLRA were adjudicated before the National Labor Relations Board, a federal administrative agency.⁹⁴ Disputes over the rights created in collective bargaining agreements were resolved privately before arbitrators selected by the parties to the contract.⁹⁵ Employment discrimination claims, on the other hand, were resolved by a completely different set of institutions. Title VII gave primary responsibility for the enforcement of its provisions to federal courts.⁹⁶ State employment discrimination laws were enforced in state courts or before state administrative agencies.⁹⁷ Thus, even if the provisions of labor law and employment discrimination law were susceptible to some form of compromise, it is hard to see what institution would facilitate the compromise and carry it out. By spreading the enforcement of labor and employment laws over so many institutions, Congress all but guaranteed that Congress itself, perhaps the most sclerotic institution in American government, was the only one that could resolve the conflicts between labor law and the law of employment discrimination.

This discussion of the relationship between these two legal regimes is, to a large extent, simply a hypothesis. It is an area in need of study by legal historians. By looking at the impediments that law and legal institutions placed in the way of the sort of nationwide, interracial, economically-oriented Civil Rights Movement of which Sugrue chronicles the decline, legal historians will help to complete his narrative.

CONCLUSION

It is impossible to read *Sweet Land of Liberty* without contemplating the present. Sugrue's narrative ends in the 1990s with a dismal assessment of the state of black America.⁹⁸ He also discusses the dismaying disparity in the way whites and African Americans perceive issues of race relations.⁹⁹ According to most whites, racial discrimination

93. For a detailed exploration of the separation of the institutional mechanisms used to enforce these rights, see FRYMER, *supra* note 83, at 1–43.

94. National Labor Relations Act § 3.

95. See Labor Management Relations Act § 203(d); *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448 (1957).

96. Title VII of the Civil Rights Act of 1964, § 706(f).

97. Chen, *supra* note 83, at 1717–18.

98. SUGRUE, *supra* note 2, at 538–40.

99. *Id.* at 534–36.

is a thing of the past, while African Americans perceive it as an everyday problem. Similarly, whites believe that the gap in standards of living between the races has decreased, while blacks believe it has increased. Indeed, African Americans' optimism about the potential for improvement in the socioeconomic status of their community has diminished dramatically since the 1960s. In such a depressing context, is there any room for optimism, particularly after the election of America's first African American president?

Barack Obama is not a character in *Sweet Land of Liberty*. The book was published before he was elected. Nevertheless, Obama's successful campaign and the first year of his presidency add an interesting postscript. First of all, Obama's success can be seen as an outgrowth of a trend that Sugrue discusses, namely, the remarkable successes that African Americans have had in electoral politics since the 1970s.¹⁰⁰ Second, the reaction in some quarters to his election (hoarding guns, overtly racist caricatures) indicates that there are still plenty of Americans who gave up on their Myrdalian psychotherapy a little too soon. Finally, there is the question of whether Obama's election indicates that the Civil Rights Movement has moved beyond both its parochialism and its disinclination to view African American disadvantage as the result of systemic economic problems in American society. Obama's career has been built on embracing interracial politics.¹⁰¹ Indeed, during the campaign, older civil rights leaders attacked Obama for his lack of parochialism—his disinclination to discuss racial incidents in Jena, Louisiana, or the Confederate flag in South Carolina.¹⁰² Perhaps this was just political pragmatism on Obama's part,¹⁰³ but whatever it was, his domestic legislative agenda, focused as it is on healthcare reform and promoting an economic recovery through government spending, is anything but parochial. Instead, it could be construed as a return to the interracial, economically progressive agenda that Sugrue has demonstrated is the lost legacy of the Civil Rights Movement. Whether Obama can achieve his policy ends is, of course, another question, but it may be that Sugrue has shown us not only the forgotten past of the Civil Rights Movement, but also its future.

100. *Id.* at 500–05.

101. For a vivid illustration, see Ryan Lizza, *Making It: How Chicago Shaped Obama*, *NEW YORKER*, July 21, 2008, at 49.

102. See Ta-Nehisi Coates, *A Deeper Black*, *NATION*, May 19, 2008, at 31.

103. Coates, for one, explicitly rejects the notion that Obama's disregard of the issues that are meaningful to what he witheringly calls the "Civil Rights Industrial Complex" is a political calculation. See *id.* at 32. Instead, he suggests that those leaders are stuck on issues that are, in fact, not very meaningful to most African Americans. "Survey the average voter in Harlem, Detroit or West Baltimore, ask her to rank her presidential concerns and see where 'reparations' or 'abolishing the Confederate flag' compares with, say, 'healthcare' or 'ending the war.'" *Id.* at 34.