

1985

## Book Review

David L. Gregory

Follow this and additional works at: <https://dsc.duq.edu/dlr>



Part of the [Law Commons](#)

---

### Recommended Citation

David L. Gregory, *Book Review*, 23 Duq. L. Rev. 477 (1985).

Available at: <https://dsc.duq.edu/dlr/vol23/iss2/12>

This Book Review is brought to you for free and open access by Duquesne Scholarship Collection. It has been accepted for inclusion in Duquesne Law Review by an authorized editor of Duquesne Scholarship Collection.

# Book Review

CIVIL RIGHTS: RHETORIC OR REALITY?. By Thomas Sowell. New York: William Morrow and Company, Inc., 1984. 164 pages.

*Reviewed by David L. Gregory\**

Thomas Sowell, prolific<sup>1</sup> and provocative author, and senior fellow of the Hoover Institute at Stanford University, has again raised many important and disturbing questions in his most recent book, *Civil Rights: Rhetoric Or Reality?* Controversy is certain to surround this book; it will not be met with academic nonchalance. Professor Sowell's observations are always incisive, and his works on issues of race, politics, and economics are greeted with acclaim by his admirers and denounced by his critics. There has been regrettably little balanced middle ground in response to his scholarship. Professor Sowell often seems to deliberately exaggerate his points in order to make them with more force, although perhaps thus with less theoretical cogency. Detractors wax apoplectic, and devotees naively accept his work at face value. Either reaction is an unwarranted extreme. Sowell takes pains to predict the former response to *Civil Rights: Rhetoric Or Reality?*

Many contemporary civil rights issues are permeated with rhetoric on all sides. Perhaps it is impossible and ultimately undesirable to advocate an intellectually abstract, purist position on any significant civil rights issue. Civil rights have historically been forged in the furnace of pragmatic politics and economics. In turn, each of these is composed in large measure of rhetoric and manipulation, and are susceptible to obfuscation by special interests and control-

---

\* Associate Professor of Law, St. John's University Law School. B.A., Catholic University of America; M.B.A., Wayne State University; J.D., University of Detroit; LL.M., Yale University.

1. Professor Sowell's previous books include: *THE ECONOMICS AND POLITICS OF RACE* (1983); *ETHNIC AMERICA: A HISTORY* (1981); *MARKETS AND MINORITIES* (1981); *PINK & BROWN PEOPLE & OTHER CONTROVERSIAL ESSAYS* (1981); *KNOWLEDGE AND DECISIONS* (1979); *RACE AND ECONOMICS* (1975); *CLASSICAL ECONOMICS RECONSIDERED* (1974); *SAY'S LAW: AN HISTORICAL ANALYSIS* (1975); *BLACK EDUCATION: MYTHS AND TRAGEDIES* (1972); *ECONOMICS: ANALYSIS AND ISSUES* (1971).

ling elites. Pristine abstract analysis has never been in great supply in civil rights scholarship, although Professor Sowell posits that his work at least partially meets what he perceives as great demand.

Sowell alleges that the entrenched civil rights "leadership" has perverted the civil rights movement to serve its own special interest, often radically divorced from the needs of constituencies. Many of his pointed criticisms are well taken; however, he paints with too broad a brush. By castigating virtually all of the recognized leadership groups in civil rights in the United States, he ultimately falls victim to the same sort of sweeping generalization for which he so vociferously indicts his critics.

Essentially, Professor Sowell maintains that "civil rights" has been "misused for the benefit of special interest."<sup>2</sup> Now, in 1984, thirty years after the historic school desegregation case of *Brown v. Board of Education*<sup>3</sup> and twenty years after passage of the comprehensive Civil Rights Act of 1964, including Title VII<sup>4</sup> which prohibits employment discrimination, he raises three central questions that are the basis for the book: "How much of the promise of these judicial and legislative events has been fulfilled? How much has it been perverted? How well has the social vision behind the civil rights movement been understood?"<sup>5</sup>

From the outset, Sowell creates a conceptual whipping boy that will be his target throughout the book. He fashions what he terms the "civil rights vision" from a loose amalgamation of what he views as judicial excess and perverted civil rights leadership. He contends that this "vision," circa 1984, has become increasingly filtered through judicial and political prisms. Today, it has been so nightmarishly distorted that it is scarcely recognizable when compared to its once noble origins. Sowell maintains that many civil rights advocates have grossly and speciously confused the "is" and the Kantian "ought." Further, they have neglected legal and social evidence and simple logic, or otherwise insidiously and baldly distort it to serve their own results-oriented conclusions. "The civil rights vision is not only a moral vision of the way the world *should* be, in the future, but also a cause-and-effect vision of the way the world *is* today."<sup>6</sup> Civil rights in the United States has strayed so far from its objectives that today seventy percent of the population

---

2. CIVIL RIGHTS: RHETORIC OR REALITY? at 7.

3. 347 U.S. 483 (1954), *reh'g granted*, 349 U.S. 294 (1955).

4. 42 U.S.C. 2000e-2000e-17 (1982).

5. CIVIL RIGHTS at 8.

6. *Id.* at 14 (emphasis in original).

are potential beneficiaries of affirmative action programs.<sup>7</sup>

Sowell begins by attacking what he maintains has been inflexible and dogmatic reliance by both civil rights visionaries and the courts on the role of all-too-fallible and imprecise statistics. "One of the most central—and most controversial—premises of the civil rights vision is that statistical disparities in incomes, occupations, education, etc., represent moral inequities and are caused by 'society'."<sup>8</sup> Civil rights proponents also maintain that political activity is a major instrument for betterment. Sowell also attacks this as fallacious.

He cites many instances where adversely affected minorities have fared much better economically and educationally than have native majorities.

The civil rights vision focuses on groups adversely affected in statistical disparities. Here the relationship between discrimination and economic, educational, and other disadvantages is taken as virtually axiomatic. But if this apparently obvious proposition is taken as a hypothesis to be tested, rather than an axiom to be accepted, a very different picture emerges. Groups with a demonstrable history of being discriminated against have, in many countries and in many periods of history, had higher incomes, better educational performance, and more "representation" in high-level positions than those doing the discriminating.<sup>9</sup>

While this is surely true in many cases, it is not a universal truth. It has certainly not been the uniform experience of Blacks in the United States. Sowell summarizes what he perceives as two key failures of the use of statistics in the civil rights vision. "The first is that discrimination leads to poverty and other adverse social consequences, and the second is the converse—that adverse statistical disparities imply discrimination."<sup>10</sup>

Sowell is guilty from the outset of gross exaggeration. He fails to identify these purported civil rights "visionaries" with sufficient precision. It is simply too convenient and facile to indict the courts for judicial legislation. Courts have always indulged in such activism, usually regardless of the judge's individual political persuasion.<sup>11</sup> Yet, unfortunately, vague sweeping generalizations are all

7. *Id.* at 14.

8. *Id.* at 15.

9. *Id.* at 19-20. Evidence of minority achievements despite historic discrimination has been more comprehensively presented by Professor Nathan Glazer in his recent book, *ETHNIC DILEMMAS 1964-1982* (1983).

10. *CIVIL RIGHTS* at 21.

11. The American Legal Realist frame of jurisprudence incisively demonstrated the undeniable fact of judicial "legislation" or activism. See Frank, *What Courts Do In Fact*, 26

that Professor Sowell offers as to who and or what perverted the civil rights dream into today's "vision," or, more precisely, according to Sowell, nightmare. The better and more valid observation for everyone is one not phrased in terms of strict mechanistic "acorn-or-oak" causality, but, rather, in analysis of the synergy among a wide variety of undesirable social, economic and political conditions, and unlawful discrimination. Sowell fails to consider this broader observational standpoint. Thus, his criticisms often indulge in rhetoric rather than reality. His second major argument, that adverse statistics do not imply discrimination, is perhaps even more nebulous. Although true in some instances, it is certainly not a universal truth. The use of statistics convincingly prove the existence of unlawful discrimination in many cases.<sup>12</sup> The courts, while recognizing the legitimate role of statistical evidence, have also perceptively realized the limitations of such evidence. When standing alone, adverse statistics have rarely been the sole basis for finding significant legal liability. However, in cases of adverse statistics, there are also often instances of individual, deliberate discrimination.<sup>13</sup> The United States Supreme Court has expressly discussed the synergy between coexisting adverse statistics and instances of individual discrimination.<sup>14</sup> Had Professor Sowell offered specific instances of significant cases where class action disparate impact liability has been legally proven solely upon the basis of inadequate statistics, his argument against the use of statistics would have force. It is certainly true that some present members of the Supreme Court, most notably led by Justice Rehnquist, have launched a broad judicial assault upon the use of statistics, particularly in class action disparate impact cases. However, it

---

ILL. L. REV. 645, 725 (1932); FRANK, *LAW AND THE MODERN MIND* (1930). The Critical Legal Scholars of the political left today reiterate a refined version of the Realist perception that "law is politics." See *THE POLITICS OF LAW* (D. Kairys ed. 1982). However, the more difficult challenge is to work with and through this political and judicial reality. With regard to the Realists, see Lasswell & McDougal, *Legal Education and Public Policy: Professional Training In The Public Interest*, 52 *YALE L.J.* 203 (1943); Llewelyn, *A Realistic Jurisprudence - The Next Step*, 30 *COLUM. L. REV.* 431 (1930); With regard to the need for formulating constructive alternatives to and within contemporary Critical Legal scholarship, see Gregory, Book Review, 1983 *ARIZ. ST. L.J.* 205 (reviewing *THE POLITICS OF LAW* (D. Kairys ed. 1982)); Gregory, Book Review, 62 *TEX. L. REV.* 389 (1983) (reviewing *ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* (1983)); Gregory, Book Review, 37 *VAND. L. REV.* (forthcoming 1984) (reviewing *ARONOWITZ, WORKING CLASS HERO: NEW STRATEGY FOR LABOR* (1984)).

12. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

13. *Teamsters v. United States*, 431 U.S. 324 (1977).

14. *Id.* at 338 n.19.

is by no means certain that this increasing judicial hostility toward statistics has any more intellectual attraction than their perhaps occasionally overbroad utilization.

Sowell also castigates the civil rights "visionaries" for their supposed insistence that broad political and legal initiatives are imperative to improve conditions for victims of discrimination.<sup>15</sup> Again, he cites the experience of ethnic immigrant groups to demonstrate that significant political involvement often followed rather than preceded or occurred coterminous with economic improvement.<sup>16</sup> Sowell summarizes that "it would perhaps be easier to find an *inverse* correlation between political activity and economic success than a direct correlation."<sup>17</sup> This mechanistic view misses the mark. On the contrary, there often is synergy among political and economic and social gains and the dissipation of discrimination. It would be incredible to argue against political initiatives merely because some political operatives perhaps manipulated civil rights issues to serve their own special interest in diametrical opposition to the real interest of their constituencies. Sowell offers examples of counter-productive minority-based political initiatives, in that these minority civil rights incentives often mobilized and coalesced majority animosity. Yet, the default of political acquiescence and dormancy is hardly a viable alternative. One of the basic problems with Sowell's attack on the "civil rights visions" is that most of the examples of immigrant racial and ethnic experience are drawn from other countries. There is relatively little application of similar experiences to the struggle against unlawful discrimination in the United States. Today, for example, there is little argument that the presidential candidacy of Jesse Jackson has resulted in dramatic increases in voter registration in minority communities. Whether that vote was fully mobilized in support of the Democratic presidential ticket *sans* Jackson, and whether it can be translated into legislative initiatives remain unanswered questions at this point. But, in any event, it is highly dubious whether these measures are counterproductive to Black

---

15. CIVIL RIGHTS at 29.

16. Jerold Auerbach presented an interesting historical development of this theme in *JUSTICE WITHOUT LAW?* (1982). He showed that immigrant groups, initially distrustful of conventional external legal modalities, relied on internal community dispute resolution procedures. However, as individuals from these immigrant groups were amalgamated into and often attained individual prominence in the political and legal power structures, the ethnic communities also adopted these conventional modalities while their own procedures atrophied.

17. CIVIL RIGHTS at 32.

civil rights interests.

Sowell criticizes what he regards as the unwarranted mutation of equal employment opportunity and anti-discrimination principles into the pernicious phenomenon of affirmative action. Sowell contends that the express guarantee of § 702(j) of Title VII that no employer would be required to accord preferential treatment to any group experiencing under-representation in the work force, the federal agencies abused their considerable authority to coerce employer compliance with illegitimate affirmative action quotas. This chapter has some of the precision so sorely lacking in the first chapter's attack on the ill-defined civil rights vision. Sowell grounds his analysis here with specific reference to pertinent statutes and to the *Bakke*<sup>18</sup> and *Weber*<sup>19</sup> cases. With more focus, he examines the many cultural, demographic, and geographic variables that may, at least in part, explain the differences among majority and minority groups. He posits that civil rights agencies and the courts disingenuously ignored these many important variables that are at the root of explaining statistical variances in the absence of unlawful discrimination. Instead, Sowell contends, they myopically focus solely on the "bottom line" of statistical imbalance to argue mistakenly that this ineluctably dictates the presence of unlawful discrimination in every case. Again, Sowell's criticism lacks specificity. While there have been undoubted agency excesses, he fails to document court abuses with precision, apart from his own rather personalized interpretation of *Weber*.

Sowell also attacks the landmark *Brown*<sup>20</sup> decision as the supposed paradigm of the "hard case making bad law." While discrimination and segregation against Blacks was undeniable and intolerable, the Court tortured the Fourteenth Amendment to draft a political masterpiece and a legal and evidentiary disaster. Lower courts later seized upon the transparently political decision to destroy the law and ignore evidence and logic in subsequent cases that lacked the compelling facts of *Brown*. Ultimately, this broad exercise in unwarranted and disingenuous judicial legislation resulted in the unprincipled judicial equation of integration and desegregation. This spawned the generation of increasingly attenuated and counterproductive court-ordered busing based primarily

---

18. *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

19. *United Steel Workers of America v. Weber*, 443 U.S. 193 (1979).

20. *See supra* note 3.

on attempted rectification of statistical imbalances in student and general populations. Professor Sowell scathingly highlights some of the resultant absurdities of busing schemes. Liberal courts indulged in unbridled displays of self-flagellation and *mea maxima culpas*, shifting the few available white students in urban school like pawns to afford a few token whites at each overwhelmingly "minority" urban school. These frenzied judicial maneuvers do support his argument. He then considers the "special" cases of Blacks and of women. While each group has unique problems, Sowell posits that there are complex congeries of important variables independent of unlawful discrimination that explain the situations of these groups.

For example, there are many important cultural distinctions within the generic Black race that account for major differences in education, income, and professional attainments. West Indian Blacks exceed both the Black and the national averages in all of these categories. Sowell attributes this to cultural conditioning; the superior position of this subgroup can hardly be attributed to unlawful discrimination. Regarding the general Black population, Sowell argues that substantial gains were made long before the significant case law and legislation.

Sowell particularly attacks some current Black leaders for exploiting civil rights to serve their own vested interest. He charges that unionization and minimum wage laws are but two examples of counterproductive developments that have nevertheless been supported by Black leaders because of political expediency. Labor unions have often thrown their financial support behind Black politicians. Like affirmative action, Sowell argues that these programs have only served to advance already relatively privileged Blacks, while insuring the continued exclusion of the historically disadvantaged Blacks.

Professor Sowell argues that the disparity in income and career prospects between men and women is likewise attributable to complex cultural causal variables independent of employer discrimination. Sowell breaks down the generic statistics. Single women earn 91% as much as single men, yet often are not as educated in the higher paying professions nor, until very recently, significantly represented in more arduous, higher paid forms of labor. In some academic disciplines before the onset of affirmative action, single women outperformed single men in both income and career attain-

ments.<sup>21</sup> It is marriage, and its opposite influences on the career and income prospects of men and women, rather than unlawful sex discrimination, that primarily accounts for compensation differentials. "The big difference is not between men and women, but between married women and everyone else."<sup>22</sup> He argues that the civil rights visionaries intransigently ignore the true evidence, and insist on remaining fixated upon the illusion of unlawful sex discrimination as the sole explanation for this disparity.

Because of domestic responsibilities and the rearing of children, women also tend to drop out of the labor force completely more often than men do. When a woman whose children are grown reenters the labor force, she obviously reenters with less experience or seniority than a man of the same age who has been working continuously and full time. This too reduces the likelihood that she will earn as much per hour, be retained as often during layoffs, or promoted as rapidly.<sup>23</sup>

"Ordinary labor market considerations seem to explain pay differentials better than the civil rights vision. Indeed, the ability of Black women to overtake white women in the market place is a very serious embarrassment to the civil rights visions."<sup>24</sup> Sowell summarily dismisses the proposed Equal Rights Amendment as a sheer superfluity, given the broad interpretation of the Fourteenth Amendment. He posits that the ERA is concerned with equality of status between men and women, while illegitimately disregarding the many independent lawful variables that explain those distinctions. He argues that the ERA is patently incapable of remedying those differences, because he contends there is nothing unlawful that merits rectification.

Professor Sowell also attacks the proponents of the comparable worth doctrine. Apart from the nebulous nature of the comparable worth theory, he maintains that it is supported because it is politically expedient to pander to the masses of women. However, he argues that independent market forces of supply and demand, and not unlawful discrimination, validly account for compensation differentials. He discounts compensation analysts as contemporary sellers of quack medicines, if they purport to ground comparable worth theory on the presence of unlawful employment discrimination. Civil rights proponents and lawyers are interested only in their own continued employment. Yet, he completely ignores the

---

21. CIVIL RIGHTS at 92-93.

22. *Id.* at 93.

23. *Id.* at 95.

24. *Id.* at 102.

possibility that the market itself may reflect endemic sex-based wage discrimination. He simplistically relies on the "free" market as the purportedly valid explanation for compensation differentials, yet fails to consider the potentially sex-based complexity of the market itself.<sup>25</sup>

The book concludes that civil rights are indispensable to free society, but that "the battle for civil rights was fought and won—at great cost—many years ago."<sup>26</sup> Now, however, civil rights has been perverted into a catchall for guaranteed success; every social cause cannot be illegitimately sanctified by the automatic label of a civil right. As Sowell reminds us, "everything desirable is not a civil right."<sup>27</sup> He excoriates federal courts as the worst of the "morally self-anointed" to pervert the original meaning of civil rights to serve their own political purposes. "Lies and deceptions 'in a good cause' are all too common, and nowhere more so than in political and legal doctrines that falsely sail under the flag of 'civil rights.' The perversions of the law by federal judges appointed for life have been especially brazen."<sup>28</sup>

The last chapter is largely devoted to an anticipatory response to his critics. Sowell replies to earlier criticisms of his related works, and, in part, responds to criticisms sure to be occasioned by the present book. Unfortunately, this staged *ad personam* debate is a weak and speculative conclusion. The author's defensiveness, while perhaps understandable, is out of place in this context. His work will stand or fall on its own merits; if response to past or future criticism is warranted, it merits comprehensive treatment in an independent scholarly forum.

In summary, Sowell concludes that civil rights visionaries are

---

25. One scholar of comparable worth persuasively argued that the evidence points to the inherently discriminatory nature of the market:

The community wage to which the employer relates may be partially a function of its own race or sex-differentiated wage scales. . . . The community wage thus perpetuates patterns of wage differentiation based on sex or race, which may be based on either subjective attitudes toward sex or race roles, past intentional discrimination which affected wage rates, or the continuation of an understanding among employers that they will refrain from 'spoiling the market' by bidding up the price of labor.

Blumrosen, *Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964*, 12 U. MICH. J.L. REF. 397, 442-43 (1979). See also Blumrosen, *Wage Discrimination and Job Segregation: The Survival of a Theory*, 14 U. MICH. J.L. REF. 1 (1980). Cf. Nelson, Opton, and Wilson, *Wage Discrimination and the 'Comparable Worth' Theory in Perspective*, 13 U. MICH. J.L. REF. 233 (1980). See generally Gregory, *Comparable Worth: The Demise of the Disparate Impact Theory of Liability*, 1982 DET. C.L. REV. 853.

26. CIVIL RIGHTS at 109.

27. *Id.*

28. *Id.* at 120.

trapped in an ideological prison of their own construction. Unlawful discrimination is simply not the answer to a wide range of social, economic and political problems that have explanations in independent cultural and free market bases. Yet, the civil rights proponents speciously continue to regard civil rights expansion as the universal panacea for all of these many independent problems. Unfortunately, their fallacy will ultimately rebound to the undermining of true civil rights and will result in pronounced social polarization. Sowell concludes that the civil rights battle was decisively won two decades ago and "the succeeding years have painfully revealed that blatant denials of civil rights were not the universal explanation of social or racial problems."<sup>29</sup>

*Civil Rights: Rhetoric Or Reality?* is comprised of both in large doses. There is a direct correlation between the specificity of Sowell's evidence and the cogency of the arguments he advances. He makes many telling and insightful observations, and devastatingly exposes some obvious abuses in law and in logic perpetrated to justify transparent political expediency in the name of civil rights. This unmasking of blatant results-oriented political manipulation is the most worthwhile contribution of the book. Sowell also presents important evidence of critical and historical patterns to demonstrate the convergence of many social, political, and economic variables independent of unlawful discrimination to explain statistical disparities. He dispells any lingering naive reliance on the supposed infallibility of statistical evidence alone as proof irrefutable of unlawful discrimination. The book thus accomplishes several important objectives.

However, *Civil Rights* is as much rhetoric and undisguised advocacy as it is scholarship. On those occasions, which are unfortunately many, the book suffers from the same cool arrogance, sweeping generalizations, and predisposition toward academic fiat for which Professor Sowell so unmercifully criticizes his arch villain civil rights "visionaries." Upon concluding the book, one is still at a loss to understand precisely who these visionaries are: everyone from Supreme Court Chief Justice Earl Warren to Yale Law Professor Charles Black to Atlanta Mayor Andrew Young to the entire federal judiciary is seemingly categorized as a civil rights visionary at some point. Perhaps this is done deliberately to highlight further the author's position as a "lone voice crying in the wilderness." Professor Sowell, however, speaks for a large political

---

29. *Id.* at 139.

constituency. Further, he is broadly embraced as an intellectual champion by many prominent members of the Reagan administration.

Professor Sowell's comments, always provocative, often compelling and persuasive, merit serious attention by everyone interested in the many issues of civil rights. The book reflects the very considerable strengths of his eloquent reasoning, persuasion, and scholarship. Unfortunately, it also shares many of the weaknesses for which he criticizes the civil rights visionaries. It is often better, and certainly no worse, than most of the contemporary academic and legal literature pertaining to civil rights. For its many virtues and vices it is surely worth serious attention.

