1-1-1990

Essay Review: The Civil Rights Struggle in Retrospect: Review of Cruse: Plural But Equal, and Bell: And We Are Not Saved

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Recommended Citation
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Essay Review

The Civil Rights Struggle in Retrospect


Reviewed by Robert A. Sedler

As American society moves toward the end of the twentieth century, it continues to confront the consequences of a long and tragic history of racism. The consequences of racism affect many of our institutions, including the legal system and the legal profession. Blacks and other minorities continue to be seriously underrepresented in the legal profession and in the administration of justice. While law schools struggle to enroll minority students in more than token numbers and to recruit and retain at least some minority faculty members, legal commentators debate the constitutional permissibility and social utility of "affirmative action" programs. There is ongoing controversy over the scope of civil rights laws and efforts to prevent and remediate racial discrimination. With the growth of an urban racial underclass, the problems of poverty, housing, substance abuse, and law enforcement have increasingly taken on racial overtones.

For all of these reasons, race and racial discrimination occupy an important place in the law school curriculum. Because racial discrimination has been the paradigmatic form of discrimination in American society, much of equal protection doctrine has developed in response to it, and it has been the point of departure for the constitutional analysis of other forms of group discrimination. Civil rights laws have also been initially directed at racial discrimination, and other forms of group discrimination have been proscribed on the basis of their similarity to racial discrimination. Because blacks and other racial minorities are disproportionately poor in

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1. I have elsewhere used the phrase "social history of racism" to summarize the history of discrimination and victimization of blacks and other nonwhite minorities in American society. See the discussion in Robert A. Sedler, The Constitution and the Consequences of the Social History of Racism, 40 Ark. L. Rev. 677, 677–82 (1987).


comparison to whites, an understanding of race and the consequences of racism is necessary for students of poverty law, social legislation, and family law. In urban law schools, client-contact clinical programs are likely to have minority persons as clients. Finally, because some lawyers end up as policy makers and government officials, law students need a thorough understanding of the problem of race in American society.

Our teaching about race in the law schools often approaches racial equality from the perspective of legal structure. We tend to emphasize constitutional doctrine applicable to racial equality and civil rights laws designed to bring about structural protection against racial discrimination. In so doing, we may fail to give sufficient attention to the more fundamental question of the limits of law in bringing about racial equality in the United States. In his much-reviewed book, *And We Are Not Saved*, Derrick Bell addresses the fundamental question of the limits of law. Bell analyzes the impact of the legal struggle for civil rights on black Americans and concludes that after many decades and many legal victories, racial inequality remains pervasive in American society—blacks still "are not saved."4 Bell maintains that racial equality probably cannot be attained in American society as it now exists. Therefore, he contends that the focus of the new civil rights struggle should be on "justice for all," the eradication or alleviation of poverty, and an end to all forms of discrimination. In contrast to Bell, Harold Cruse does not argue for "justice for all"; rather, he asserts that blacks must save themselves. In *Plural But Equal*, Cruse, a prominent historian, addresses the question of the "limits of law" from a different perspective. He subjects the civil rights struggle to historical analysis and concludes that "integration" was doomed to failure from the very beginning.

Although I will offer a detailed account of Cruse's argument, there is no need to do the same for Bell's book. Most teachers of Constitutional Law and related courses are by now quite familiar with *And We Are Not Saved* and the commentary it has spawned. The contrasting positions of Bell and Cruse provide a context for a retrospective view of the civil rights struggle and for some observations about the role of legal education in social reform.

**Plural But Equal**

As the title of his book indicates, Cruse's emphasis is on the distinctiveness of blacks and other racial and ethnic groups in American society. His analysis of the civil rights struggle leads him to conclude that the integration strategy is fundamentally flawed and is thus doomed to failure. Throughout the book he savagely attacks integration strategy and the

NAACP, which he sees as its primary architect.\(^5\)

According to Cruse, the late 1960s marked the end of a major civil rights "cycle" (7); he sees the 1980s as a post-civil rights era. Cruse calls in question the central premise of the modern civil rights movement—the goal of integration. Taking the *Brown* decision as the starting point of the movement, he suggests that a system of truly "separate but equal" education would have been in the best interests of black children. He faults the NAACP for pursuing an integration strategy in the face of the apparent willingness of the southern states to equalize expenditures for segregated schools (20). According to Cruse, the racial demographics of the South and North sustain a biracial system (in which schools are either predominantly black or predominantly white) that busing has not remedied (21). Thus, when the NAACP rejected compromise, it denied blacks the benefits they might have derived if public schooling had been allowed to evolve into racially separate but educationally equal systems. The *Brown* decision, says Cruse, actually did blacks a disservice\(^7\); the "separate but equal" doctrine that *Brown* ruled unconstitutional should have been supplanted by the truly democratic doctrine of "plural but equal" (39).

*Brown* fostered the illusion that actual integration—not just the eradication of all legally mandated segregation—would occur in American society. Because Americans believe in the concept of race,\(^8\) however, the expectation that the *Brown* decision would lead to full racial integration was completely improbable (37).\(^9\) Set against the goal of racial integration is the fact of racial pluralism. As Cruse explains it: "The United States is racially, \(^{5}\) Cruse says that in the 1940s, "the term 'racial integration' . . . had been imperceptibly introduced into the lexicon of the NAACP as a synonym for 'racial democracy,' 'racial equality,' and 'civil rights.' " Harold Cruse, *Plural But Equal: A Critical Study of Blacks and Minorities and America's Plural Society* 26 (New York, 1987). Subsequent page references will be cited parenthetically in the text.

\(^6\) Cruse describes a "cycle" as a "course or series of events or operations that recurs regularly and usually leads back to the starting point" (7). He says, however, that the civil rights struggle of the 1950s and 1960s was not the first civil rights cycle. The first cycle (1868–96) ended with black civil rights advocates "beaten down in abysmal defeat" (8). Cruse focuses on the defeat in Congress of the Blair Education Bill (10–11). The bill—defeated in 1890, a decade after it was introduced—would have appropriated large sums of federal money for public school education and would have required "separate but equal" funding for racially segregated schools in the south (10–13). Although the black leadership of the time supported the Blair Bill and did not make an issue of segregated schools, the white political leadership in the south opposed it (13–18).

\(^7\) Cruse calls the *Brown* decision a "mindless act of social irresponsibility" because it eliminated the black schools and so denied "the legitimacy of the important concept of the community or the neighborhood public school" (197). He notes that during the *Brown* litigation, South Carolina took the lead among the southern states by offering to equalize the black schools by substantial increases in funding (199). According to Cruse, when the NAACP rejected this offer, it lost the chance to fashion black political bases around public school funding and administration (199–200).

\(^8\) There is a "social psychology of race in America" (36). According to Cruse, "*Brown* was but the latest of a long series of judicial decisions stemming from the moral imperfections that had marred the American Constitution at its birth" (35). What the framers had in mind was an all-white nation of English subjects, but institutionalized black slavery negated the all-white ideal (33–34).

\(^9\) Cruse notes that before *Brown*, racial segregation stemmed not only from laws, as in the southern states, but also from "racial custom, racial economics, racial politics, and racial culture" (38) throughout the nation.
ethnically, and culturally a plural society. The legal and judicial problem is that the American Constitution [does not] acknowledge the pluralistic composition of American society" (38). Brown, by mandating integration, simply perpetuates the myth that separatist restrictions on blacks are all that stands in the way of equality.

Full racial integration was resisted because it intruded on "sacred relations." Using Frazier's gradients of integration, Cruse distinguishes between those areas of American life that involve "secondary contacts," or "secular relations," as opposed to "primary contacts," or "sacred relations" (47). "Secular relations" are secondary because they are rather impersonal (for instance, in the streets, on public transportation, and in places of public accommodation). "Sacred relations" are primary because they are more interpersonal (for instance, in the schools or residential neighborhoods). The workplace falls somewhere in the middle. Progress in racial integration is more likely to occur in areas of life that are "secular" (47). (This may explain why there has been less resistance to civil rights laws prohibiting discrimination in places of public accommodation and employment than to laws prohibiting housing discrimination.) Thus, there was enormous resistance to Brown because the integration mandate was directed at the public school, clearly a "sacred institution" (47). Cruse explains the white flight to the suburbs as an attempt to keep the "sacred areas" of home and school as they were before the Brown decision (51).

In attacking the integration strategy, Cruse draws an important distinction between separateness and segregation. Because of the actual racial and ethnic pluralism in American society, there will be separateness; separateness, however, is not inconsistent with equality:

Philosophically, "separate but equal" is, in the normative sense, "unequal" only if in social practice it is the governing intent to make separateness politically, economically, and socially unequal, which of course makes such practices immoral. Thus, separateness, which is not immoral, became segregation, which is immoral because it was not the intent to make separate equal. . . . Legally imposed segregation was what rendered separateness implicitly inferior. Remove the legal sanctions of imposed segregation, and separateness has the potential of achieving equality in its own right. (67)

Cruse insists that "[r]acial segregation was not the cause of the inferior education found in separate black public schools" (197–98). Rather, the root cause is American educational philosophy, which ignores "the intellectual and spiritual needs of nonwhite minorities" (198). If "the separate-

11. Comparing the situation of blacks and white ethnic groups in American society, Cruse refers to blacks as the "less equal" minority (53). He says that white ethnic groups have the choice of how assimilated or how separate they want to be. Despite their suffering a degree of exploitation, they were able to find employment and to improve their situation by hard work (55). He sees white ethnics as a group set apart from blacks, because class lines rather than race have been the main barrier to assimilation (59).
12. Derrick Bell has likewise been an unremitting critic of what he calls the NAACP's "integration at all costs" or "racial balance" strategy to achieve educational equality for black children. In And We Are Not Saved he continues the attack in Chapter 4, "Neither Separate Schools Nor Mixed Schools: The Chronicle of the Sacrificed Black Schoolchildren." The fundamental mistake, says Bell, was to "equate integration with the effective
but-equal doctrine that Brown ruled unconstitutional [had] been supplanted by the truly democratic doctrine of "plural but equal" (249), there would have been black community control over black schools, which, Cruse maintains, would have made the educational system responsive to the needs of black children. By demanding unqualified racial integration, the civil rights movement "elected to barter away all potential claims that the urban black community had to retain local control over black education as if it were an unnecessary entitlement" (253).

To achieve a "plural but equal" society, the civil rights movement should have worked from the very beginning to encourage black economic development, instead of promoting racial integration. Because the NAACP adopted "noneconomic liberalism" as its guiding philosophy (75), it lost a means of political leverage that might have extended meaningful equality for blacks beyond "the phantom results of mere integrated racial equality" (174). Cruse lists the many problems that confront urban black communities: "mounting black-on-black crime, unemployment, the menace of drugs, illegitimate births, teen delinquency, family disorganization, and a full catalogue of each and every malaise under the heading of ghetto pathology" (256). Although he acknowledges that these problems are a result of a history of racial discrimination and segregation, he maintains that racial integration is not "the magic solution" (256). The real value of eliminating discrimination is empowerment; that is, the important consequence is freeing a minority group to develop resources that derive from "its own political, economic, and cultural plurality" (259).

Cruse recognizes that there were clear gains from the civil rights crusade. It eliminated the structural barriers, both legal and extralegal, that stood in the way of black equality. It brought about at least the moral condemnation of institutional racism and resulted in the enactment of civil rights legislation that provided greater employment and educational opportunities for blacks (285). Nevertheless, Cruse emphasizes that only a

13. Likewise, Bell, speaking through Geneva Crenshaw, imagines the effect of different Brown decision that would have focused not on desegregation but on equalization of facilities and black representation in educational decision making. Under such a decision, the Court would have held as follows:

1. Even though we encourage voluntary desegregation, we will not order racially integrated assignments of students or staffs for ten years.

2. Even though "separate but equal" no longer meets the constitutional equal protection standard, we will require immediate equalization of all facilities and resources.

3. Blacks must be represented on school boards and other policy-making bodies in proportions equal to those of black students in each school district. (112)

14. Cruse contends that from the inception of the NAACP, its leadership split over whether primacy should be given to economic questions or civil rights questions. Because it was "unable to resolve this conflict programmatically at the time of its founding, the NAACP dispensed with an economic program . . . ." (75).
relatively small (and favored) part of the black population benefited educationally, economically, and socially, while “at least half the black population would be pushed farther down the economic scale into a permanent slough of poverty, unemployment, and welfare” (285). Thus, the rise of a new black middle class in the 1970s was accompanied by an ever-widening and permanent black underclass, hopelessly mired in poverty and deprivation (285).

Cruse argues that, with the demise of the civil rights era, political organization becomes the only means for change. It is time, he says, to deal with the “organizational deficiencies that have hampered black progress in economic, cultural, educational, and other social fields” (342). The civil rights movement failed to address the central problem, the economic powerlessness of black people (360). For most urbanized blacks, “the civil rights of integration and upward economic mobility were meaningless” (369). An independent black political party would be the first step in this process (378). The main issue for the black minority today, according to Cruse, is not “the unresolvable, ambiguous, open-ended legalisms of equal protection,” but rather “the reality of the closed, privileged arena of economic competition for the rewards of social status through economic parity” (382). Thus, the “bottom line for the next black political manifesto is economic justice, without which there will be no future black survival” (385).

Cruse concludes on a combative note:

> In the future . . . blacks must struggle to save themselves because allies are not promised. In organizing to save themselves, any political allegiance blacks would consider extending to other minorities would have to be purely conditional. Despite the false promises of the most recent civil rights cycle of the Sixties and Seventies, American blacks still represent the most crucial minority group, the most strategically positioned to impact on the institutional structures of the total society. What is lacking is the quality of black leadership capable of harnessing black potential. (391)

**A Retrospective View**

There can be little doubt that in the United States today we still have “two societies, one black, one white—separate and unequal.”17 There is an

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15. Bell also makes the point that affirmative action programs have had a very limited effect in overcoming black poverty. Quoting from William Julius Wilson, The Declining Significance of Race: Blacks and Changing American Institutions 110, 152 (Chicago, 1978), Bell notes that affirmative action programs “are not designed to deal with the problem of the disproportionate concentration of blacks in the low-wage labor market. Their major impact has been in the higher-paying jobs in the expanding service-producing industries.” As a result, the black community is developing a “deepening economic schism . . . with the black poor falling further and further behind middle- and upper-income blacks” (Bell, 124).

16. Cruse believes that “the traditional civil rights leadership will oppose any attempt on the part of an alternative leadership to organize blacks into an independent political bloc” (379).

enormous economic gap between blacks and whites, with blacks suffering disproportionate unemployment and underemployment; the family income of blacks averages little more than half that of whites. There is also an educational gap, with blacks continuing to lag significantly behind whites in academic achievement and quality of educational experience. Further, there is a power gap. Although racial demographics, coupled with federal voting rights laws, have increased the number of black officeholders, particularly in the central cities where the black population is concentrated, blacks continue to be seriously underrepresented in positions of power, in the elite professions, and in the economic mainstream. Finally, blacks are physically separate from whites. The black population is concentrated within the central cities of the nation's largest metropolitan areas, where they generally live in isolation from both urban and suburban whites. Truly, there are two societies, "separate and unequal," and it is difficult to disagree with Bell, speaking through his heroine Geneva Crenshaw, when he writes: "the once swiftly moving march toward racial equality through law reform has slowed to a walk, leaving millions of black Americans no better off [than] they were before the civil rights movement" (45).

At the same time, major structural changes have been brought about in American society through the civil rights struggle. As Bell emphasizes in his book, the civil rights struggle concentrated on attacking the existing structural impediments that denied equality to blacks. The struggle has been largely successful in the sense that the Constitution has been interpreted to prohibit state-imposed racial segregation and other traditional forms of intentional governmental discrimination against blacks. Federal laws now prohibit racial discrimination in voting, employment, public accommodations, and housing. Similar protection is afforded by the laws of many states. This means that there is now in place a system of prevention: the law prohibits present discrimination against blacks by the government and by most private entities, and it provides remedies for such discrimination.

The system of prevention, however, does not purport to deal directly with the present consequences of the social history of racism, nor is it designed to do so. Because the consequences are so pervasive, self-perpetuating, and self-reinforcing, the system of prevention, even if vigorously and fully enforced, will do relatively little to alter the societally disadvantaged and subordinate position of blacks. Indeed, the system of

18. See the discussion of the economic gap in Sedler, supra note 1, at 678–80.
19. Id. at 680.
20. Id. at 680–81.
21. Id. at 681.
22. See the discussion of the self-perpetuating and self-reinforcing nature of racial inequality, id. at 682–83, n.12.
23. Although civil rights laws in voting, employment, and housing in some circumstances reach action having a racially discriminatory effect, the Constitution reaches only intentionally discriminatory action. Racially neutral action, however, will frequently interact with the consequences of the social history of racism to disadvantage blacks. And even when the test is "racially discriminatory effect," the action may still be found to be justifiable. See, e.g., Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989).
prevention has built-in limits. As Bell has emphasized, the Supreme Court has not interpreted the Fourteenth Amendment as expansively as it could have to promote equality for blacks. In fact, in affirmative action cases, the Court is now interpreting the Fourteenth Amendment as limiting the power of government to use racial preference for blacks as a means of bringing about racial equality.

In my own view, the most important failure of interpretation has occurred in the area of constitutionally mandated school desegregation. The Court has adhered to the de jure-de facto distinction and has been unwilling to impose a constitutional obligation on the states to operate racially integrated schools to the maximum extent feasible. It has also sharply limited the circumstances in which a court can order metropolitan desegregation in order to remedy the de jure segregation existing in an urban school district. The Court has in effect ensured that the educational gap between blacks and whites in American society will remain and that the life choices of countless black children will be diminished.

Both Cruse and Bell discount the importance of racial integration in education. They argue that the focus should be on effective education for black children. As Bell puts it, racial integration "is not synonymous with, and may be antithetical to, effective education for black children" (117). I find myself in sharp disagreement with both authors on this issue. In the real world in which black children live, racially integrated education is all

24. Bell treats the issue in his seventh chapter, "The Declining Importance of the Equal-Protection Clause: The Chronicle of the Amber Cloud." He argues that "[w]hen minorities most need the Fourteenth Amendment's shield, the Court does not seem to respond. . . . So much of the Court's sensitivity is reserved for white concerns that there seems to be little left for black needs" (167, 168). He also notes that "[s]uspect-classification doctrine has helped relatively powerless minorities, but only when the classification under review is so blatantly and arbitrarily discriminatory that the Court could strike it down under a much less exacting standard of review" (175). See also Robert Allen Sedler, Racial Preference, Reality and the Constitution: Bakke v. Regents of the University of California, 17 Santa Clara L. Rev. 329, 370–72 (1977) ("The compelling state interest test thus has been of no utility in enabling the Supreme Court to deal with the constitutionality of racial discrimination, and is not in practice the frame of reference with which the Court has approached this question." Id. at 372).

25. In chapter 5, "The Racial Barrier to Reparations: The Chronicle of the Black Reparations Foundation," Bell criticizes the "judicial tendency to use—in order to forestall effective remediation of discrimination already suffered—standards established by blacks to end discrimination" (133–34). He says that Bakke (Regents of the Univ. of California v. Bakke, 438 U.S. 265 (1978)) "is an unhappy example of this practice" (134). In City of Richmond v. J. A. Croson Co., 109 S. Ct. 706, 721 (1989), the Supreme Court emphasized that strict scrutiny applies to remediation of racial preference, stating that, "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification."


28. Cruse goes even further, advocating black community control over black schools, which, he maintains, would make the educational system responsive to the needs of black children (199).
too often synonymous with effective education for black children. The available data strongly indicate that black children who are attending racially integrated schools perform better academically, as measured by performance on standardized achievement tests, than black children who are attending predominantly black schools. This is not because of racial mixing as such, but because such factors as the predominantly middle-class composition of the typical integrated school and the availability of better teachers, curricula, and facilities in integrated schools than in black schools. In the real world, there is a strong correlation between attendance at racially integrated schools and the improved academic achievement and of black children.

But precisely because the Constitution has not been interpreted as requiring the state to operate racially integrated schools to the maximum extent feasible, a large number of black children attend school in urban school systems that are comprised primarily of low- and moderate-income black children. The Detroit school system, for instance, is "black controlled"—a majority of the board of education, the superintendent, most of the administrators, and a majority of the teachers and principals are black. According to Cruse, this should make the educational system more responsive to the needs of black children, and perhaps it does. But if Detroit is any example, this kind of school system is not one in which black children thrive. They generally have significantly lower levels of academic achievement than students elsewhere in the state, and they fall further behind national norms with each additional year of schooling. Almost sixty percent of them never graduate from high school, and frequently they attend school in a condition of social disorganization. Black children are similarly disadvantaged in other urban school systems in the United States. Plainly, racially integrated schools would go a long way toward achieving racial equality in the United States.

Bell contends that the Court could also have interpreted the equal protection clause as invalidating laws that in practice have a racially discriminatory effect (175). A discriminatory effect rather than a discriminatory purpose standard could have provided greater constitutional protection against governmental action detrimental to the interests of black Americans. Further, the Court could have interpreted the Fourteenth Amendment more favorably for blacks by holding that overcoming the present consequences of past societal discrimination is a compelling governmental interest. Although this interpretation, which would justify affirmative action measures that give preference to blacks and other

30. It is a matter of common knowledge that except for two city-wide selective high schools and perhaps a few elementary schools, middle-class black and white parents residing in Detroit will not use the Detroit public schools.
31. See the discussion in Sedler, supra note 26, at 1709, 1707.
32. Under the "effect" standard, actions that perpetuate the consequence of historical racism would be unconstitutional unless supported by strong justification. Sedler, supra note 1, at 704–20, 731–37.
racial-ethnic minorities, secured four votes in Bakke, it has since been decisively rejected by the Court. Rather than encouraging the equal participation of blacks in all important aspects of American life, the Court has limited the permissible use of racial preference to achieving educational diversity (as in Bakke) and to overcoming the present consequences of the government's own identified past discrimination.

In assessing the effectiveness of the civil rights struggle, we must recognize that the Court itself has stopped short of giving maximum constitutional protection to measures that aspire to achieve racial equality. Nonetheless, both Bell and Cruse demonstrate very clearly the "limits of law." Legal action alone cannot overcome the present consequences of generations of racism. Bell may emphasize a "just society for all," while Cruse emphasizes "black pluralism," but both agree that the central problem for black Americans today is racial poverty and economic powerlessness. Because the civil rights struggle concentrated almost entirely on attacking the existing structural impediments that denied equality to blacks, it could affect the central problem only marginally. Although many impediments have been removed and a system for preventing racial discrimination has been established, these advances do not deal directly with the black Americans' heritage of racial poverty and economic powerlessness.

What can law teachers learn from a retrospective view of the civil rights struggle? We must recognize that there are indeed "limits of law." Even if the legal struggle for racial equality had been entirely successful, even if the Supreme Court had given maximum constitutional protection to aspirations for racial equality, even if the system of prevention had operated to perfection, we would still be a very long way from achieving a racially equal society. The consequences of our history of racism are so pervasive and self-perpetuating that the system of prevention can do little to alter the disadvantaged and subordinate position of blacks. Thus, we must recognize that in American society today we cannot separate questions of race from questions of poverty and class. Although there are issues of race distinct from issues of poverty, such as affirmative action and residential racial integration, these are issues that primarily affect only middle-class blacks. The problems of black urban underclass remain beyond the reach of such remedies. Finally, we must reorient our teaching about race in the law schools. It is no longer enough to approach racial equality from the perspective of legal structure and to emphasize constitutional doctrine and

34. See the discussion in Croson, 109 S. Ct. at 727.
35. As Justice O'Connor stated in Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 286 (1986): "The Court is in agreement that . . . remedies of past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program" (O'Connor, J., concurring). There must be findings of identified past discrimination, and the findings must provide the government with a "strong basis in evidence for its conclusion that remedial action was necessary." Id. at 277, quoted in Croson, 109 S. Ct. at 724. Wygant actually imposes serious limits on preferential programs; the effort to maintain minority hiring gains by protecting blacks from layoffs was deemed unconstitutional.
civil rights laws. Rather, we must help our students gain an understanding of how racial inequality came to exist in American society, and why there are "limits of law" in bringing it to an end. We must explore social and economic policy with our students as well. As the United States moves into a new civil rights cycle, our teaching about race and the role of the law in bringing about racial equality must move in a new direction as well.