Adversarial Legalism and the Civil Rights State

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Robert Kagan's Adversarial Legalism is one of the most important books on law and courts published in the last several decades. It is probably best known for its critique of adversarial legalism, the distinctively American legal style that produces high transaction costs and enormous legal uncertainty. Kagan's now famous story of the dredging of the Oakland Harbor provides a memorable example of how multiple points of access to government decision-making can produce nearly endless delay.

Adversarial Legalism, though, is much more than a garden-variety attack on excessive litigiousness. It is above all a work of comparative politics, an examination of an emerging form of American "exceptionalism." The central theme of the book is not the weakness of the American state -- the core assertion of almost all previous studies of American exceptionalism -- but the way in which American adversarial legalism melds two ostensibly conflicting features of contemporary politics: our fragmented political institutions and our commitment to activist government. Kagan explains that adversarial legalism is the unintended product of "something old and something new," our eighteenth century constitutional system that disburses political power in order to limit it; and our post-1932 demand for "total justice"--his shorthand for a political culture that "expects and demands comprehensive government protections from serious harm, injustice, and environmental damage -- and hence a powerful, activist government."[1] While it is easy to understand how adversarial legalism can delay and frustrate government action, in my experience it is harder for most people (at least for my students) to grasp Kagan's larger point about how adversarial legalism can promote activist government.

In a chapter I published in the volume containing Kagan's first article on adversarial legalism, I showed how adversarial legalism contributed to the remarkable expansion of special education programs and mandates in the 1970s.[2] The right to a "free appropriate public education" spelled out in "individualized educational programs" and protected by elaborate adversarial procedures was first announced by the lower federal courts, then embraced by Congress, and later imposed by federal judges on local school systems. The Individuals with Disabilities Education Act illustrates both sides of adversarial legalism: it is regularly denounced for creating too much litigation and conflict, but it also significantly improved educational, psychological, and medical services for disabled children. Anyone familiar with school districts' ever-growing special education budget knows that we are not in stagnant Oakland Harbor anymore.

One of the most remarkable political developments of the past fifteen years has been the use of litigation by state attorneys general to create national taxation and regulatory regimes. The leading example is the Master Settlement Agreement of 1998, which imposed a $250 billion tax on tobacco products and established nation-wide limits on tobacco sales and marketing—and even on lobbying by tobacco companies. This agreement grew out of litigation in several state courts, most notably Mississippi, Florida, and Minnesota.[3] As Attorney General of New York, Eliot Spitzer used litigation under a broad state anti-fraud law to create a de facto national regulatory regime for the securities industry. He has also used state court suits to change practices in the insurance and banking industries. Spitzer may have left public life, but the litigational practices he championed continue to be used by ambitious state attorneys general throughout the country.

The area in which adversarial legalism has produced the most profound expansion of government programs and protections is civil rights. In fact, the civil rights revolution of the 1960s was the driving force behind the change in political culture that Kagan and his colleague Lawrence Freedman describe as the demand for "total justice."[4] Over the course of the 1960s the demand for “simple justice"--above all the dismantling of the Jim Crow system in the South--was transformed into a much broader government effort not only to address the deep-seated inequalities created by centuries of slavery and racial apartheid, but to eliminate discrimination on the basis of gender, language, disability, age, and sexual orientation. This required an enormous assertion of government authority from the center—arguably the most aggressive use of federal power in U.S. history.

Civil rights thus presents the most important example of how adversarial legalism promotes activist government. Yet in Adversarial Legalism Kagan says surprisingly little about civil rights policy. I suspect this is in part because civil rights looked like a "dog bites man" story: who would be surprised to learn that litigation and adversarial contestation play a major role in shaping policy on school desegregation, employment discrimination, or enforcement of the Voting Rights Act? Kagan demonstrates the importance of adversarial legalism by showing how it influences policymaking in unexpected areas. The Half Moon Bay Fishermen’s Marketing Association’s use of litigation to block harbor dredging is a bit more startling than the NAACP Inc. Fund’s use of litigation to attack employment discrimination.

In this paper I use two examples from civil rights policy to illustrate how adversarial legalism has contributed to a peculiar and still poorly understood form of

state-building in the United States. My argument is this: in these policy arenas, the United States has developed a complex division of labor between courts and agencies that has produce regulatory and enforcement policies more aggressive than those likely to have flowed from a purely administrative or purely court-based approach. The complicated, frequently shifting rules of the game in civil rights have, to be sure, generated extensive uncertainty, duplication, and controversy. But the result has been vigorous government action (including a commitment to affirmative action) rather than the enfeeblement of the administrative of state. In his recent book The Welfare State Nobody Knows, Christopher Howard demonstrates that the conventional story about American exceptionalism seriously underestimates the size of the American welfare state because it does not adequately acknowledge distinctively American forms of policymaking.[5] Similarly, through adversarial legalism we have also built a civil rights state that is stronger and more extensive than we generally appreciate.

This paper is divided into three parts. The first section examines federal efforts to combat employment discrimination under Title VII of the 1964 Civil Rights Act. Here I rely on the writings of the Hugh Davis Graham, Arthur Blumrosen, John Skrentny, Jack Greenberg, George Rutherglen, and especially Sean Farhang of Berkeley's Goldman School of Public Policy. This is the story of how liberals in the civil rights era slowly turned their back on New Deal institutional arrangements and fell in love with adversarial legalism. It is also the story of how courts and agencies worked together essentially to rewrite a statute that they considered inadequate for increasing employment opportunities for racial minorities and for women. The second section focuses on Title VI of the Civil Rights Act, which prohibits racial discrimination in federally funded programs. Here I

argue (relying primarily on my own research) that the courts converted a statutory provision specifically designed to create an administrative alternative to litigation into one that authorized judicial enforcement of administrative rules. The result was an aggressive federal regulation of many, many activities of state and local government. The final section offers several generalizations about the behavior and incentives of Congress, federal agencies, and the Supreme Court in an era of adversarial legalism.

Title VII and the Rise of a Private Enforcement Regime

On the eve of enactment of the seminal Civil Rights Act of 1964 and Voting Rights Act of 1965, there was a pervasive sense that litigation had proven incapable of undermining the Jim Crow system in the South and that in civil rights -- as in economic policy three decades earlier-- "the day of enlightened administration had come."[6] These laws offered a number of New Deal solutions to a problem the original New Deal had recognized, but not dared to attack. The civil rights legislation of 1964 and 1965 handed important rulemaking and enforcement powers to federal agencies, particularly the Civil Rights Division within the Department of Justice, the Equal Employment Opportunity Commission (EEOC) created under Title VII, the new Office of Civil Rights (OCR) in the Department of Health, Education, and Welfare (HEW), and similar units in other departments.

Much of the extended debate over civil rights legislation centered on the extent of those administrative powers. Could federal agencies promulgate binding rules and issue “cease and desist” orders, or would they be limited to filing suit in federal court? Could the EEOC initiate litigation itself, or would it be required to rely on private plaintiffs or

attorneys in the Department of Justice? Who would assume responsibility for "pre-clearing" election law changes in "covered" Southern states? The Department of Justice? Local federal judges? Federal judges in the District of Columbia? These institutional issues loomed particularly large because the laws' central substantive mandate--do not discriminate on the basis of race--remained so vague. Many of the key participants understood how much hung on matters of institutional design, and they drew on their recent experience to make educated guesses about the likely consequences of various proposals. For example, Department of Justice attorneys who had handled voting rights issues in the South were exasperated both by the constant stream of obstacles erected by southern officials to prevent African-Americans from voting, and by the unwillingness of some federal district court judges to help eliminate them.[7] As a result, the 1965 act placed the burden on southern states to justify *any* new voting law, and required them to seek approval from administrators or judges in Washington, not local federal district court judges appointed, in effect, by the states' segregationist Senators.

During the "longest debate" of 1964, no section of the proposed legislation was subject to more scrutiny and legislative bargaining than Title VII, which prohibited racial and gender discrimination by private employers. Passage of the act was not secured until the Johnson Administration and Senate Democratic leaders reached an agreement with Senate Minority Leader Everett Dirksen, who supplied enough Republican votes to end the Southern Democrats' filibuster. The most important part of the compromise (usually known as the "Dirksen-Mansfield substitute") set a number of limits on the power of the EEOC. It denied the EEOC power to issue cease-and-desist orders or even to file suit in

federal court. It also explicitly denied the EEOC any authority to disrupt "bona fide" seniority systems or to require an employer to achieve a racially balanced workforce.

In 1963-64 the battle lines over Title VII reflected three decades of bitter partisan disagreement over labor relations. Both Republicans and Democrats viewed the issue of the extent of the EEOC's authority through the lens of their experience with the National Labor Relations Board (NLRB). This was understandable since Title VII involved government regulation of business practices similar to that instituted by the NLRB. In fact, the NLRB had already waded into the ticklish issue of racial discrimination by unions.[8] New Dealers in the House, Senate, and the administration favored creating an enforcement agency analogous to the Board, with power to investigate complaints, promulgate legally binding rules, and above all issue enforcement orders on hiring practices, reinstatement, and back-pay. They also sought to keep the federal courts at arms length: their version of the legislation limited judicial review of the new agency to the Administrative Procedure Act's deferential "arbitrary and capricious" standard, and made no provision for private enforcement suits. Sean Farhang explains that the "administratively-centered enforcement framework" established by the House Judiciary Committee with the approval of the Johnson Administration "embodied the enforcement preferences" of Democratic civil rights advocates in Congress and leading civil rights groups, including the NAACP and the Leadership Conference on Civil Rights. Civil rights leaders "had consistently advocated for this administrative enforcement framework with no private rights to litigate, in job discrimination bill since 1944 and . . . it was the overwhelmingly dominant model at the state level."[9] They considered private litigation a

dead-end, and pinned their hope on systematic enforcement action by a powerful, expert agency insulated from judicial second-guessing.

To business-friendly Republicans—including many of the Senators whose support civil rights advocates so desperately needed to break the Dixiecrat filibuster--creating a new National Labor Relations Board was simply unacceptable. As the economist and Nixon advisor Arthur Burns once put it, "the words cease-and-desist and N.L.R.B. are inflammatory words to most businessmen. They find the N.L.R.B. in its activities among the worst in the federal government and in many instances, they are absolutely right in this evaluation."[10] The GOP's staunch opposition to granting administrative agencies cease-and-desist power, Hugh Davis Graham notes, "reflected the great battle over administrative reform of the 1940s, in which a coalition of Republicans and southern Democrats attacked the regulatory abuses they associated with the New Deal."[11] Republicans on the House Judiciary Committee warned in their minority report that it would be "a major mistake to model legislation in the field on the National Labor Relations Board, which has one of the sorriest records of all the Federal agencies for political involvement."[12] House leaders eventually removed the cease-and-desist power from the bill in order to craft legislation that could pass the Senate.

Even this weakened EEOC was too much for Senate Republicans. According to Graham, the amendments Dirksen insisted upon were "devised primarily to limit the EEOC," which still "reminded Dirksen and his more conservative colleagues uncomfortably of its crusading earlier model: the NLRB."[13] They insisted upon removing the EEOC's authority to initiate court suits against employers. Under the Dirksen amendment, the Department of Justice was given power to pursue systematic

“pattern and practice" suits, but the vast majority of cases would be left to private litigation. The NAACP and other civil rights advocates vigorously opposed this change, but were able to extract only one concession: in these private cases judges could waive filing fees, appoint attorneys for indigent plaintiffs, and award attorneys fees to the victorious party. The NAACP’s Legal Defense and Education Fund’s Jack Greenberg argued that this was "the only way to make private enforcement feasible."[14]

Sean Farhang provides this succinct summary of the changes made in the House and the Senate regarding enforcement of Title VII:

> While the key move of House Republicans on the fair employment provision had been to *judicialize* the enforcement forum, relying upon bureaucratic authority to execute the prosecutorial function, the key move of Republicans in the Senate, led by Dirksen, was to substantially *privatize* the prosecutorial function. They made private lawsuits the dominant mode of Title VII enforcement, creating an engine that would, in the years to come, produced levels of private enforcement litigation beyond there imagining.[15]

As Farhang suggests, the debate over the authority of the EEOC is instructive not only because it illustrates the New Deal political divide on administrative power, but above all because the participants were so *wrong* about the consequences of these arrangements for civil rights. In Hugh Davis Graham's words, in the 1960s “both sides seem to be betting on the wrong horse." Both parties “had fallen into ossified, knee-jerk patterns of commitment and rhetoric."[16]

One of the few people to recognize this at the time was law professor and influential EEOC consultant Arthur Blumrosen, who understood the potential for a private, litigation-based enforcement strategy. According to Blumrosen,

> Based on a decade of experience, the civil rights movement should have welcomed the court enforcement, while those who wished to minimize the impact of the law should have preferred an administrative agency with seemingly broad

> powers which could be "captured" by the interest is set out to regulate. Neither group, however, saw events in this perspective.[17]

Farhang notes the irony that if Senate Republicans had accepted the House provisions on the powers of the EEOC, "the long run outcome would have been a far weakened enforcement regime."[18]

What happened to so confound the predictions of all but the most astute participants in the 1963-64 debate? The obvious answer is that federal judges proved more amenable to aggressive enforcement of Title VII than anyone had imagined. The federal judiciary that heard Title VII cases in the 1960s and 1970s was a far cry from the conservative institution the NLRB had faced in the 1930s.

In the late 1960s the NAACP Legal Defense and Education Fund (LDF) made litigating Title VII cases a high priority. According to its chief litigator, Jack Greenberg,

> Between 1965 and 1970, LDF brought the cases that clear away the procedural obstacles to using . . . Title VII effectively and later, for some years, brought virtually all the cases they gave the law its bite. We enlisted scholars, economists, and labor experts every step of the way to target industries where lawsuits would do the most good. They also informed courts of legal wrongs and how to remedy them.[19]

Building on its initial court victories and taking advantage of attorney's fee awards, LDF became more aggressive both in the volume of litigation and in its targets:

> Between 1971 and 1974, the staff did four to five class action trials and after that one or two each year. . . . In the first half of 1980, staff lawyers were lead counsel in eight cases in the Supreme Court, twenty-six in courts of appeal, and twenty-nine in district courts. By then, more than half the cases were against state and local governments and there were many against large corporations and unions. . . . We have more cases than the entire Equal Employment Opportunity Commission.[20]

Greenberg was not exaggerating when he bragged,

> Our Title VII operation was a major triumph in making legal doctrine and achieving social gain -- blacks, other minorities, and women won a dramatic

> increase in the number of jobs available to them and in the higher pay they received in those jobs. In terms of the impact of the change wrought, it was almost on par with the campaign that won *Brown*.[21]

To be sure, LDF did have significant assistance, not just from other civil rights organizations but from the EEOC itself. The EEOC worked closely with civil rights organizations, often filing amicus briefs to support their position and issuing guidelines to provide them with legal ammunition.[22]

Saying that litigation by civil rights organizations with the assistance of the EEOC promoted enforcement of Title VII does not do justice to the enormous changes in public policy wrought by the employment discrimination litigation of the 1970s. It is more accurate to say that the federal courts *rewrote* Title VII, turning a weak law focusing primarily on *intentional* discrimination into a bold mandate to compensate for past discrimination, to prohibit employment practices that have a "disparate impact" on racial minorities (and, later, women), and above all to substantially increase the job opportunities available to African-Americans. Almost all laws combined broad aspirations with multiple constraints. In implementing these laws, some agency officials, interest groups, and members of Congress will emphasize the broad purposes and try to minimize the constraints; others will do the opposite. What is notable about Title VII is that the most fervent supporters of an aggressive attack on employment practices were so despondent about the limitations imposed by the legislation passed by Congress in 1964. Emphasizing the section's "broad purposes" in effect required judges and administrators to ignore uncomfortably clear provisions of the law.

The version of Title VII enacted in 1964 not only granted few powers to the EEOC (leading insiders repeatedly described it as a "poor enfeebled thing"[23]), but it

imposed a number of important substantive constraints on policymakers. One section of the law explicitly permits employers to use "professionally developed ability tests" as long as they are not "designed and intended or used to discriminate because of race, color, religion, sex, or national origin."[24] Another, added to appease labor unions, protected any "bona fide seniority or merit system." This meant that the significant advantages conferred upon white male employees by previous discriminatory actions could not be taken away, even if this "inevitably had the consequence of impeding the progress of minority employees and women into jobs from which they had previously been excluded."[25] Protecting seniority systems, one district court judge wrote in a frequently cited opinion, threatened "to freeze an entire generation of Negroes into discriminatory patterns that existed before the act."[26]

Even more important were Title VII's explicit endorsement of an "intent" standard and its concomitant rejection of any demands for racial balance in the workplace. The law provided that a court can impose sanctions on an employer only if it "finds that the respondent has *intentionally* engaged in or is *intentionally* engaging in an unlawful employment practice."[27] Anticipating the coming fight over affirmative action §703(j) announced,

> *Preferential Treatment.* Nothing contained in this title shall be interpreted to require an employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individuals or groups on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed . . .

The bill's Senate floor leaders emphasized over and over again that Title VII prohibited only intentional discrimination, not failure to create a racially balanced workforce. In Hubert Humphrey's words, Title VII "does not limit the employer's freedom to hire, fire,

promote, or demote for any reason—or no reason—so long as his action is not based on race."[28] "Contrary to the allegations of some opponents of this title," Humphrey told the Senate,

> there is nothing in it that will give any power to the Commission or to any court to require hiring, firing, or promotion of employees in order to meet a racial 'quota' or to achieve a certain racial balance. That bugaboo has been brought up a dozen times; but it is nonexistent. In fact, the very opposite is true. Title VII prohibits discrimination. In effect, it says that race, religion, and national origin are not to be used as the basis for hiring and firing. Title VII is designed to encourage hiring on the basis of ability and qualifications, not race or religion.[29]

The "Clark-Case memorandum"—a statement by Title VII's floor leaders designed to serve as a de facto committee report—did not mince words:

> There is no requirement in title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve a violation of title VII because maintaining such a balance would require an employer to hire or refuse to hire on the basis of race. It must be emphasized that discrimination is prohibited to any individual.[30]

The act's chief sponsors' eagerness to demonstrate that Title VII would not institute racial or gender quotas was not just a prudent legislative strategy. According to Hugh Davis Graham, "the evidence suggests that the traditional liberalism shared by most of the civil rights establishment was philosophically offended by the notion of racial preference."[31] As President Kennedy put it a few months before his death, ""I think it would be a mistake to begin to assign quotas on the basis of religion, or race, or color, or nationality. I think we'd get into a good deal of trouble."[32]

Although EEOC staff members and civil rights advocates had initially shared this focus on eliminating intentional discrimination rather than mandating racial balance, they soon came to believe (probably correctly) that a law limited to attacking overt, intentional discrimination and committed to protecting existing seniority and merit hiring systems

would do little to change long-term employment patterns and practices. According to Alfred Blumrosen, "All of the EEOC's early interpretations of Title VII emerged from a unified idea—that the statute should be read so as to maximize its impact on employer practices."[33] As violence and unrest spread through the urban north, the EEOC became obsessed with "finding something that *works*, that gets *results*, even if that included race consciousness."[34] Civil rights groups attacked the EEOC for shuffling paper while the cities burned. The EEOC, John Skrentny has noted, "had a limited audience for its performance, and that audience was already booking loudly." [35]

Forced to choose between its ambitious definition of its mission and its allegiance to a statute it had played no role in writing, the EEOC chose the former:

> Given the determination of the EEOC's professionals--and by 1967 of the chairman and a majority of the commissioners -- to mount a 'wholesale' attack on institutionalized racism, the agency was prepared to defy Title VII restrictions and attempt to build a body of case law that would justify its focus on effects and its disregard of intent. But *commission lawyers acknowledged that such a course would set it at odds with the compromise language that was the key to Title VII's passage.* [36]

Even the commission's official administrative history conceded that "eventually this will call for reconsideration of the amendment by Congress, or the reconsideration of its interpretation by the commission."[37]

Blumrosen later explained in detail why adhering to the restrictions embedded in Title VII "would have plunged Title VII investigations into an endless effort to identify an 'evil motive'" and prevented it from "changing industrial relations systems."[38] "Creative administration," he maintained, "converted a powerless agency operating under an apparently weak statute into a major force for the elimination of employment discrimination."[39] The Supreme Court openly embraced such "creativity" several years

later when it issued its famous decision in *Steelworkers v. Weber*. Justice Brennan's majority opinion argued that while the explicit language of Title VII seemed to prohibit affirmative action programs developed by employers under pressure from the EEOC (Weber's "literal interpretation," he conceded, was "not without force"), judicial and administrative interpretation of Title VII should be guided by the "spirit" and overriding purpose of the law, which was to improve employment opportunities for racial minorities and thus to achieve "the integration of blacks into the mainstream of American society."[40] This strategy of ignoring the constraints contained in the statute in order to change employment practices was not invented by the Supreme Court; it had been the mantra of the EEOC for more than a decade prior to Brennan's decision.

The big story in the first fifteen years of litigation under Title VII was how willing the federal courts were to carry out the legislative revisions the EEOC expected would eventually need to come from Congress. Critics of these decisions have explained in detail how federal judges tortured the wording of the law.[41] Even the courts' defenders concede that judges played fast and loose with the statutory language. Paul Frymer, for example, writes that "courts significantly rewrote aspects of the law . . . and, in the process, got rid of very carefully placed loopholes that unions and other civil rights opponents had demanded in order to pass the act, turning it from one that emphasize color-blindness to one that underscored affirmative action."[42] Some of this de facto revision of the statute was achieved in Supreme Court decisions such as *Griggs v. Duke Power*[43], *Albemarle Paper Co. v. Moody*[44][45], *Franks v. Bowman Transportation Co.,*[46] *Weber*, and (somewhat later) *Johnson v. Transportation Agency.*[47] Almost as important were such seminal lower court decisions as *Quarles v. Phillip Morris*[48], *Contractors*

Association v. Secretary of Labor Association[49], and a series of Fifth Circuit decisions on seniority systems.[50]

The Supreme Court's 1971 decision in *Griggs* was particularly important in establishing a "disparate impact" alternative to the Act's explicit but inherently hard-to-prove "disparate treatment" test. Chief Justice Burger's opinion held that "Under the Act, practices, procedures, or tests neutral on their face, *and even neutral in terms of intent*, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." Under *Griggs*, once the plaintiff shows that a hiring, firing, or promotion practice will have a "disparate impact" on racial minorities (or women), the burden shifts to the employer to prove that the practice is "related to job performance" and justified by "business necessity." The Court later added a third stage: if the employer offers a convincing "business necessity" argument, the plaintiff then has an opportunity to show that this is merely a pretext for discrimination. None of these tests or requirements were mentioned in the original version of Title VII.

It is possible, of course, that if the EEOC had been given as much power as Democrats had originally hoped, it would have done much the same as the courts. After all, the courts often followed agency guidelines and advice. It is hard to believe, though, that such action by the EEOC would not have generated serious political opposition. Republicans would have said, "We told you so," and launched an attack on the "runaway bureaucracy." This almost certainly would have led Republican Presidents Nixon and Ford to appoint commissioners less committed to amending the statute through administrative action. Labor unions, too, were highly dissatisfied with the new enforcement policies, adding significantly to the political pressure for greater restraint.

While Blumrosen's claim of imminent agency "capture" by "the interests it set out to regulate" understates the extent to which the EEOC continued to push for aggressive action, the EEOC certainly was more susceptible to pressure from Congress and the president than were federal courts.

Not only were the federal courts more insulated from political pressure, but unlike the EEOC they engaged in statutory revision in a slow, incremental, even stealthy fashion. As a result, it took years for the judicially revised Title VII to emerge. Meanwhile employers had time to adapt to the new regime. More importantly, the Congress that had passed the original Title VII no longer existed by the time the courts have handed down their most important rulings. The power of Southern Democrats plummeted in the 1970s, as did the number of Republicans in the House and Senate, especially after 1974. By 1975 liberal Democrats dominated the party leadership as well as key positions on the Judiciary Committees, which would be the first stop for any legislative revision of judicial interpretations of Civil Rights Act. One could say that the courts proved particularly adept at the art of political "salami slicing." As Wilbur Cohen, the leading practitioner of this art, once explained, "the principle of salami slicing . . . is to take a piece of salami and slice it very thin and then pile slice upon slice so that eventually you have a very good sandwich. And that is my concept of the evolution of social legislation."[51] By the time the Supreme Court, the lower courts, and the EEOC had assembled the Title VII sandwich, Congress had changed sufficiently to enjoy the meal. Or at least this was true of the leaders of the key committees, who stood ready to block any legislative amendment of these judicial revisions.

John Skrentny points out that the judiciary was also skillful at *legitimating* this "new model of discrimination." A key part of the judicial art, he argues, is "asserting that what is new (the controversial case at hand) is *not* new."[52] The novelty of the policy established in the pivotal case of *Griggs v. Duke Power* was disguised not only by the Court's rhetorical effort to tie "disparate impact" analysis to the ultimate purposes of Title VII, but also by the fact that it was written by Chief Justice Burger for a unanimous Court. For all these reasons the division of labor established by Title VII proved to be a particularly good mechanism for slowly redesigning the government's attack on employment discrimination without revising the underlying statute.

By 1969 civil rights groups had come to appreciate the virtues of the institutional arrangement they had attacked only a few years before. Their faith in the courts was revived, and with the election of Richard Nixon their trust in the EEOC plummeted. The LDF's Jack Greenberg now told the Senate Judiciary committee that "the entire history of the development of civil rights law is that private suits have led the way and government enforcement has followed." Joseph Rauh agreed "without reservation."[53] Congress continued to debate expansion of the power of the EEOC. But, as Sean Farhang explains, the strategy of civil rights groups had changed significantly:

> While they still supported cease-and-desist, the relative weighting of their preferences regarding administrative implementation versus private litigation had been decisively transformed as compared to 1963-64. They now wanted both, and they were unwilling to give up private enforcement for cease-and-desist powers. . . . [E]mpowered and partially financed (through attorney's fees) by the private enforcement provisions of the Dirksen compromise, civil rights groups found themselves at the leading edge of Title VII enforcement, wielding the weapon of private litigation to make what they judged to be new, meaningful, and gratifying inroads into labor markets previously foreclosed to African Americans. . . . Civil rights advocates could not, they had now decided, afford to rely solely upon the beneficence of bureaucrats, who themselves were dependent upon the

> beneficence of elected officials for resources and power, to enforce fair employment practices.[54]

As Greenberg put it, "with private enforcement we were the captains of our own ship. We took initiatives that more cautious government agencies wouldn't."[55] In 1972 Congress gave the EEOC power to file employment discrimination suits but not to issue cease-and-desist orders. The institutional issues that had seemed so important in the eyes of New Dealers now seemed insignificant.

The role private enforcement cases came to play in employment discrimination policy is indicated by the volume of suits filed in federal court. Private enforcement cases averaged less than 100 per year in the late 1960s. This grew to about 5,000 cases per year by the late 1970s, reached almost 10,000 annually in the 1980s, and then skyrocketed to over 22,000 per years in the late 1990s. In fact, employment discrimination cases now constitute almost one-fifth of all non-prisoner lawsuits brought under federal statutes.[56] As these statistics indicate, strong incentives lead plaintiffs to file such cases and attorneys to help them do so. The impressive growth of employment discrimination can be traced not just the new interpretations of Title VII announced by the courts in the 1970s, but to congressional enactments that lower the costs and raise the benefits of litigation for plaintiffs and their lawyers.

As mentioned above, one of the few concessions civil rights groups wrung out of the Senate in 1964 was attorney's fees for "prevailing parties" in Title VII cases. Here again the courts departed from the most obvious meaning of this provision. According to George Rutherglen, "Despite its reference to 'the prevailing party,' this provision has been applied in diametrically opposed ways to prevailing plaintiffs and prevailing defendants. Prevailing plaintiffs almost always recover an award of attorney's fees;

prevailing defendants almost never do."[57] When the Supreme Court interpreted Reconstruction era legislation to allow federal courts to award compensatory damages in employment discrimination cases, the lower courts awarded attorneys fees to prevailing plaintiffs in these cases as well. But in 1975 the Supreme Court reaffirmed the traditional "American rule," which requires explicit legislative authorization for fee shifting.[58] Congress responded by passing the Civil Rights Attorney's Fees Award Act (CRAFAA) of 1976, which extended fee shifting to all civil rights laws (including Titles VI and IX, the subject of the next section of this paper).

The congressional debate over CRAFAA offers a good illustration of how policymaking through litigation served the political needs of Democrats and liberal Republicans (not yet an endangered species) in the 1970s. While committed to improving the plight of racial minorities, women, the disabled, and other disadvantaged groups, they were growing increasingly wary of the emerging backlash against entitlement spending, social regulation, and the federal bureaucracy. They particularly feared being labeled supporters of "big government." Combining federal mandates on subnational governments and the private sector with enforcement through the courts provided a handy mechanism for squaring the political circle: this was an attractive way to provide more government protections without increasing government spending or expanding the federal bureaucracy.[59] The Senate Report on CRAFAA emphasized that the bill would strengthen enforcement of civil rights law "while at the same time limiting the growth of the enforcement bureaucracy." Senate Minority Leader Hugh Scott claimed that this legislation "would cost the government nothing" and "would make the civil rights laws almost self-enforcing."[60] What politician could object to that?

In the late 1970s and early 1980s the Supreme Court was divided—sometimes even splintered—in employment discrimination cases. By the late 1980s a slim conservative majority on the Court had begun to whittle away at the Title VII precedents established over the preceding two decades. Decisions of the Rehnquist Court increased the burden of proof for plaintiffs, provide additional defenses to employers, and generally make it harder for plaintiffs to prevail in "disparate impact" cases. A series of decisions announced by the Court in June, 1989, produced a firestorm of criticism from civil rights organizations, Democrats in Congress, and the now substantial employment discrimination bar. In 1990 Congress passed legislation overturning a number of Title VII decisions of the Rehnquist Court. President Bush vetoed the legislation, denouncing it as a "quota bill." Congress responded by passing the Civil Rights Act of 1991, which overturned even more Court decisions and significantly expanded the damages available to plaintiffs in employment discrimination cases. This time President Bush signed the legislation, which contained enough ambiguities to allow both sides to declare victory.[61] Since the Act both made it easier for plaintiffs to prevail in employment discrimination cases and significantly increased the value of winning, the number of Title VII cases filed in federal court quickly shot up once again.

Both the 1976 CRAFAA and the Civil Rights Act of 1991 provide significant support for Thomas Burke's argument that Congress has become a leading proponent of adversarial legalism.[62] Congress has repeatedly demonstrated its support for the court-centered private enforcement regime created--largely by accident and miscalculation--in 1964. Conversely (and somewhat paradoxically), the Supreme Court has become a major *critic* of adversarial legalism, frequently making it more difficult for plaintiffs to get into

court, to win their cases once there, to receive attorneys fees, or to collect large damage awards. As Andrew Siegel has documented at great length in his aptly titled law review article, "The Court Against Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisdiction," in recent years a deep-seated "anti-litigation spirit" has been a "powerful force shaping the Court's basal understanding of its institutional project."[63] Recognizing that the federal judiciary was becoming more hostile to "disparate impact" claims, the sponsors of the 1991 Civil Rights Act looked for ways to encourage employment discrimination litigation without handing more power over to federal judges. Their solution was to increase the role of *juries* in Title VII cases. In 1964 civil rights organizations had sought to avoid jury trials because they feared that southern juries would be hostile to civil rights claims. Three decades late they saw juries as an attractive alternative to decision-making by judges appointed by Presidents Reagan and Bush.[64]

Employment discrimination litigation exhibits almost all the disadvantages of adversarial legalism highlighted by Robert Kagan. Consider the following description provided by George Rutherglen, a leading legal expert on Title VII:

> Title VII establishes an enforcement scheme that is divided into three-stages: state or local administrative proceedings; investigation and conciliation by the Equal Employment Opportunity Commission (EEOC); and litigation by private individuals, or by the EEOC or the Attorney General. This three-stage scheme is inherently more complicated than any simple mechanism for purely administrative or judicial enforcement. . . . As result, the legal doctrine governing these issues has become ever more complex, making litigation of employment discrimination cases highly technical and specialized. The doctrinal complexity, moreover, does not point in a single direction, but serves a variety of different purposes, some favorable to plaintiffs, others to defendants. . . . [C]onsidered together, these policies yield a complex system of enforcement that threatens to sidetrack employment discrimination cases into a multitude of collateral procedural issues.[65]

This procedural complexity would be less troublesome if Congress or the Supreme Court had succeeded in resolving key issues about the burden of proof or even the meaning of "discrimination." But they have not. Consequently, significant discretion remains in the hands of district court judges and juries. Despite decades of court decisions, EEOC rules, and congressional attempts at fine-tuning, it is hard to predict the outcome of employment discrimination cases. Uncertainty still reigns supreme.

The result is *not,* however, weak government regulation. Facing the prospect of paying very large damage awards if they lose in court, employers inevitably look for ways to avoid the financial risks (and bad publicity) of litigation. And the EEOC has been eager to offer them a "safe harbor" from the uncertainties of adversarial legalism. Since 1979 the EEOC has maintained that employers can protect themselves from disparate-impact suits by adopting "voluntary" affirmative action plans consistent with its Uniform Guidelines on Employee Selection Procedures and Guidelines on Affirmative Action.[66] The major effect of the 1991 Civil Rights Act was to increase employers' incentives to sail into this "safe harbor." With employers facing greater potential losses and a heavier burden of proof, Rutherglen notes, "affirmative action becomes less and less a voluntary option and more and more a mandatory requirement. It becomes the only realistic way to avoid liability under the theory of disparate impact."[67] This is why many business leaders oppose "reverse discrimination" attacks on affirmative action: victory in these cases would have left them perched precariously between the Scylla of disparate-impact lawsuits and the Charybdis of "reverse discrimination" challenges, depriving them of any "safe harbor" in a sea of legal uncertainty. Whatever the flaws of the adversarial legalism, it does not produce a less powerful central government.

An "Inspired Model for Attacking the Often-Intractable Problem of Discrimination": The Transformation of Title VI

Title VI of the 1964 Civil Rights Act established the principle that "no person in the United States shall be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance." It directed federal agencies to issue "rules, regulations, or orders of general applicability" to carry out this provision, and to terminate funding for any "particular program" that failed to comply. Although Titles VI and VII both target racial discrimination (Title VI, unlike Title VII, makes no mention of gender), in several ways they are mirror images of one another. The original version of Title VII applied only to private employers, not public officials. Title VI, in contrast, applies primarily to state and local governments. Title VII was extremely controversial in 1963-64, the focus of the most important bargaining over the legislation. But "almost no attention was paid to Title VI," which Hugh Davis Graham describes as "the sleeper that would become by far the most powerful weapon of them all."[68]

Most importantly, while the Dirksen-Mansfield substitute made private judicial enforcement central to implementation of Title VII, Title VI was consistently presented and defended as a mechanism for replacing costly, time-consuming constitutional litigation with decisive administrative action. In his explanation of the initial version of Title VI, President Kennedy stated, "indirect discrimination, through the use of Federal funds, is just as invidious" as direct discrimination "and it should not be necessary to resort to the court to prevent each individual violation."[69] The Congress that had focused so intently on the enforcement role of the courts under Title VII said nothing about the

role of the courts in implementing Title VI. There is no mention of private enforcement suits either in the statute itself or in its legislative history. This was not an oversight. Since it was already unconstitutional either for state and local governments to discriminate on the basis of race or for the federal government to support such activity, suits by aggrieved private individuals were already available—just too cumbersome to be effective. While Title VII made illegal private activities that had previously been legal under federal law, Title VI applied new administrative sanctions against those who violated preexisting constitutional norms.

Consequently, the limited congressional debate over Title VI focused on the extent of the powers granted to federal agencies. The House and the Senate imposed several constraints on their authority: rules issued under Title VI must be approved by the president himself; federal agencies must give Congress thirty days advance warning of funding terminations; state and local governments are entitled to public hearings prior to termination of funds and judicial review after the fact; and such terminations apply only to the particular program found guilty of discrimination, not to the entire institution receiving funding. Having delegated substantial power to federal administrators, members of Congress wanted to make sure they did not wield it precipitously, arbitrarily, or without giving Congress a heads-up.

We know from detailed accounts of school desegregation and the development of affirmative action programs in the construction industry that administrative action under Title VI initially proved a potent weapon for change.[70] Desegregation guidelines issued by HEW in 1965 and 1966 were a crucial component of the "reconstruction of southern education" accomplished at long last in the late 1960s and early 1970s. The threat of

fiscal sanctions was made particularly compelling by the new pot of money Congress made available to southern school systems when it passed the landmark Elementary and Secondary Education Act of 1965. But it still took a subtle combination of judicial and administrative action to desegregate southern schools. In Gary Orfield's words, "The policy shift announced by the Office of Civil Rights [in HEW] was possible only because of a series of helpful court decisions."[71]

The breakthrough on school desegregation came in 1966-67, when judges on the Fifth Circuit incorporated key elements of HEW's guidelines into their opinions and remedies in Fourteenth Amendment cases. In a particularly important ruling, *United States v. Jefferson County Board of Education*, Judge John Minor Wisdom wrote that Title VI "was necessary to rescue school desegregation from the bog on which it had been trapped for years." HEW's guidelines "offer, for the first time, the prospect that the transition from a *de jure* segregated dual system to a unitary integrated system may be carried out effectively, promptly, and in an orderly manner."[72] If administrative guidelines provided courts with the "judicially manageable standards" essential for desegregating schools, the courts offered HEW's Office for Civil Rights crucial political support. As Stephen Halpern explains in his detailed analysis of this court-agency partnership,

> HEW officials realized that federal courts were a good ally, and the agency had few allies in beginning the politically touchy task of enforcing Title VI . . . Time after time, the Fifth Circuit intervened . . . to give HEW's school desegregation efforts "a boost." Moreover, in meetings with angry southern educators HEW officials could claim that their hands were tied—that court decisions and hence, indirectly, the Constitution itself, required HEW to be as insistent as it was.[73]

According to Halpern, in the southern desegregation effort "the synergistic power of the bench and bureaucracy working together was apparent." "[F]ederal judges lauded HEW's

'expertise' in writing the Guidelines, and HEW officials, in turn, extolled and relied on the 'objective' policies of the courts." He also notes the irony of this arrangement: "The enforcement of a law intended as a substitute for litigation became heavily dependent on and linked to the standards advanced in litigation."[74]

It did not take long for administrators throughout the federal government to discover that termination of funding for state and local governments is too blunt and extreme a sanction to be politically palatable or administratively attractive in ordinary times. In a report highly critical of federal agencies' lax enforcement of Title VI, the United States Commission on Civil Rights identified a central dilemma facing these funding agencies: "Although funding termination may serve as an effective deterring to recipients, it may leave the victim of discrimination without a remedy. Funding termination may eliminate the benefits sought by the victim."[75] Just as importantly, funding cut-offs threaten to damage relations between the federal agency and those state and local officials with whom they worked on a regular basis -- not to mention antagonizing members of Congress upon whom administrators rely for appropriations. As Congress replaced small categorical grants with much larger block grants in the 1970s, termination of funding became all the more awkward.

In the early 1970s civil rights advocates blamed the shortcomings of administrative enforcement of Title VI on the Nixon administration, and launched the Dickensian case of *Adams v. Richardson* to force HEW to be more aggressive.[76] After years of unproductive litigation, it became evident that the central problem lay not in the political motives of Republican administrations so much as in the administrative mechanisms created by Title VI. Meanwhile civil rights groups were slowly and

haphazardly developing an alternative means for putting teeth in Title VI: private suits to enforce the rules promulgated by federal agencies but not aggressively enforced by them.

If these agency rules had merely tracked court rulings defining racial discrimination under the Fourteenth Amendment, then such litigation would have been of little significance. But agency rules under Title VI usually went far beyond what the courts had deemed constitutionally required. In order to provide specific guidance to recipients of federal funding, agency rules often created a strong presumption in favor of racial proportionality. They took a hard line against practices that has a "disproportionate impact" on racial minorities without being intentionally discriminatory.

Bilingual education provides a good example of the division of labor between federal courts and federal agencies that eventually emerged under Title VI. In 1970 the Office for Civil Rights in HEW issued new rules on "school districts with more than 5% national origin minority group children." The regulations announced that

> when the inability to speak and understand the English language excludes national origin minority group children from effective participation in the educational program offered by school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to those students.[77]

The original rules were not very specific about the content of those "affirmative steps." But within a few months it had issued detailed guidelines for bilingual education. HEW Secretary Elliot Richardson told a Senate committee that OCR would require schools with a significant number of non-English speaking students to engage in

> total institutional reposturing (including culturally sensitive teachers, instructional materials and educational approaches) in order to incorporate, affirmatively recognize, and value the cultural environment of ethnic minority children so that the development of positive self-concept can be accelerated.[78]

Failure to follow these guidelines would constitute discrimination on the basis of "national origin" and thus called for termination of federal funding to the school district.

The impetus for these regulations seems to have come not from newly formed Hispanic groups but from idealistic young lawyers in the Office of Civil Rights. They received unexpected political support from the White House, which was courting Hispanic voters in anticipation of the 1972 election. But OCR had neither the capacity nor the political will to translate these demanding guidelines into enforcement action. By 1974 it had reviewed only 4% of the covered school districts. It found over half of the review districts out of compliance. Some of these districts agreed to a remedial plan. Others refuse to negotiate at all. Only once did the Office of Civil Rights take even the first step towards termination federal funds.[79]

Once again it was the federal judiciary that came to the rescue of the OCR. In 1974 the Supreme Court heard a Title VI bilingual education class action suit filed by legal assistance lawyers representing Chinese American parents in San Francisco. In its brief opinion in *Lau v. Nichols*[80], the Court avoided the question of whether the Fourteenth Amendment required school districts to provide education in students' native language by finding that the school was bound by HEW's Title VI regulations. Those regulations, the Court concluded in summary fashion, were well within the power granted to HEW by Title VI. The court implied -- but did not specifically state -- that the regulations could be enforced by the federal courts. The next year HEW issued more specific bilingual education guidelines known appropriately as the "*Lau* remedies." Federal district courts in New York and New Mexico ordered school districts with large numbers of Hispanic students to comply with them.[81]

In school desegregation cases federal judge had required school districts to comply with HEW's guidelines in order to remedy *constitutional* violations. But no one claimed that failure to provide bilingual education constituted a violation of the Constitution. *Lau v. Nichols* thus marked a subtle yet important shift that few appreciated at the time: the federal courts were now willing to entertain private suits to enforce administrative regulations issued under Title VI, even those without any clear connection to the Fourteenth Amendment. This transformed a mechanism designed to create an administrative alternative to constitutional litigation into one that combine broad rulemaking authority for federal agencies with judicial enforcement through private suits.

It is easy to argue that Title VI was intended to give agencies authority to issue "prophylactic" regulations that extend beyond the basic requirements of the Constitution. At the same time, as we have seen, many restrictions were placed on the agency's power to enforce these rules. Not only was the president himself required to okay Title VI rules, but Congress was to receive advanced warning of funding cut-offs, and recipients were entitled to a prior hearing and to judicial review. Most importantly, everyone knew that termination of funding was a highly visible action that most agencies would take only in unusual circumstances. Termination of funding is not cheap; it requires the expenditure of a significant amount of political capital.

The addition of judicial enforcement for private rights of action significantly altered this political equation. Now agencies could write broad Title VI regulations and allow others to take the political heat for enforcing them, something civil rights organizations and federal judges were happy to do. Even more importantly, federal judges could enforced these rules not by ordering the termination of funding--by far the

most obvious remedy for the violation of Title VI--but by issuing injunctions requiring recipients to alter their practices in specific ways to comply with agency rules. After all, private parties did not go to court asking for termination of funding for the programs in which they participated; they wanted state and local officials to use federal money in different ways. Remarkably, for years the Supreme Court heard many cases under Title VI and its various "clones" (especially Title IX of the 1972 Education Amendments and §504 of the 1974 Rehabilitation Act) without directly addressing the underlying questions of who could file suit and what kind of relief could be ordered at the courts. The lower courts understandably took the Supreme Court's silence as a green light to entertain private rights of action and to issue injunctions requiring compliance with agency rules.

In 1979 the Court seemed to resolve the private right of action question definitively when it held that Congress had intended to authorize private suits to enforce Title IX.[82] Since Title IX is modeled on Title VI, it seemed obvious that a similar private right of action existed under Title VI. Indeed, recognizing a private right of action to enforce Title IX was an even bigger reach than recognizing a private right of action to enforce Title VI. One could argue that Title VI was passed to protect constitutional rights, and thus that both Congress and the courts possess broad power to remedy violations by state and local governments. But the courts had never held that gender is a "suspect classification" under the Fourteenth Amendment. Many forms of gender discrimination -- such as providing more funding to male sports than to female sports -- would never be considered unconstitutional. Title IX was enacted under the Spending Clause, not § 5 of the Fourteenth Amendment. Congress simply determined that it would not spend federal money on programs that failed to provide equal benefits to women.

Termination of funding is a particularly appropriate remedy for violation of a law enacted under the Spending Clause. Once again, though, Supreme Court ruled that the funding cut-off needed to be supplemented by the injunctive power of the courts, largely because the process explicitly created by Congress was insufficient for protecting the rights established by agency rules.

In the 1970s private rights of action under Title VI and Title IX were usually brought by civil rights organizations. Not only were these cases too expensive for most private individuals to pursue, but prospective injunctive relief promised few benefits for those initially aggrieved. The 1976 Civil Rights Attorneys Fees Awards Act made suits under Title VI and Title IX somewhat more attractive by allowing judges to award fees and costs to the "prevailing parties." Oddly, Congress included Titles VI and IX in this legislation despite the fact that he it had never explicitly authorized private suits under them. Congress was clearly more favorably disposed to aggressive enforcement of these rules in the mid-1970 that had been a decade before. Yet it remained curiously silent on many key issues.[83]

An even more important spur to litigation eventually came from the Supreme Court: it authorized federal judges to award *monetary damages* to plaintiffs in Title VI and Title IX cases. The court first permitted the award of back pay in a splintered, garbled decision on racial discrimination in the employment practices of the New York City Police Department.[84] A decade later the Court announced that federal courts can require public schools to pay damages to students who have been subjected to sexual harassment by teachers.[85] Soon thereafter it ruled that a student could sue a school district for monetary damages when it fails to take adequate steps to prevent sexual

harassment by a fellow student.[86] In each case the Court placed substantial weight on sexual harassment guidelines issued by the Department of Education's Office of Civil Rights, which, it argued, had afforded schools clear notice of what was expected of recipient of federal funding.

In authorizing monetary damages, the Court argued that the "general rule" is that "absent clear direction to the contrary by Congress, the federal courts have the power to award *any* appropriate relief in a cognizable cause of action brought pursuant to a federal statute."[87] Since the causes of action under Titles VI and IX are "implied" not explicit, they establish no limitations on awards. "The court's analytical construct," Justice Scalia wrote in his separate opinion, "comes down to this: unless Congress expressly legislates a more limited remedial policy with respect to rights of action it does not know is creating, it intends the full gamut of remedies to be applied." Here was an irony Scalia could not resist pointing out: "To require, with respect to a right that is not consciously and intentionally created, that any limitation of remedies must be expressed, is to provided, in effect, that the most questionable of private rights will also be the most expansively remediable."[88]

The combination of attorney's fees and monetary damages significantly increased incentives for private parties to file suits under Titles VI and IX. Eventually a private bar developed to litigate these cases. This had the effect not just of increasing the number of cases filed, but of augmenting the political support for this enforcement mechanism. A better example of path dependency in action would be hard to find.

In 2001 Justice Stevens compose the following ode to the "integrated remedial scheme" that the courts, Congress, and agencies had developed under Title VI:

> This legislative design reflects a reasonable -- indeed inspired -- model for attacking the often-intractable problem of racial and ethnic discrimination. On its own terms the statute supports an action challenging policies of federal grantees that explicitly or unambiguously violate antidiscrimination norms (such as policies that on their face limit benefits or services to certain races). With regard to more subtle forms of discrimination (such as schemes that limit benefits or services on ostensibly race-neutral grounds but have the predictable and perhaps intended consequence of materially benefiting some races at the expense of others), the statute does not establish a static approach but instead empowers the relevant agencies to evaluate social circumstances to determine whether there is a need for stronger measures. Such an approach builds into the law flexibility, an ability to make nuanced assessments of complex social realities, and an admirable willingness to credit the possibility of progress.[89]

In the case then before the Court, the state of Alabama had refused to comply with Department of Justice rules requiring drivers' tests to be conducted in Spanish as well as English. The Department claimed that Alabama's English-only rule would have a disproportionate impact on those born outside the U.S., and therefore violated Title VI. For Justice Stevens this rule reflected

> the considered judgment of the relevant agencies that discrimination on the basis of race, ethnicity, and national origin by federal contractees are significant social problem that might be remedied, or least ameliorated, by the application of a broad prophylactic rule.

Since the issue in this case, *Alexander v. Sandoval*, was virtually identical to the one decided by the Court a quarter-century before in *Lau v. Nichols*, Stevens consider it an easy one to resolve.

Surprisingly, Stevens lost. As he bitterly and accurately complained, "in a decision unfounded in our precedent and hostile to decades of settled expectations, a majority of this Court carves out an important exception to the right of private action long recognized under Title VI." The Court's majority held that while private parties could sue to enforce the explicit statutory mandate contained in the first section of Title VI, they could not sue to enforce agency *regulations* issued under its second section. Since

the Court had repeatedly deferred to federal agencies' interpretation of Title VI in previous cases, this was an odd ruling, to say the least.

Alexander v. Sandoval was in large part a reflection of the Rehnquist Court's hostility to affirmative action and to "effects" tests in discrimination cases. The Court's five-member majority in essence said, "since we interpret Title VI to outlaw only *intentional* discrimination, we will not allow agencies to impose a broader definition through the rulemaking process." But *Sandoval* also indicated that some members of the court -- perhaps a majority, but a fleeting one at best -- entertain serious doubts about the entire array of institutional arrangements that have grown up around Titles VI and IX. Under the new regime created by *Sandoval*, it would seem, when agencies seek to go beyond the Court's interpretation of Title VI and the Fourteenth Amendment, they are on their own in the enforcement process. They must invoke the awkward funding termination process rather than rely on court-based enforcement by private parties.

It is much too early to write the obituary for Steven's "inspired model" for attacking discrimination. In a 2005 "retaliation" case brought under Title IX, a closely divided Court seemed to retreat from *Sandoval's* narrow interpretation of the judicially enforceable rights contained in cross-cutting federal mandates.[90] The direction the Court ultimately takes will depend on the judicial appointments of the next president. It is also quite possible that a Democratic Congress could amend the relevant statutes to explicitly authorize private damage suits enforcing agency rules. When Democrats controlled Congress in the 1980s and 1990s they repeatedly reversed Supreme Court decisions restricting civil rights litigants' access to the federal courts.

It is probably more useful to examine the reasons behind the growth of this enforcement regime than to speculate about the likelihood of its demise. The institutional arrangements that gradually evolved under Titles VI and IX were the product of two convictions. The first is that for every federal right there should be an effective federal remedy, created, if necessary, by the courts. As the Supreme Court stated in an earlier "implied private right of action" case, *J.I. Case v. Borak*, "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose."[91] The second is that neither the tools wielded by civil rights agencies under these statutes nor those employed by the courts—most notably, structural injunctions and §1983 suits—were adequate for uprooting subtle yet invidious forms of discrimination. Implicit in the Court's marrying of private damage suits with administrative regulation under these statutory provisions is recognition that neither federal agencies nor the federal judiciary can go it alone in creating an effective regulatory regime.

Conclusion

The most important moral of these two stories is that adversarial legalism can promote aggressive federal regulation of the private sector and subnational governments. Indeed, it has been central to the development of the American civil rights state. Private litigation under Titles VI and VII both supplemented and spurred administrative action. Federal courts and agencies developed a subtle yet effective division of labor: administrators could focus on writing rules and guidelines, which more politically insulated judges would then enforce. Freed from the politically onerous job of taking enforcement actions against well-connected businesses and state and local officials, civil

rights agencies were emboldened to promulgate aggressive regulations they could never hope to carry out on their own. These administrative rules supplied judges with the "judicially manageable standards" they so often have difficulty devising on their own. Courts' ability to issue injunctions, to award monetary damages, and to provide attorney's fees not only put real teeth into the enforcement process, but provided strong incentives for private litigants to monitor the behavior of employers and recipients of federal funding. The growth of the civil rights bar, in turn, provided crucial political support for these institutional arrangements when they were threatened by adverse Supreme Court decisions.

In the early 1970s, just as these new patterns were emerging under civil rights statutes, innovate judges on the D.C. Circuit were marking the arrival of what Judge David Bazelon famously called "a new era in the long and fruitful collaboration of administrative agencies and reviewing courts."[92] According to his colleague Judge Harold Leventhal, courts and agencies "are in a kind of partnership for the purpose of effectuating the legislative mandate."[93] "Our duty," Judge Skelly Wright announced, "is to see that the legislative purposes hearalded in the halls of Congress, are not lost in the vast halls of the federal bureaucracy."[94] These quotations capture the sense that judges had come to view their job not as constraining administrators, but as collaborating with them to produce more effective—and often more ambitious—government programs.[95] As the history of Title VII so vividly illustrates, sometimes vindicating broad "legislative purposes" meant ensuring that inconvenient statutory provisions *are* in fact "lost in the vast halls of the federal bureaucracy." Such a purposive, non-textualist approach to statutory interpretation, Justice Stevens has told us, "builds into the law flexibility, an

ability to make nuanced assessments of complex social realities, and an admirable willingness to credit the possibility of progress."

These new institutional arrangements were not carefully planned, but slowly evolved through accidents, miscalculations, experimentation, opportunistic lawyering, and assorted other forms of "muddling through." In the long run these arrangements survived and prospered because they fit so well with key features of the new political environment. Years of divided government eroded Democrats' and civil rights leaders' faith in the executive branch and in New Deal institutional norms. Growing public suspicion of "big government"—and especially centralized bureaucracy—led advocates to search for ways to attack various forms of discrimination without seeming to expand the power of federal bureaucrats. In the case of civil rights, those leading the demand for "total justice" not only confronted "a set of governmental structures that reflected mistrust of concentrated power,"[96] but increasingly rejected New Deal-style efforts to overcome fragmentation of power through administrative centralization. Within a decade of passage of the Civil Rights Act and Voting Rights Act, it was clear that the days of "enlightened administration" had come and gone. The era of it adversarial legalism was upon us.

Most of the Supreme Court decisions discussed in this paper came not from the egalitarian Warren Court, but from the allegedly conservative Burger Court. In retrospect it is hard to see how a Court that issued *Roe v. Wade*, mandated school busing, made gender a "semi-suspect classification," broadened the rights of religious dissenters, placed a lengthy moratorium on capital punishment, and approved a variety of affirmative action programs could ever have been considered "conservative." But the

Burger Court was both more internally divided and more cautious than the Warren Court had been in its heyday. For such a Court, policymaking through statutory interpretation and through subtle changes in the rules of federal court jurisdiction had special appeal. Giving new meaning to federal statutes (including not just recent enactments, but long forgotten Reconstruction laws as well) seemed more modest, more pragmatic, and more politically prudent than explicit constitutional innovation. It allowed judges to deal with social or political problems without inciting a confrontation with elected officials. If such decisions prove more controversial than expected or if unintended consequences appear, then legislators can always change the law. As Donald Horowitz has put it, "Judges who recoil at innovation in constitutional lawmaking may not see the same dangers at all in the interpretation of statutes."[97] Justice Brennan was particularly skillful at using "creative" statutory interpretation to draw centrist justices into a majority coalition.

The Rehnquist Court's decisions in *Sandoval*, in the Title VII cases overturned by the Civil Rights Act of 1991, and in a large number of cases limiting the jurisdiction of the federal courts indicate that since the late 1980s the Supreme Court has had second thoughts about the wisdom of the policies and institutional arrangements described above.[98] Indeed, over the past two decades opposition to adversarial legalism has become a guiding theme of Supreme Court jurisprudence. One cannot hope to understand the divisions within the Rehnquist and Roberts Courts without appreciating the extent to which the justices disagree profoundly on whether the civil rights state created through adversarial legalism constitutes an "inspired model" for attacking discrimination or a judicially abetted perversion of federalism and separation of powers.

A central irony of civil rights policy is that Congress imposed many constraints on civil rights agencies in the 1960s, then castigated the Supreme Court for belatedly acknowledging those constraints in the 1980s and 1990s. Obviously Congress had changed enormously. The Congress that produced the civil rights legislation of 1964-65 was soon replaced by one that was significantly more liberal and entrepreneurial, less southern, and more sympathetic to adversarial legalism. As Tom Burke has shown, adversarial legalism appeals to legislators for many reasons. Never was this more true than in the quarter-century stretching from the inauguration of Richard Nixon in 1969 to the election of a Republican Congress in 1994. Closely allied with a phalanx of civil rights organizations, Democratic leaders, especially those on the two Judiciary Committees, sought to preserve the institutional arrangements developed by courts and agencies and to insulate them from interference by Republican administrations. Not surprisingly, this congressional support for adversarial legalism evaporated once Republicans took control of Congress.[99]

Running through both of these stories is the continuing American debate over affirmative action. Do the Constitution and civil rights laws prohibit only intentional discrimination, or does a failure to achieve racial balance constitute adequate evidence of illegal discrimination? Regardless of context—whether it be school assignments, college admissions, employment practices, or electoral districting—policymakers inevitably face this dilemma: on the one hand, affirmative action and explicit racial preferences are highly unpopular, so unpopular, in fact, that few politicians are willing openly to endorse them[100]; on the other hand, since it is very hard to prove intentional discrimination, some form of "disparate impact" analysis is probably essential for any effective regulatory

program. Lack of clear standards, lack of transparency, lack of accountability—all these normally undesirable attributes of adversarial legalism have helped policymakers in each of the three branches of government cope with this central (and perhaps irresolvable) dilemma of modern civil rights. This helps explain why despite their obvious flaws, few people are eager to jettison the institutional arrangements that have grown up since the late 1960s. One muted cheer for adversarial legalism.

ENDNOTES

[1] Robert Kagan, Adversarial Legalism: The American Way of Law (Harvard, 2001), pp. 15 and 35.
[2] "Separation of Powers and the Strategy of Rights: The Expansion of Special Education," in Marc Landy and Martin Levin, eds., The New Politics of Public Policy (Johns Hopkins University Press, 1995)
[3] Martha Derthick, Up in Smoke, second edition (CQ Press, 2005).
[4] Lawrence M. Friedman, Total Justice (Russell Sage, 1985)
[5] The Welfare State Nobody Knows: Debunking Myths about U.S. Social Policy (Princeton, 2007)
[6] The phrase comes from Franklin D. Roosevelt's Commonwealth Club Address, September 23, 1932. For an extended explanation of its significance, see Sidney Milkis., The President and the Parties (Oxford, 1993).
[7] See, for example, Brian K. Landsberg, Free at Last to Vote: The Alabama Origins of the 1965 Voting Rights Act (Kansas, 2007)
[8] Hugh Davis Graham, The Civil Rights Era: Origins and Development of National Policy (Oxford, 1990), p. 103
[9] Sean Farhang, "The Political Development of Job Discrimination Litigation," p. 17-18
[10] Quoted in Graham, The Civil Rights Era, p. 426
[11] Ibid, p. 130
[12] House Report #570, p. 19, quoted in Farhang, "Political Development," p. 20
[13] Graham, Civil Rights Era, p. 146
[14] Quoted in Farhang, "Political Development," p. 35.
[15] Ibid, p. 29, emphasis added
[16] Graham, Civil Rights Era, pp. 430-31
[17] Blumrosen, Modern Law: The Law Transmission System and Equal Employment Opportunity, (University of Wisconsin Press, 1993), pp. 48-49
[18] Farhang, "Political Development," p. 57
[19] Greenberg, Crusaders in the Courts: Legal Battles of the Civil Rights Movement, Anniversary Edition (Twelve Tables Press, 2004), p. 443.
[20] Ibid, p. 454
[21] Ibid, p. 443
[22] Blumrosen provides a detailed account of the many ways the EEOC attacked discrimination, encouraged litigants, and promoted affirmative action, Modern Law, chaps. 5, 6, 10, 12, and 14-16. Graham and John Skrentny provide accounts that are not quite as detailed, but more balanced: Civil Rights Era, pp. 190-254 and The Ironies of Affirmative Action, (Chicago, 1996) ch. 5. Robert Lieberman offers a brief description of the cooperation between the EEOC and civil rights groups in his paper, "Private Power and American Bureaucracy: The EEOC and Civil Rights Enforcement," March, 2007.
[23] The phrase initially appeared in Michael Sovern, Legal Restraints on Racial Discrimination in Employment (Twentieth Century Fund, 1966), p. 205
[24] §703(h), also known as the "Tower amendment." This was a congressional response to the much publicized Motorola decision in Illinois. See Graham, Civil Rights Era, p. 149-50.
[25] George Rutherglen, Employment Discrimination Law: Visions of Equality in Theory and Doctrine, second edition (Foundation Press, 2007), p. 152
[26] Quarles v. Phillip Morris, 279 F. Supp. 505 (E.D.Va., 1968), at 516.
[27] 7036(g), emphasis added
[28] Quoted in Rutherglen, Employment Discrimination Law, p. 17. Justice Rehnquist's dissent in *Weber* provides many more examples of such statements by the leading of supporters of the Civil Rights Act.
[29] 110 Congressional Record 6549 (1964)
[30] Quoted in Graham, Civil Rights Era, p. 150-51
[31] Graham, Civil Rights Era, p. 120
[32] Quoted in Graham, Civil Rights Era, p.106
[33] Blumrosen, Modern Law, 67
[34] Skrentny, Ironies of Affirmative Action, p. 115, emphasis in the original.

[35] Ibid, p. 127
[36] Graham, Civil Rights Era, p. 250, emphasis added
[37] Quoted in Graham Civil Rights Era, p. 250
[38] Blumrosen, Modern Law, p. 75
[39] Blumrosen, Black Employment and the Law (Rutgers, 1971), p. 53
[40] United Steelworkers of America v. Weber 443 U.S. 193 (1979)
[41] See, for example, Justice Rehnquist's dissent in *Weber*, Justice Scalia's dissent in *Johnson v. Transportation Agency*, Nelson Lund, "The Law of Affirmative Action In and After the Civil Rights Act of 1991: Congress Invites Judicial Reform," 6 George Mason Law Review 87 (1997), Herman Belz, Equality Transformed: A Quarter-Century of Affirmative Action (Transaction, 1991), and Graham, Civil Rights Era, chs. 9 and 15.
[42] Black and Blue: African Americans, the Labor Movement, and the Decline of the Democratic Party (Princeton, 2008), p. 87. The most extensive and sophisticated effort to justify the courts' deviation from conventional statutory interpretation is William Eskridge's Dynamic Statutory Interpretation (Harvard, 1994). I highlight the connection between *Weber* and Eskridge's theory of statutory interpretation in "Statutory Reconstruction: The Politics of Eskridge's Interpretation," Georgetown Law Journal (November, 1995).
[43] 401 U.S.424 (1971)
[44] Albemarle Paper Co. v. Moody
[45] 422 U.S. 405 (1975)
[46] 424 U.S.747 (1976)
[47] 480 U.S. 616 (1987)
[48] 279 F. Supp. 505 (E.D. Va.,1968)
[49] 442 F.2d 159 (3rd Cir, 1971)
[50] These decisions are described in Blumrosen, Modern Law, pp. 95-96
[51] Quoted in Derthick, Policymaking for Social Security, p. 26
[52] The Ironies of Affirmative Action, p. 159-60
[53] Quoted in Farhang, "Political Development," p. 55
[54] Ibid, 56-57
[55] Quoted in Farhang, "Political Development," p.57.
[56] Farhang, "Political Development," pp 2, 65, and 78.
[57] Employment Discrimination Law, p. 188
[58] Alyeska Pipeline v. Wilderness Society 421 U.S. 240 (1975)
[59] I develop this theme at greater length in "From Tax and Spend to Mandate and Sue: Liberalism after the Great Society," in Sidney Milkis and Jerome Mileur, eds., The Great Society and the High Tide of Liberalism (University of Massachusetts Press, 2005).
[60] Quoted in Farhang, "Political Development," p. 73
[61] For a detailed review of these events, see Reginald C. Govan, "Honorable Compromises and the Moral High Ground: The Conflict between the Rhetoric and the Content of the Civil Rights Act of 1991," 46 Rutgers Law Review 1 (1993).
[62] Thomas Burke, Lawyers, Lawsuits, and Legal Rights: The Battle over Litigation in American Society. (University of California Press, 2002), esp. chs. 2 and 5.
[63] 84 Texas Law Review 1097 (2006) at 1114
[64] Rutherglen, Employment Discrimination Law, p. 178; Govan, "Honorable Compromises," at 56.
[65] Rutherglen, Employment Discrimination Law, pp. 157-59
[66] Blumrosen, Modern Law, ch. 15
[67] Environmental Discrimination Law, p. 90
[68] Civil Rights Era, p. 83
[69] H.R. Document #124, 88th Cong., 1st Sess. (1963), p. 12
[70] Stephen Halpern, On the Limits of the Law: The Ironic Legacy of Title VI of the Civil Rights Act (Johns Hopkins, 1995); Gary Orfield, The Reconstruction of Southern Education ((Wiley-Interscience, 1969); Hugh Davis Graham, "Since 1964: The Paradox of American Civil Right Regulation," in Melnick and Keller, eds., Taking Stock: American Government in the Twentieth Century (Woodrow Wilson Center Press and Cambridge University Press, 1999); Skrentny, The Ironies of Affirmative Action.

[71] Orfield, Reconstruction, p. 340
[72] Quoted in Halpern, On the Limits of the Law, p. 61
[73] Ibid, p. 73
[74] Ibid, pp. 73, 67, and 76,
[75] Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs, Report of the U.S. Commission on Civil Rights, June, 1996, p. 40. Beryl Radin adds that within a funding agency the final decision on termination will usually be made by the Office of General Counsel and the Office of the Secretary, not the Office of Civil Rights. The former are usually less willing to cut off funds than is the latter. Implementation, Change, and the Federal Bureaucracy (Teachers College Press, 1977), pp. 125-26
[76] For extended accounts of this case, see Jeremy Rabkin, Judicial Compulsions: How Public Law Distorts Public Policy (Basic Books, 1989); Rosemary Salomone, "Judicial Oversight of Agency Enforcement: The *Adams* and *WEAL* Litigation," in Barbara Flicker, ed., Justice and School Systems: The Role of the Courts in Education Litigation (Temple, 1990); and Halpern, On the Limits of the Law.
[77] Quoted in Gareth Davies, See Government Grow: Education Politics from Johnson to Reagan (Kansas, 2007), p. 151.
[78] Quoted in Davies, See Government Grow, p. 153
[79] Davies, See Government Grow, pp. 147-57. My discussion of activity in HEW and the White House draws on Davies' excellent chapter on bilingual education and on John Skrentny, The Minority Rights Revolution (Harvard, 2004), ch. 7.
[80] Lau v. Nichols 414 U.S.563 (1974)
[81] Davies, See Government Grow, pp. 160-1
[82] Cannon v. University of Chicago 441 U.S. 677 (1979)
[83] Similarly, in 1986 Congress abrogate state sovereign immunity under Titles VI and IX, which meant that monetary awards again state governments would not be barred by the 11th amendment. But it never explicitly authorized those awards in the first place.
[84] Guardians Association of NYC Police Dept. v. Civil Service Commission 463 U.S. 582 (1983)
[85] Franklin v. Gwinnett County Public Schools 503 U.S. 60 (1992) and Gebster v. Lago Vista Independent School District 524 U.S. 274 (1998)
[86] Davis v. Monroe County Board of Education 526 U.S. (1999)
[87] Franklin v. Gwinnett Public School, at 71
[88] Franklin v. Gwinnett Public School, at 77-8
[89] Alexander v. Sandoval 532 U.S. 275 (2001).
[90] Jackson v. Birmingham Boar of Education 544 U.S. --- (2005)
[91] 377 U.S. 426 (1964), at 433
[92] EDF v. Ruckelshaus, 439 F.2d 589 (D.C. Circuit, 1971) at 597
[93] Portland Cement Assoc. v. Ruckelshaus, 486 F. 2d 375(D.C. Cir., 1973), at 394
[94] Calvert Cliffs Coordinating Committee v AEC, 449 F. 2d 1109(D.C. Cir., 1971), at 1111
[95] I provide additional support for this argument in "The Politics of Partnership," 45 Public Administration Review 653 (1985)
[96] Kagan, Adversarial Legalism, p. 15
[97] The Courts and Social Policy (Brookings, 1976), p. 13.
[98] For additional examples, see Melnick, "Deregulating the States: The Political Jurisprudence of the Rehnquist Court," in Tom Ginsburg and Robert Kagan, eds., Institutions and Public Law: Comparative Approaches (Peter Lang, 2005).
[99] For example, in both the Prison Litigation Reform Act of 1996 and the Antiterrorism and Effective Death Penalty Act of 1996, the Republican 104th Congress adopted aggressive measures to limit habeas corpus petitions and litigation over prison conditions.
[100] Joan Le and Jack Citrin, "Affirmative Action," in Nathaniel Persily, Jack Citrin, and Patrick J. Egan, eds., Public Opinion and Constitutional Controversy (Oxford, 2008); Paul Sniderman and Thomas Piazza, The Scar of Race (Belnap, 1993)