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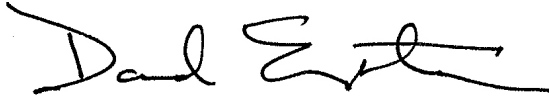
March 15, 2018

Dear Public Law and Policy Workshop Participants:

Please find attached two sets of materials I plan to discuss during the workshop next week. The first is an attempt at an introduction to a book project that is tentatively titled, *The Road to Walmart*. The second is an overstuffed draft of the book's fifth chapter, much of it built around a remarkable case brought before the Illinois Fair Employment Practices Commission in the mid-1960s. If you have limited time to read, I would steer you to the second of the two, as the ideas laid out in the book introduction are easier to summarize during the workshop itself.

Thanks for reading, and I'm looking forward to discussing the project with you.

Sincerely,

A handwritten signature in black ink, appearing to read "David Engstrom", with a stylized, flowing script.

David Freeman Engstrom

## INTRODUCTION – THE ROAD TO WALMART

The bill signing ceremony in Albany in March 1945 was a momentous one—“the largest of its kind,” the *New York Herald Tribune* reported, “in the memory of the capital’s oldest attachees.”<sup>1</sup> And those who made speeches to the hundreds of assembled guests used rhetoric to match. Governor Thomas Dewey, fresh off his first loss as the Republican nominee for President, likened the State Law Against Discrimination (SLAD) to the Declaration of Independence and declared it a “great social advance” that would “assure equality of opportunity for all our people.”<sup>2</sup> Another speaker called it a “proclamation of economic emancipation,”<sup>3</sup> harking back to the freeing of slaves some 60 years earlier. Yet this was not just the usual hyperbole that comes in the afterglow of a hard-fought legislative victory. After all, New York’s SLAD was, for then at least, the most sweeping regulatory effort to eradicate discrimination ever enacted at any level of government in the United States. Even bolder, by focusing on job discrimination in particular, the SLAD was intervening in one of the most bitterly contested issues of the day: the distribution of benefits and burdens in the American workplace.

Though a trailblazer, New York did not write on a clean slate. For nearly a century, Americans had experimented with anti-discrimination policies designed to live up to the American creed.<sup>4</sup> In the years after the Civil War, the Reconstruction Congress enacted a sweeping law prohibiting racial discrimination in public accommodations, taking a step toward opening restaurants, hotels, and theaters to all. After that statute fell victim to the Supreme Court’s narrowing interpretation of the Fourteenth Amendment in the *Civil Rights Cases*,<sup>5</sup> two dozen state legislatures filled the void by enacting public accommodations statutes of their own.<sup>6</sup> The first part of the 20<sup>th</sup> century brought a grab-bag of further efforts, including state laws prohibiting discrimination in jury service and laws prohibiting job discrimination by public schools and other government employers as well as some quasi-public ones, such as public utilities and entities overseeing New Deal work relief projects.<sup>7</sup> Finally, during World War II, the need to maintain a steady supply of minority and women workers to fuel the war effort spurred yet another round of anti-discrimination efforts. Most prominent among them was President Franklin Roosevelt’s executive order creating the wartime Committee on Fair Employment Practices (COFEP) to confront discrimination by defense contractors.<sup>8</sup>

None of these earlier efforts, however, could compare to New York’s SLAD. For starters, while prior laws in New York and elsewhere sported muscular anti-discrimination language, they often failed to specify any enforcement mechanism to back it up. This left implementation to private individuals pursuing lawsuits in court, but without many of the litigation-promoting tools, including attorney’s fees for prevailing plaintiffs, that make robust enforcement possible and are commonplace today. Others handed implementation to toothless agencies with investigatory powers but no ability to mete out sanctions if discrimination was found. FDR’s wartime COFEP

perfectly embodied the latter approach: The Committee lacked any enforcement authority beyond the ability to informally conciliate disputes, hold public hearings, and enter purely advisory orders that employers and unions could, and often did, ignore.

In stark contrast, the SLAD vested the newly created State Commission Against Discrimination (SCAD) with real, hard-edged enforcement powers. This included the power to hale an employer or union before it, hold a public hearing, and then order the defendant to “cease and desist” from discriminatory actions or take additional “affirmative action” needed to remedy those actions. A second difference was just as stark: Prior laws covered only public or quasi-public entities (public schools, public utilities) or private entities imbued with a public purpose (innkeepers, employers engaged in publicly financed war production). The SLAD, however, applied to purely private acts of discrimination—an unthinkable intrusion into the principle of liberty of contract that had prevailed during the *Lochner* era just a decade before.

In both of these respects, New York’s law was more than a bold experiment in the use of state authority to regulate private conduct in the fraught area of race relations. New York’s experiment also embodied a new vision of government as the New Deal gave way to the post-war era in which the state would use the tools at its disposal to regulate social relations among groups. SLAD was an “expression of confidence,” as Dewey put it from the podium, “that government is not such a clumsy thing that it cannot solve delicate problems.”<sup>9</sup>

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Today the confidence Dewey projected to his audience back in March 1945 is badly shaken, but it is surely not for lack of trying. In the intervening decades, legislators, agency administrators, and judges have built a vast regulatory edifice designed to eradicate job discrimination. Indeed, even before Governor Dewey signed the SLAD into law in 1945, other bills outlawing job discrimination had begun to flood Congress and state legislatures. Within months of New York’s signing ceremony, New Jersey enacted a similar law, and several more northern and western states soon followed suit, establishing Fair Employment Practices Commissions—or FEPCs, as the SCAD-like agencies came to be called—to enforce them.<sup>10</sup> Many of these same states also enacted separate laws mandating equal pay for women.<sup>11</sup>

At the federal level, predictably fierce Southern opposition made action on job discrimination downright slow. Despite fielding multiple bills during every session beginning in 1945, Congress would not join the state-level parade and enact enforceable job discrimination legislation for some twenty years, until the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964. And when it did, Congress crafted a regime that was radically different in structure from the FEPCs that states like New York built starting in 1945. Indeed, rather than delegate enforcement authority to an administrative

agency, Title VII gave that authority to private litigants bringing lawsuits in court, with the federal Equal Employment Opportunity Commission (EEOC) playing mostly a supportive role via informal “conciliation” of disputes—or, beginning in 1972, by bringing lawsuits of its own in a court like any other litigant. In stark contrast to the FEPCs created at the dawn of American job discrimination law in New York and elsewhere, the EEOC has remained, like the wartime COFEP the architects of state FEPCs sought to improve upon, a “poor, enfeebled thing,” as Michael Sovern, a law professor at Columbia (and later its president), memorably put it soon after Title VII’s enactment.<sup>12</sup>

To be sure, these legislative victories did not come all at once. Legislative campaigns in large industrial states like Michigan, Illinois, and Pennsylvania were protracted affairs that stretched across more than a decade.<sup>13</sup> Still, an observer looking back from the vantage point of 1965, with a newly minted federal-level regime on the books and a raft of state-level FEPCs and equal pay laws firmly in place, could be forgiven for thinking that Governor Dewey’s confident assurance of “equality of opportunity for all our people” would soon become reality well beyond New York.

What began in New York in 1945 and continued at the federal level in 1964, however, has plainly fallen short of Dewey’s confident vision. Indeed, few would look back from today’s vantage and see proof of government’s dexterity or its ability to solve problems, delicate or otherwise. Rumbblings along those lines came early. Even before New York’s groundbreaking law took effect, key members of the mid-century civil rights community—among them Roger Baldwin, a founder and longtime head of the American Civil Liberties Union—expressed skepticism about the likely efficacy of the FEPC approach.<sup>14</sup> And their concerns were arguably borne out: Many state FEPCs proved to be timid implementers, with some critics charging that the agencies had been quickly “captured” by the employers and labor unions they were supposed to regulate.

The federal-level regime that Congress added with Title VII of the Civil Rights Act of 1964 has likewise come in for tough criticism. To be sure, the court- and litigation-centered Title VII regime has enjoyed substantial successes. Title VII lawsuits ramped up quickly in the late 1960s and early 1970s, putting a stop to many overt practices—for instance, “whites only” notations in shop windows, at factory gates, and in newspaper help-wanted ads—in the mostly Southern states that still lacked FEPCs. Many credit an initial wave of Title VII suits with substantial labor market gains for African-Americans, particularly in the South,<sup>15</sup> and a narrowing of the otherwise stubborn “wage gap” between men and women over roughly the same period.<sup>16</sup> Private lawsuits against unions proved surprisingly effective in facing down racially discriminatory labor practices.<sup>17</sup>

More recently, however, these early gains have been buried in an avalanche of reproach. Two sets of statistics frame the concerns. First, while most indications are that Americans have grown more rather than less tolerant over time,<sup>18</sup> the annual number of

“charges” filed with the EEOC asserting job discrimination under Title VII and cognate federal job discrimination laws, such as the Americans with Disabilities Act, has steadily climbed to nearly 100,000, and roughly 15,000 of these in turn yield lawsuits in the nation’s federal courts. This is a case volume that outstrips virtually all other federal litigation regimes, from securities and antitrust to intellectual property and the Fair Labor Standards Act.<sup>19</sup> Only prisoner suits produce more federal litigation.

Second, and despite all of this frenzied activity, job discrimination remains rampant. Recent tester field experiments reflect the brutal labor market conditions facing minorities, particularly those seeking low-wage work. African-American applicants are *half* as likely to get call-backs or outright job offers as whites with perfectly equal qualifications and job histories.<sup>20</sup> Even a black-sounding name on an otherwise identical resume is enough to slam the door shut.<sup>21</sup> Stubborn sex-based pay inequities are no less dispiriting, with the most reliable studies finding that women earn roughly 80 percent of what men do in the same jobs.<sup>22</sup> Sexual harassment is, by all accounts, pervasive.<sup>23</sup>

These twin realities have spurred a searing set of critiques. For many conservative critics, the frenzy of job discrimination litigation has become a stand-in for a broader critique of the American tendency to use private litigation to implement key public policies. A prime target are large-scale class action lawsuits brought, it is said, by a sophisticated and well-heeled plaintiff’s employment bar targeting PR-sensitive companies or industries in lawsuits that amount to little more than legalized extortion.<sup>24</sup> The *bête noire* for these critics is the recent case of *Walmart v. Dukes*,<sup>25</sup> a mammoth class action lawsuit brought on behalf of 1.6 million women employees claiming that Walmart’s grant of wide discretion to local-level managers in making employment decisions worked to the systematic disadvantage of women employees. And while the United States Supreme Court soundly rejected the *Walmart* women’s lawsuit in a controversial 2011 decision, a powerful sense remains that American job discrimination law is a litigation regime run amok. Job discrimination lawsuits, the argument goes, are cause and consequence of an “overlawyered” society and a vivid illustration of the American tendency to shoehorn virtually any type of social malady into a narrowly legalistic and litigious framework.

The critiques from the other side of the political aisle can be just as harsh and sound many of the same themes. For some, swelling job discrimination caseloads reflect an unduly legalistic focus on emotional and stigmatic harms that feeds a culture of victimization and dilutes efforts to address discriminatory practices that cause real and measurable economic inequalities.<sup>26</sup> Others go further and argue that the rights frame around which American job discrimination law is organized stigmatizes the very victims of discrimination it is supposed to help. Worse, by individualizing conceptions of harm, the vast system of job discrimination regulation built since 1945 has enervated social movements and stymied more transformative efforts to alter material relations among

groups.<sup>27</sup> To that extent, the enormous commitment of time and energy to policing job discrimination both reflects and feeds an unhealthy preoccupation with identity politics over class-based political action.

If the nation's job discrimination laws yielded substantial labor market gains for protected groups, then one might be willing to overlook such distortions. But a second line of critique levels a lower-abstraction and more concrete charge of basic inefficacy. Efforts to regulate job discrimination via lawsuits, some say, have altered human resources departments but mostly produced mere "filing-cabinet compliance," not meaningful integration of the American workforce.<sup>28</sup> More recently, a rough-hewn consensus has emerged that the current regime is simply ill-equipped to deal with the problem of job discrimination in its modern-day guise. Its centerpiece is the view that the problem of job discrimination has undergone a fundamental shift in recent decades.<sup>29</sup> Gone are the days of overt, intentional discrimination in rigidly hierarchical organizations. Instead, job discrimination tends to result from the operation of unconscious or subtle biases in flatter and more collaborative workplaces. The result is fewer discrete decision-making nodes against which individualized, tort-like lawsuits deploying traditional legal-evidentiary tools can be directed.<sup>30</sup> A second piece of the rough consensus follows directly from this diagnosis: Many observers believe that the best way to combat discrimination in today's workplace is a highly aggregated, "structural" regulatory approach that uses statistical forms of proof to isolate the systemic effects of implicit biases and subtle stereotypes.<sup>31</sup> Far from legalized extortion, giant lawsuits of the sort the Court thwarted in *Wal-Mart* might be one of few ways to reach the organizational practices at the root of much present-day labor market inequality.

The EEOC has drawn some of the most concentrated fire of all. Underfunded and forever beleaguered, the Commission has steadily bureaucratized as it has sought to develop more efficient systems for triaging the crush of mostly individualized charges it receives.<sup>32</sup> Lost in these efforts are enforcement actions using the Commission's statutory authority to initiate larger-scale lawsuits in federal court asserting that a company has engaged in a "pattern or practice" of discrimination. When it does bring these larger-scale actions, the EEOC has too often achieved meager and even disastrous results.<sup>33</sup> Perhaps as a result, the Commission has largely receded into the safer mode of endless non-binding "conciliation" of individualized disputes that deliver strikingly little return on the substantial public resources required.<sup>34</sup>

Yet as dense as this thicket of critiques is, the reform proposals that flow from it are surprisingly thin. The bulk of them are narrow and restrained, proposing doctrinal tweaks designed to make particular kinds of cases, including large-scale class actions, more or less winnable, but without altering the regime's core structure.<sup>35</sup> Others call upon the EEOC to make more vigorous use of its power to bring "pattern and practice" lawsuits in court but do not pair such calls with incentives that might move an agency that is not already doing so to alter its approach.<sup>36</sup> Still other proposals go bigger but

lack political saleability or suffer obvious flaws. Some commentators would scuttle the current regime entirely and rely on market forces to snuff out any remaining discrimination despite evidence of its stubborn, custom-enforced persistence.<sup>37</sup> Others would turn back the clock, doubling down on the FEPC approach that still exists at the state level by endowing the federal EEOC with FEPC-like adjudicative and injunctive powers—and then presumably giving the agency a huge and permanent budgetary injection to fund their exercise in tens of thousands of cases.<sup>38</sup> A final family of proposals advances gauzy reforms in the “new governance” vein in which a cadre of “intermediaries” play a “facilitative” role, engaging employers in an underspecified collaborative process of organizational reform and renewal.<sup>39</sup>

Many of these proposals are closely argued and demonstrate an admirable grasp of the unique regulatory challenges job discrimination poses. The struggle to safeguard Americans’ civil rights is plainly better for them. And yet, more than half a century after New York’s trailblazing action, one cannot help but think that the debate around one of the largest and most consequential regimes in the entire American regulatory state suffers from exhaustion and a failure of imagination.

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How did we get from Dewey’s confident 1945 vision to the *Walmart* case, and what can be done about it? This book seeks to reinvigorate debate over the past, present, and future of American job discrimination law by tracing the origins and evolution of the present-day regime, from the early state-level regulatory efforts in New York and elsewhere in the 1940s and 1950s through their eclipse by Title VII in 1964 and the years immediately following, as the current regime’s final elements were set into place. Underpinning my argument throughout is an urgent sense that the current American approach to job discrimination regulation needs to be fundamentally rethought and redesigned, and that understanding the institutional origins of the regime we have today provides a rich stock of insight and the raw material for how to go about it. To that extent, the book is largely a work of history, but with an unapologetically presentist focus on how we arrived at the current reality and where we might go next.

In building its argument, the book pursues three distinct but interrelated lines of inquiry. The first is to recount the creation of the current regime of job discrimination regulation by detailing how the shifting political economy of civil rights shaped the institutional choices made, and not made, at key moments in the regime’s evolution. Much of my focus is on a core design puzzle that is present in virtually any regulatory area but has special force in the job discrimination context: the choice between public administration and private litigation, or a mix of the two, in the implementation and enforcement of legal mandates. That question has since occupied more modern theorists, who have endlessly debated the agency-courts choice on efficiency, expertise,

and democratic accountability grounds.<sup>40</sup> But the founding decades of American job discrimination law were the nation's first and, to this day, most sustained meditation on the issue. Along the way, legislators, agency administrators, civil rights and women's advocates, and business leaders hotly debated a wide range of related questions that have since dominated the debate over the shape and meaning of civil rights, including the relative merits of individuation and aggregation in the adjudication of disputes, the propriety of damages as a civil rights remedy and "quota"-based hiring, how best to modulate private enforcement efforts and steer them toward productive ends, and the degree to which American job discrimination law should be isolated from, or connected to, the pull and haul of politics and wider social policymaking. The result was a critically important and richly argued social conversation, the outcome of which would profoundly shape the future of civil rights and, with it, the evolution of the American regulatory and litigation state.

An important initial task from here is to show that the immediate post-war period was what historians would call a contingent moment, when legislators, agency administrators, civil rights and women's advocates, and business leaders advocated a diverse array of regulatory alternatives, many of them radically different from what ultimately became law. The two most basic choices, embodied by the state FEPCs and Title VII respectively, were not made out of whole cloth but rather drew upon longstanding but starkly different visions of workplace regulation. The first was agency-centered, but it was also very different from the technocratic managerialism that defines much of the administrative state today. It stretched back to the Progressive Era and, before that, the Freedman's Bureau, but as the drive for fair employment got off the ground in 1945, it was the National Labor Relations Board that offered the closest, if highly imperfect, analogue. At its core was a go-slow, lay-directed, corporatist approach to civil rights enforcement in which the agency was to serve as a convener and a balancer of interests, a site for democratic deliberation, and an adjunct to existing structures of workplace democracy. The other vision of workplace regulation was court- and litigation-centered and harked back to a long tradition of damages-based litigation at common law and under the Reconstruction-era civil rights statutes. However, like its agency-centered counterpart, it also found a close but imperfect analogue in a relatively recent New Deal creation, the Fair Labor Standards Act, with its mix of public and private litigation brought in court.

These two regulatory visions staked out the poles of the debate, but they hardly exhausted the possibilities in play. Among the most dramatic alternatives was a remarkable but unsuccessful overture made by leading conservative Republican Senator Robert Taft to civil rights groups in 1946 setting forth an aggressive, largely court-centered, and explicitly quota-based approach that would have required larger employers to hire a set number of African-Americans as employees. Equally striking were equal pay laws proposed by women's groups at around the same time providing

for class action authority, multiple damages, and attorney's fees long before any of these were an established part of the American regulatory and legal landscape. Even the debate in the run-up to enactment of Title VII itself, lionized in dozens of books befitting its status as landmark legislation,<sup>41</sup> featured strikingly creative design alternatives, now mostly lost to history, that would have set American fair employment law down an entirely different path by granting the new federal EEOC a substantial measure of "gatekeeper" control over privately initiated charges and lawsuits or, alternatively, by connecting up agency enforcement efforts to the manpower and other resources within the Department of Labor. The resulting debate extended well beyond the FEPC and Title VII models that won out—and, turning to the present, offers a number of possible blueprints for how to remake the regime going forward.

A second task in mapping the origins of American fair employment law is to understand why the FEPC and Title VII approaches prevailed and others did not. Here my focus is on cataloguing the conditions that channeled the early drive for fair employment toward an exclusively administrative approach in the first place—and then, in turn, how the erosion of those conditions re-channeled the regime in an equally stark, court- and litigation-centered direction beginning in the mid-1960s and early 1970s. Two such conditions dominate my account: strategic conflict among civil rights and women's groups about how best to attack job discrimination; and the pivotal position of a conflicted labor movement within the nascent New Deal coalition. As we will see, mainline civil rights groups like the NAACP and Urban League preferred the FEPC approach, with its focus on agency-led "conciliation" of disputes, because it entrenched a gradualist, individualized, and negotiation-based approach that offered a measure of control over the pace and substance of racial change not possible with a court- and litigation-centered approach. The FEPC approach helped the civil rights establishment manage internal conflict across a range of thorny issues—including the propriety of damages as a civil rights remedy and "quota"-based hiring—by denying more militant and increasingly litigious local protest networks an entrée into the courts. Unions, for their part, preferred the conciliation-centered FEPC approach because it could serve as an adjunct to the collective bargaining and grievance processes that the New Deal had institutionalized. This was deemed particularly important as the nation turned to the peacetime "reconversion" of the wartime economy and, with it, the delicate task of re-absorbing returning war veterans into employment ranks now filled with recent female and black and brown arrivals. Indeed, agency-centered implementation was the best way the American industrial order could engage in what would amount to a grand round of corporatist bargaining and, as legendary labor leader Walter Reuther put it in 1947, "sweat this thing out."<sup>42</sup>

Tracing the origins of American job discrimination regulation thus offers a glimpse of the mid-century clash of institutional choices, social movement dynamics, and political and economic imperatives in defining the shape and meaning of civil rights.

In so doing, it also permits needed revision of the few existing accounts of the American fair employment law's earliest decades. For instance, excavating the early battles over fair employment law easily rejects the view that an agency-centered approach to the problem of job discrimination came to dominate initially because administrative enforcement promised to be more effective than available court- and litigation-centered alternatives.<sup>43</sup> Not only did the civil rights community at the time express skepticism about FEPC's likely efficacy,<sup>44</sup> but fair employment's founding decades featured an array of surprisingly successful litigation efforts. These include a rising tide of lawsuits by militant local civil rights groups challenging black exclusion from places of public accommodation, and a stunning but mostly forgotten lawsuit in 1938 in which 29 Michigan women sued General Motors for wage discrimination using a decades-old criminal statute and won the first large damages judgment in the history of American anti-discrimination law. Of course, the historical record is full of odes to administrative expertise as the only way to make inroads against the knotty problem of job discrimination.<sup>45</sup> And there was plainly a lack of private enforcement capacity, even in the urban North, suggesting that only the court-centered proposals advanced in state legislatures and Congress at the time that, like the equal pay laws proposed by some women's groups, contained litigation-enhancing devices, such as attorney fee-shifts, damages multipliers, or aggregation mechanisms, could have worked. But the evidence points decisively away from the notion that the choice of an agency-centered approach at the dawn of American fair employment law can be explained solely, or even substantially, by reference to judgments about the likely efficacy of competing approaches. Instead, the structure of early American job discrimination regulation mirrored the deeply ambiguous coalition of interests that birthed it.

Similarly, my recovery of the origins of American job discrimination regulation counters the view, advanced by some, that the road to *Brown v. Board of Education* represented a critical and misguided break by civil rights groups from mobilization efforts around industrial and economic issues in favor of a legal attack on social segregation.<sup>46</sup> To the contrary, the story of early American job discrimination regulation shows that the campaign to integrate American industry continued through 1954 and beyond, but it turned away from asserting constitutional rights and toward what was in many ways a far more difficult task of creating statutory ones, and it moved, if only temporarily, out of the courts and into the New Deal administrative state.<sup>47</sup> Expanding the historical frame beyond *Brown* and its court-centered antecedents reveals that civil rights groups did not entirely forsake workplace rights. And yet, those groups guided the movement toward institutional choices that reflected the cautious gradualism of the civil rights mainstream and the coalitional constraints of the labor-led New Deal bloc.

Finally, my focus on intra-movement and intra-coalitional dynamics offers a richer and more satisfying explanation than existing accounts for why Congress turned to the courts, first in enacting Title VII in 1964 and then, more decisively, with the Equal

Employment Opportunity Act of 1972 and the Civil Rights Act of 1991. To be sure, my purpose is not to refute the now-standard narrative in which the eleventh-hour intervention of Senator Everett Dirksen and the conservative bloc he led pushed Title VII away from the FEPC approach and toward a court- and litigation-centered approach in 1964, at least in part to end-run a Democrat-controlled executive branch.<sup>48</sup> Much less is it to suggest that legislative battles throughout were not importantly shaped by a growing racial reaction, particularly among working class whites in the urban North and elsewhere.<sup>49</sup>

But Congress's sudden turn to the courts in 1964 also reflected a deeper shift in the political economy of civil rights. Part of this was the removal of the twin conditions that largely drove the agency-centered FEPC choice three decades before. By 1964, squeamishness among mainline civil rights groups about the propriety of "quota"-based hiring had begun to fall away.<sup>50</sup> And a marked shift in the use of monetary awards by the state FEPCs and steady growth of Title VII lawsuits had left civil rights groups far more comfortable than they were two decades before with private pursuit of tort-like money damages as a discrimination remedy.<sup>51</sup> Just as important, years of bitter battles with discriminatory unions had convinced many within the civil rights establishment that a rising plaintiff's bar, which had begun to embrace civil rights as an attractive payday, was also a less conflicted—and, with union power on the wane, a more potent—political ally. In short, the debate as Title VII was set into place in 1964 and then amended and strengthened in the years that followed was merely a remix of the intra-movement and intra-coalitional struggles that had bedeviled the drive for fair employment since the 1940s. An equally important part, however, was that by 1964 American fair employment law was already shifting to a new conceptual foundation. Tort-like damages had largely replaced politics and FEPC's unique, deliberative, corporatist model of administration as the moral center of the regime. These deep changes in the political economy and in the core conception of civil rights—not the eleventh-hour intervention of Dirksen—paved the road to *Walmart*.

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The second line of inquiry running throughout the book turns from the origins of regulatory choices to their consequences by connecting up the story of the creation of American job discrimination regulation to persistent dilemmas in American civil rights policy. As the nation's first sustained effort to regulate the problem of discrimination, the state FEPCs and the early Title VII regime that eclipsed it set the terms of the debate and, to paraphrase SLAD architect Joseph Robison's words back in 1964, set "pattern[s]... for the administration of anti-bias legislation generally"<sup>52</sup> that continue to echo today.

Existing histories of the earliest decades American job discrimination regulation tell a story that is shot through with irony. Most blame Republican opposition and a growing racial reaction in the North for stymieing the FEPC movement and thus creating a “regulatory vacuum” on the job discrimination issue.<sup>53</sup> In turn, they assert, it was the lack of a federal FEPC and the inability of the hobbled state FEPCs to move African-Americans into labor markets that radicalized civil rights groups and pressured federal judges and bureaucrats to shift from a highly individualized and “color-blind” remedial approach to a pattern-centered and even explicitly “race-conscious” one.<sup>54</sup> On this view, it was obstructionist Republicans who set the stage for more polarizing developments: the Nixon Administration’s creation of the first federal “affirmative action” program in 1969 via the Philadelphia Plan’s requirement that federal construction contractors set “goals and timetables” for hiring minority workers; the Supreme Court’s sanction in 1971 of a disparate impact standard of discriminatory proof announced in *Griggs v. Duke Power Co.*<sup>55</sup> If Republicans had allowed FEPC to flourish, the story goes, all this might have been avoided.<sup>56</sup>

Tracing the origins of American job discrimination regulation, however, points to other, deeper ironies arising from the regulatory choices made in the critical early decades. As we shall see, it was not just Republicans, but also the nascent civil rights movement itself that forestalled available court-centered and even race-conscious approaches within the early regime. The chief irony, then, is not that Republican opposition to the more restrained FEPC approach set the stage for later developments. Rather, it is that many pivotal Republicans were prepared to support the civil rights cause by enacting a range of potentially effective court-centered alternatives—extending, perhaps, even to quota-based hiring. But the liberal coalition’s adherence to an administrative approach crowded out any such alternatives.

Of course, it remains possible that the mainline civil rights groups that advocated the go-slow FEPC approach, or the unions who advocated administrative enforcement of equal pay laws, were right in their view that a harder-edged, court- and litigation-centered approach built around damages remedies would have set back the cause of racial and gender advancement by pushing for too much too quickly, or by speeding the labor movement’s demise. But it seems just as likely that the liberal fair employment coalition’s embrace of available alternatives to the FEPC approach in particular could have yielded an earlier integration of the industrial order and substantial black economic gains long before Title VII’s implementation in the late 1960s and 1970s, when the economy was already shifting away from the industrial jobs on which most African-Americans depended and a labor-based system of workplace democracy was already on the wane.<sup>57</sup> Put simply, different regulatory choices might have won what in hindsight looks like a race against time.<sup>58</sup>

More broadly, understanding agency-centered enforcement as part of a menu of regulatory options opens up a richer set of explanatory possibilities for the subsequent

development of American job discrimination law, particularly the emergence of a more pattern-centered and even explicitly race- and gender-conscious approach during the later 1960s and 1970s. For instance, the FEPC choice meant that the nation's first sustained encounter with the difficult conceptual and evidentiary questions that the new fair employment laws raised came in a deeply contested administrative context. Commentators going back to the earliest legislative debates in the 1940s questioned whether agency administrators or judges would be more likely to see the problem of job discrimination in pattern-based or even race-conscious terms.<sup>59</sup> As late as 1972, as Congress faced the question whether to endow the EEOC with FEPC-like powers or instead to continue to build out the court- and litigation-centered side of the regime, Congresswoman Shirley Chisholm of New York expressed a similar sentiment when she asked:

Would the gentleman agree that if the EEOC had the right and opportunity to issue cease-and-desist orders, then it would have to naturally follow that perhaps we would not have to be speaking this afternoon in terms of preferential quotas?<sup>60</sup>

Given the counterfactual nature of Chisholm's question, we can never know for sure. But substantial evidence suggests that the unique bureaucratic pressures agency administrators faced during the run-up to Title VII's enactment may have had precisely the opposite effect on subsequent doctrinal development. In Pennsylvania, to note just one episode recounted in what follows, legislative opponents' efforts to slash the state FEPC's budget pressed agency administrators to economize on enforcement costs by adopting a more pattern-centered and systemic regulatory approach to the problem of job discrimination.<sup>61</sup> Years later, when lower federal courts first began to confront the evidentiary and other issues raised by job discrimination and made their first steps toward the development of a disparate-impact standard of proof leading up to the Supreme Court's 1971 *Griggs* decision, they worked against the backdrop of a growing body of case law and a conception of discrimination and discriminatory proof that had been forged in the unique, administrative, FEPC context.<sup>62</sup> Thus, the ironies of affirmative action might be even deeper than existing histories acknowledge. Indeed, the agency-centered approach to implementation and enforcement that dominated the first three decades of American job discrimination law, designed in significant part to forestall a more race-conscious and quota-based approach, may have instead spurred its emergence.

Finally, and perhaps most important of all, the choice of an agency-centered approach was critical for it shaped the political context in which the nation's first experiment with regulating job discrimination went forward in later decades. As the high rhetoric of Governor Dewey, a Republican, back in 1945 suggests, the partisan

mantle on civil rights was very much up for grabs as the first fair employment campaigns got underway in the 1940s and 1950s. But in embracing administrative implementation, the liberal fair employment coalition asked Republicans to do something that their ideological commitments made difficult and even impossible: oversee the significant expansion of the New Deal administrative state. As a result, the choice of administrative enforcement not only assured staunch Republican opposition on fair employment beyond New York. It also delivered the fair employment issue, and the early civil rights movement more broadly, into the teeth of a much larger debate about the legitimacy and place of the administrative state in the post-war American legal and political order. As the later 1940s and 1950s unfolded, early debates about quotas and whether legal coercion was appropriate at all in the delicate area of race relations shifted to very different rhetorical terrain: creeping administrative power.<sup>63</sup> By de-linking civil rights from the broader critique of New Deal state-building, the liberal coalition's embrace of the Taft plan or any of the other mostly court-centered alternatives on offer might have fundamentally altered the trajectory of American law and politics around civil rights. Republicans, not Democrats, might have seized the mantle of leadership on the premier civil rights issue of the day, thus denying the bitterly partisan soil in which the later politics of racial backlash would take root and flourish.<sup>64</sup>

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A third and final strand of the book moves outward, and onto a prescriptive footing, by locating the history of American job discrimination regulation within a broader set of ideas about the development of the American regulatory state. For instance, my account lends critical insight to a narrative that links the evolution of American job discrimination law to the broader post-war shift away from administrative regulation and toward private litigation as a regulatory tool.<sup>65</sup> Many theories have been offered for that wider trend: an American taste for “adversarial legalism” as a result of a constitutional structure that forecloses more statist regulatory solutions; a legislative desire to end-run the executive during periods of divided government; or the rise of rent-seeking plaintiffs’ lawyers and public interest groups distrustful of bureaucracy.<sup>66</sup>

In some ways, the story of early American job discrimination regulation stands as a useful counter-study because, at least initially, civil rights and women’s groups and their coalition partners chose bureaucratic over judicial power and then stuck to it despite growing evidence that courts and litigation might offer the better course. They did so in significant part, my account suggests, because administrative implementation offered a more controlled and incrementalist approach seen as critical to movement-building success. Similarly, administrative implementation promised softer-edged enforcement and a more encompassing weighing of policy priorities—what Lon Fuller labeled “polycentric” dispute resolution—than was likely to result from judges deciding

discrete disputes brought to them by litigants who would often be seeking purely private advantage.<sup>67</sup> In both ways, the story of American job discrimination regulation suggests that regulatory choices will often turn on a subtler balancing of factors than existing theories allow.

More importantly, tracing the institutional evolution of American job discrimination regulation from its origins in the mid-1940s to its final crystallization in the decades after 1964 helps us to see what are perhaps the two most distinctive features of the early 21<sup>st</sup> century American regulatory and litigation state. The first is a diminished role for politics in much of the day-to-day work of policymaking and enforcement. There are numerous causes, and now is not the time to name all of them. But an obvious culprit is the delegation of significant policymaking authority to politically insulated judges via the creation of private enforcement regimes. Moreover, while much of administrative law is designed to mitigate the “democratic deficit” that exists when policy is made by unelected bureaucrats, agency administrators have nonetheless increasingly come to justify their work on grounds of technocratic expertise and the analytic management of regulation, not democratic accountability.<sup>68</sup> To be sure, much of this was by design—and a compelling explanation for Congress’s turn to the courts in 1964 and then again in 1972 in the making of American fair employment law was a pronounced skepticism, among civil rights groups and industry alike, of arbitrary and politically motivated agency action. Both sides, interestingly, feared regulatory “capture” by the other. But the end result is a system in which politically insulated judges are left to make the most normatively contestable determinations about what constitutes actionable discrimination, including the degree to which employers should be held liable where they facilitate workplace discrimination that may ultimately be rooted in broader societal influences.<sup>69</sup> Worse, judges typically make those determinations not at the merits stage, but rather at the class certification stage using the clunky procedural machinery of Rule 23.<sup>70</sup> The overall effect is that administrative discretion, and thus politics, has been progressively drained from the system, perhaps feeding into a more general felt loss of political agency that is transforming our politics.<sup>71</sup>

A second key feature of the current American regulatory state is a tendency to diffuse regulatory authority across a wide range of distinct actors and entities, each with their own sources of institutional authority, often performing the same or overlapping tasks.<sup>72</sup> Indeed, many of our most consequential regulatory regimes, including job discrimination regulation, have evolved over time into hybrids of public and private enforcement in which multiple enforcers—including federal and state administrative agencies, state attorneys general, and private litigants—operate and interact within complex “ecologies of enforcement.”<sup>73</sup> The primary institutional design challenge in this pluralistic regulatory landscape is not choosing between enforcement modes or deciding which should be given primary or exclusive domain. Rather, it is optimal coordination

of multiple, overlapping, and interdependent enforcement mechanisms—of which private enforcement is often the most important.

This is not to deny fragmentation’s potential virtues. Division of regulatory authority can engender salutary innovation and competition while leveraging distinctive forms of institutional capacity.<sup>74</sup> It also guards against regulatory capture because of the difficulty of capturing multiple implementers, thus protecting an enacting coalition’s policy choices from rapid subversion by regulatory opponents.<sup>75</sup> But over the long-term, regulatory pluralism also brings with it steep political challenges by making regulatory design choices especially “sticky” and thus resistant to reform. This is because fragmented regulatory regimes mobilize an array of beneficiaries to defend their own piece of implementation authority against efforts to centralize or otherwise change the regulatory structure.<sup>76</sup> The resulting feedback effects can protect and even progressively strengthen an institutional design choice long after a policy problem has shifted out from under it.

Viewing the evolution of American job discrimination regulation through the lenses of depoliticization, fragmentation, and path dependency helps frame the search for reforms that would better align the existing system with current realities. For instance, a detailed history of the origins of the regime helps make the case that the current agency role, centered on “conciliation” of a stream of mostly individual disputes, is a costly anachronism and should be dismantled. The EEOC’s non-binding “conciliation” of disputes, and even adjudication by state FEPCs with cease-and-desist authority, deliver strikingly little return on the substantial public resources required.<sup>77</sup> Both are also a far cry from the “structural” approach that many now see as the best way to combat “second-generation” discrimination embedded in organizational structures and routines as opposed to overt individual prejudices.<sup>78</sup> Agency adjudication centered around “conciliation” of disputes might have made sense when job discrimination was seen as the simple fruit of ignorance, to sidestep midcentury sensitivities around “quota”-based hiring, or to serve as an adjunct to collective bargaining in brokering the delicate process of “reconversion” to a peacetime economy following World War II. But it makes little sense today.

Second, seeing the evolution of American job discrimination regulation as a species of the broader challenges of the 21<sup>st</sup> century American regulatory state helps point toward creative ways to coordinate the administrative and litigation sides of the current system that emerged over time in parallel to one another. One possibility—building on an idea floated in the battle over pay equity laws in the 1940s and early 1950s and then again in the run-up to Title VII’s enactment in 1963—would be to repurpose the EEOC and state FEPCs by vesting them with an expansive set of litigation “gatekeeper” powers to shape and channel the private litigation efforts that have increasingly come to dominate the system.<sup>79</sup> In particular, agencies could be given the power to “license” or “veto” class action and other systemic lawsuits or intervene in and

take over their control. Granting agencies such a gatekeeper role would preserve private initiative within the system while injecting agency expertise and a degree of democratic accountability into the complex and normatively contestable question of which organizational practices constitute actionable discrimination. When combined with the dismantlement of agency adjudication of disputes, an agency gatekeeper role in larger-scale lawsuits would also effect a critical shift in emphasis within the current regime by moving the focus of agency enforcement efforts away from individualized actions and toward more systemic ones, thus better aligning the system with a more structural approach.

Of course, these are only two possible reform ideas that come from a richer understanding of the institutional origins of the current regime. They are surely not the only ones. A revised institutional structure—and, in particular, a revived administrative role—may also be justified by the technical complexities of labor market practices in the new gig economy or the continued rise of arbitration as an alternative to adjudication in courts, which raises complex questions about when contractual waivers and contracting over procedure bring valuable efficiencies and when they merely serve to defeat the exercise of valuable statutory rights.<sup>80</sup> Moreover, any substantial change in the institutional structure of the current regime will plainly require far more justification and defense than is offered here, and it will also have to overcome significant political hurdles. But seeing the current regime as a result of past institutional choices and a process of development is nonetheless empowering. Identifying, and owning, the path dependencies that have led us to the current reality is a first step toward meaningful reform.

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All of this, however, gets us far ahead in the story. For now, we must start back at the dawn of American fair employment law and work our way forward if we are to understand why the current regime looks the way it does and how we might alter it. And in terms of beginnings, the road to *Walmart*, it turns out, starts not in Albany in 1945 but in Lansing, Michigan roughly two years earlier, in 1943.

Introduction – The Road to *Walmart*

Chapter 1 – “The Dirtiest and Lowest Jobs”: Mid-Century Job Discrimination and the Puzzle of Regulatory Choice

Chapter 2 – Advancing the Race: Protest, Accommodation, and the Rise of FEPC

Chapter 3 – “Not Merely There to Help the Men”: Equal Pay Laws, *St. John v. General Motors*, and the Union Connection

Chapter 4 – Making FEPC: The Politics of Fair Employment in Michigan and Pennsylvania

Chapter 5 – Breaking FEPC: *Myart v. Motorola* and the Transformation of American Fair Employment Law

Chapter 6 – The Passion of Joseph Clark

Conclusion – The Road from *Walmart*

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<sup>1</sup> *Anti-Bias Bill Signed; Dewey Uses 22 Pens*, NEW YORK HERALD TRIBUNE, March 13, 1945, at 32.

<sup>2</sup> *Id.*

<sup>3</sup> *Anti-Racial Bill Signed by Dewey*, NEW YORK TIMES, March 13, 1945, at 38.

<sup>4</sup> The “American creed” phrase is often attributed to Gunnar Myrdal’s seminal examination of race in America. See GUNNAR MYRDAL, *AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* (1944).

<sup>5</sup> 109 U.S. 3 (1883).

<sup>6</sup> At least two dozen states enacted statutes barring discrimination in public accommodation in the two years following the Supreme Court’s decision, and another six enacted such laws before the end of the century. DUANE LOCKARD, *TOWARD EQUAL OPPORTUNITY: A STUDY OF STATE AND LOCAL ANTIDISCRIMINATION LAWS* 16 (1968); Comment, *Private Remedies Under State Equal Rights Statutes*, 44 ILL. L. REV. 363, 370 (1949).

<sup>7</sup> See JOHN F. DUFFY, JR., *STATE ORGANIZATION FOR FAIR EMPLOYMENT PRACTICES* 4 (1945); Arthur Earl Bonfield, *The Origin and Development of American Fair Employment Legislation*, 51 IOWA L. REV. 1043, 1051 (1967). Duffy charts state legislation prohibiting discrimination “in various fields of employment” from 1920 to 1945. These include statutes prohibiting discrimination in work relief projects and public works, the state civil service, labor unions, defense and war contracts, public utilities, and public schools (mainly religion). Some of these were enacted prior to World War II. The statutes regarding work relief projects were the most numerous during the inter-war period, with 10 states enacting such laws between 1933 and 1941. Statutes prohibiting discrimination by labor unions and defense and war contractors were all war-era enactments, save Pennsylvania which enacted its labor discrimination provision in 1937.

<sup>8</sup> DUFFY, *supra* note \_\_, at 5; Bonfield, *supra* note \_\_, at 1059. This set of laws also included the National War Labor Board and miscellaneous state laws targeting discrimination by labor unions and defense contractors.

<sup>9</sup> *Anti-Racial Bill Signed by Dewey*, NEW YORK TIMES, March 13, 1945, at 38.

<sup>10</sup> In the pre-1964 era, those states enacting enforceable FEP laws and delegating primary enforcement authority to agencies or independent commissions include: New York (1945), New Jersey (1945), Massachusetts (1946), Connecticut (1947), New Mexico (1949), Oregon (1949), Rhode Island (1949),

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Washington (1949), Alaska (1953), Michigan (1955), Minnesota (1955), Pennsylvania (1955), Wisconsin (1957), Colorado (1957), California (1959), Ohio (1959), Illinois (1961), Kansas (1961), Missouri (1961), Hawaii (1963), Indiana (1963), Iowa (1963), Vermont (1963).

<sup>11</sup> See BUREAU OF NAT'L AFFAIRS, INC., EQUAL PAY FOR EQUAL WORK: FEDERAL EQUAL PAY LAW OF 1963, at 31-52 (1963) (summarizing twenty-two state equal pay laws as of 1963).

<sup>12</sup> MICHAEL I. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 205 (1966).

<sup>13</sup> Nor did the states following New York's lead merely enact carbon copies. Several leapfrogged New York by including women or the disabled among protected groups. See PAUL BURSTEIN, DISCRIMINATION, JOBS, AND POLITICS: THE STRUGGLE FOR EQUAL EMPLOYMENT OPPORTUNITY IN THE UNITED STATES SINCE THE NEW DEAL 8, 21-23 (1985). The earliest state to include disability among the protected groups was Wisconsin, in 1965.

<sup>14</sup> Letter from Roger Baldwin to Thurgood Marshall (December 15, 1944) (NAACP Papers, LOC, Part II, Box A185).

<sup>15</sup> John J. Donohue III & James J. Heckman, *Re-evaluating Federal Civil Rights Policy*, 79 GEO. L.J. 1713 (1991); James P. Smith & Finis R. Welch, *Black Economic Progress After Myrdal*, 27 J. ECON. LIT. 519 (1989); James J. Heckman & Brook S. Payner, *Determining the Impact of Federal Antidiscrimination Policy on the Economic Status of Blacks: A Study of South Carolina*, 79 AM. ECON. REV. 138 (1989); James J. Heckman & J. Hoult Verkerke, *Racial Disparity and Employment Discrimination Law: An Economic Perspective*, 8 YALE L. & POL'Y REV. 276 (1990).

<sup>16</sup> See Francine D. Blau & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends, and Explanations* 66 fig.1, 69 tbl.1 (Nat'l Bureau of Econ. Research, Working Paper No. 21,913, 2016), <https://perma.cc/QU2Z-7YXN> (noting a narrowing of the wage gap beginning in the early 1970s).

<sup>17</sup> PAUL FRYMER, BLACK AND BLUE: AFRICAN-AMERICANS, THE LABOR MOVEMENT, AND THE DECLINE OF THE DEMOCRATIC PARTY (2008); Paul Frymer, *Acting When Elected Officials Won't: Federal Courts and Civil Rights Enforcement in U.S. Labor Unions, 1935-85*, 97 AM. POL. SCI. REV. 483, 484 (2003).

<sup>18</sup> See, e.g., WILLIAM JULIUS WILSON, THE DECLINING SIGNIFICANCE OF RACE: BLACKS AND CHANGING AMERICAN INSTITUTIONS (1978); GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION (1957). For an updated economic version, see James J. Heckman, *Detecting Discrimination*, 12 J. OF ECON. PERSPECTIVES 101, 101-102 (1998) (arguing that "most of the disparity in earnings between blacks and whites in the labor market of the 1990s is due to differences in skills they bring to the market, and not to discrimination within the labor market," and concluding that labor market discrimination is "the problem of an earlier era").

<sup>19</sup> Charge and litigation numbers are drawn from Stephen B. Burbank et al., *Private Enforcement of Statutory and Administrative Law in the United States (and Other Common Law Countries)* 60-72 (Univ. Pa. Law Sch. Pub. Law & Legal Theory Research Paper No. 11-08, 2011), <http://ssrn.com/abstract=1781047>; Admin. Office of the U.S. Courts, *Judicial Business of the United States Courts*, U.S. COURTS 129 tbl.C-2A (2012), <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/JudicialBusiness2011.pdf> ("U.S. District Courts—Civil Cases Commenced, by Nature of Suit, During the 12-Month Periods Ending September 30, 2007 Through 2011"); and *Charge Statistics, FY 1997 Through FY 2012*, EEOC, <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>.

<sup>20</sup> See Devah Pager, Bruce Western, & Bart Bonikowski, *Discrimination in a Low-Wage Labor Market: A Field Experiment*, 74 AM. SOC. REV. 777 (2009); Devah Pager, Bruce Western, & Bart Bonikowski, *Employment Discrimination and the Changing Landscape of Low-Wage Labor Markets*, 2009 U. CHI. LEG. FORUM 317 (2009).

<sup>21</sup> Bertrand, Marianne and Sendhil Mullainathan, *Are Emily And Greg More Employable Than Lakisha And Jamal? A Field Experiment On Labor Market Discrimination*, 94 AM. ECON. REV. 991 (2004).

<sup>22</sup> See Blau & Kahn, *supra* note 16, at 66 fig.1, 69 tbl.1 (estimating female-to-male earnings ratios and demonstrating that the ratio hovered around 80% as of 2010).

<sup>23</sup> Precise measures of the extent of sexual harassment are hard to find, as differences in methodologies, measurement, and sampling leads to highly variable estimates. However, an extensive survey of the academic literature by an EEOC-convened task force found that anywhere from 25% to 85%

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of women report having experienced sexual harassment in the workplace. When using the most widely adopted survey instrument, the Sexual Experiences Questionnaire, 60% of women report have experienced harassment. See Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic, Select Task Force on the Study of Harassment in the Workplace (June 2016), available at [https://www.eeoc.gov/eeoc/task\\_force/harassment/report.cfm#\\_ftnref71](https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm#_ftnref71).

<sup>24</sup> As a concrete example, in the recent *Wal-Mart v. Dukes* case, respondents and multiple amici raised the specter of “blackmail settlements.” See, e.g., Brief for the Chamber of Commerce of the United States of America as Amicus Curiae Supporting Petitioner, *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541 (2011) (No. 10-277), 2011 WL 288900, at \*21-22 (noting class certification dramatically raises stakes in litigation for defendants, often creating “intense pressure to settle” even weak claims in way tantamount to “judicial blackmail” (citing *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995))); Brief of Intel Corporation as Amicus Curiae Supporting Petitioner, *Wal-Mart Stores*, 131 S. Ct. (2011) (No. 10-277), 2011 WL 288897, at \*8-9 (“It is universally recognized that [liability, litigation costs, and public-relations] pressures allow opportunistic plaintiff’s [sic] (and their counsel) to extract undeserved settlements from defendants.”). For a more skeptical view, see Charles Silver, “We’re Scared to Death”: *Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357 (2003).

<sup>25</sup> *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541 (2011).

<sup>26</sup> See, e.g., RICHARD THOMPSON FORD, *RIGHTS GONE WRONG: HOW LAW CORRUPTS THE STRUGGLE FOR EQUALITY* (2011); KATHY BULMILLER, *THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS* (1988). A similar critique holds that Title VII reflects the divergence of identity and class politics, yielding an unfortunate segregation of racial and economic policies and a failure to reconcile anti-discrimination law with labor law. See, e.g., JUDITH STEIN, *RUNNING STEEL, RUNNING AMERICA: RACE, ECONOMIC POLICY, AND THE DECLINE OF LIBERALISM* (1998); FRYMER, *supra* note \_\_.

<sup>27</sup> See WENDY BROWN, *STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY* (1995); Nancy Fraser, *Rethinking Recognition*, 3 NEW LEFT REV. 107 (2000).

<sup>28</sup> See Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531, 1547 (1992); Frank Dobbin et al., *Equal Opportunity Law and the Construction of Internal Labor Markets*, 99 AM. J. SOC. 396, 402-03 (1993); Lauren B. Edelman, *Legal Environments and Organizational Governance: The Expansion of Due Process in the American Workplace*, 95 AM. J. SOC. 1401, 1406 (1990); John R. Sutton & Frank Dobbin, *The Two Faces of Governance: Responses to Legal Uncertainty in U.S. Firms, 1955 to 1985*, 61 AM. SOC. REV. 794, 800-01 (1996).

<sup>29</sup> Classic treatments include Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2011); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995).

<sup>30</sup> Moreover, as explicit discrimination has receded and workplace hierarchies have flattened, winning individual lawsuits has become increasingly difficult even as their number continues to rise. Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. OF EMPIRICAL LEG. STUD. 429, 441 (2004).

<sup>31</sup> Sturm, *supra* note \_\_; Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1 (2006); Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849, 851-54 (2007).

<sup>32</sup> In 1980, there was a staff of 3,390, which declined to 2,852 in 2000, and then was cut even further to 2,158 employees in 2007 (a total decline of 36 percent). See EEOC, U.S. Equal Employment Opportunity Commission Budget and Staffing History 1980 to Present (2008), available at <https://www.eeoc.gov/eeoc/plan/budgetandstaffing.cfm>.

<sup>33</sup> Recent efforts have even drawn censure from the courts for the agency’s less-than-stellar litigation performance. See *CRST Van Expedited, Inc. v. EEOC* (cert granted) (asking whether a Title VII dismissal based on EEOC failure to satisfy its pre-suit investigation, reasonable cause, and conciliation obligations, form the basis of a defense-side fee award). Joni Hersch & Jennifer Bennett Shinall, *Fifty Years*

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Later: *The Legacy of the Civil Rights Act of 1964*, 34 J. POL'Y ANALYSIS & MGMT. 424, 449-50 (2015) (discussing how the underfunding of the EEOC has led to a precipitous decline in public interest lawsuits filed by the agency in recent years)

<sup>34</sup> See *Fiscal Year 2012 Performance and Accountability Report*, U.S. EQUAL EMP. OPPORTUNITY COMM'N 26 (Nov. 15, 2012), [http://www.eeoc.gov/eeoc/plan/upload/2012par\\_1.pdf](http://www.eeoc.gov/eeoc/plan/upload/2012par_1.pdf) (noting total conciliation settlements of \$71 million, as compared to the \$197 million the EEOC budgets for charge processing).

<sup>35</sup> Among many possible examples are: David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899 (1993) (proposing doctrinal shifts inspired by tort law); Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357 (2009) (same); Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052-57 (1978) (arguing for a shift away from what the author describes as a "perpetrator perspective" to a "victim perspective" in antidiscrimination law); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997 (2006) (offering a "behavioral realist" approach to disparate treatment cases that would eliminate a requirement of mental awareness on the part of a defendant that she is discriminating). An exception that is pitched at a more middle level of abstraction is Richard Thompson Ford, *Bias in the Air: Rethinking Employment Discrimination Law*, 66 STAN. L. REV. 1381 (2014), which calls for a more thoroughgoing effort to place the regime on a new doctrinal footing by imposing on employers a "duty of care" and, as with sexual harassment law, immunizing employers from certain kinds of liability where they can show they had organizational structures and processes in place to prevent and remedy illegitimate ascriptive hierarchies.

<sup>36</sup> See, e.g., Maurice E. R. Munroe, *The EEOC: Pattern and Practice Imperfect*, 13 YALE L. & POL'Y REV. 219, 275-79 (1995) (proposing that the EEOC abandon all efforts to resolve individual claims in favor of more systemic enforcement efforts); Nancy M. Modesitt, *Reinventing the EEOC*, 63 S. METHODIST UNIV. L. REV. 63, 1237, 1249 (2010) (offering a similar proposal).

<sup>37</sup> RICHARD EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992); WALTER K. OLSON, *THE EXCUSE FACTORY: HOW EMPLOYMENT LAW IS PARALYZING THE AMERICAN WORKPLACE* 49, 63 (1997).

<sup>38</sup> See Julie Chi-Hye Suk, *Antidiscrimination Law in the Administrative State*, 2006 U. ILL. L. REV. 405, 472-73 (advancing such a proposal as a way to remake the present-day regime); Anne Noel Occhialino & Daniel Vail, *Why the EEOC (Still) Matters*, 22 HOFSTRA LAB. & EMP. L.J. 671, 704 (2005) (arguing that EEOC charge processing still plays a "critical" role); Joseph Prud'homme, *Federal Employment Law: Current Problems and a Call for Reform*, 1 J. RACE, GENDER & ETHNICITY 51 (2006) (arguing in favor of greater EEOC empowerment).

<sup>39</sup> Sturm, *supra* note \_\_\_\_.

<sup>40</sup> Classic contributions include Gary S. Becker & George J. Stigler, *Law Enforcement, Malfeasance and Compensation of Enforcers*, 3 J. LEGAL STUD. 1 (1974); William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1 (1975); and A. Mitchell Polinsky, *Private Versus Public Enforcement of Fines*, 9 J. LEGAL STUD. 105, 120-21 (1980). From this foundational literature has come a stylized set of claims about the relative merits and demerits of public and private implementation and enforcement of legal mandates. See generally Glover, *supra* note **Error! Bookmark not defined.**, at 1145-60 (discussing the rise and functions of private enforcement); Stephenson, *supra* note **Error! Bookmark not defined.**, at 107-13 (reviewing the advantages of private enforcement). For instance, private litigation, the standard account goes, taps private information and resources, and it serves as a "failsafe" mode of enforcement when public agencies facing resource or political constraints are unable or unwilling to enforce. See FARHANG, *supra* note \_\_\_, at 20 ("Lawsuits provide a form of auto-pilot enforcement that will be difficult for bureaucrats or future legislative coalitions to subvert . . ."); John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 227 (1983) (arguing that private enforcement "performs an important failsafe function by ensuring that legal norms are not wholly dependent on the

current attitudes of public enforcers”); Richard B. Stewart, *Crisis in Tort Law?: The Institutional Perspective*, 54 U. CHI. L. REV. 184, 198 (1987) (noting that private enforcement “frees individuals from total dependence on collective bureaucratic remedies” and “provides a back-up guarantee of redress”). But private enforcement can also be overzealous, uncoordinated, and democratically unaccountable. See Stephenson, *supra* note **Error! Bookmark not defined.**, at 114-20 (reviewing the disadvantages of private enforcement). Public enforcement by agencies avoids some of these pathologies by bringing to the table a synoptic view, technocratic expertise, and wise and democratically accountable prosecutorial discretion where the costs of enforcement exceed its benefits. But agencies can also be captured by the very interests they are supposed to regulate. For an up-to-date review of all of these arguments, see David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616 (2013).

<sup>41</sup> See, e.g., ROBERT D. LOEVY, *TO END ALL SEGREGATION: THE POLITICS OF THE PASSAGE OF THE CIVIL RIGHTS ACT OF 1964* (1990); Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417 (2003); CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* (1985); PAUL BURSTEIN, *DISCRIMINATION, JOBS AND POLITICS: THE STRUGGLE FOR EQUAL EMPLOYMENT OPPORTUNITY IN THE UNITED STATES SINCE THE NEW DEAL* (1985); HUGH GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY, 1960-1972* (1990).

<sup>42</sup> Testimony of Walter A. Reuther, United Auto Workers, Subcommittee of the Committee on Labor and Public Welfare, 80<sup>th</sup> Cong., June 13, 1947 at 310.

<sup>43</sup> See, e.g., CHEN, *supra* note \_\_, at 103; ALFRED W. BLUMROSEN, *BLACK EMPLOYMENT AND THE LAW* 10-11 (1971); Arthur Earl Bonfield, *The Origin and Development of American Fair Employment Legislation*, 52 IOWA L. REV. 1043, 1048-51, 1069-70 (1967); SOVERN, *supra* note \_\_, at 19-20.

<sup>44</sup> See, e.g., William J. Collins, *The Labor Market Impact of State-Level Anti-Discrimination Laws, 1940-1960* 56 LABOR & INDUST. REL. REV. 244 (2003) (finding small overall labor-market effects). Several older studies offer qualitative and roughly contemporaneous assessments, see DUANE LOCKARD, *TOWARD EQUAL OPPORTUNITY: A STUDY OF STATE AND LOCAL ANTIDISCRIMINATION LAWS* (1968); MORROE BERGER, *EQUALITY BY STATUTE: THE REVOLUTION IN CIVIL RIGHTS* (1967); MICHAEL SOVERN, *LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT* (1966); Herbert Hill, *Twenty Years of State Fair Employment Commissions: A Critical Analysis with Recommendations*, 14 BUFF. L. REV. 22, 62 (1964-65); Arnold H. Sutin, *The Experience of State Fair Employment Commissions: A Comparative Study*, 18 VAND. L. REV. 965 (1964-65); PAUL H. NORGREN & SAMUEL E. HILL, *TOWARD FAIR EMPLOYMENT* (1964); Elmer A. Carter, *Practical Considerations of Anti-discrimination Legislation – Experience Under the New York Law Against Discrimination*, 40 CORNELL L.Q. 40 (1954), but there has been no systematic effort that takes advantage of available archival sources.

<sup>45</sup> See Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 406 (2007) (the New Deal gave rise to a “prescriptive vision of how public policy should be made” according to which “[t]he democratic process identified social problems at the most general level” and “[i]t was then the job of experts to discern the best way to solve a particular problem and implement the appropriate policy”).

<sup>46</sup> See Risa Lauren Goluboff, *“Let Economic Equality Take Care of Itself”: The NAACP, Labor Litigation, and the Making of Civil Rights in the 1940s*, 52 UCLA L. REV. 1393, 1401 (2005) (“[I]n the end, the NAACP’s lawyers chose not to take as their focal point the problems of working African Americans as working African Americans.”); MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961* 121 (1994) (arguing the NAACP’s legal strategy was often driven by organizational and, in particular, membership-building imperatives). But see Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before Brown*, 115 YALE L.J. 256, 311 (2005) (recovering a more pluralistic set of views among civil rights groups). For other studies exploring this same territory, see RISA GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* 12 (2007); FRYMER, *supra* note \_\_, at 58-59; Risa L. Goluboff, *“We Live in a Free House Such as It Is:” Class and the Creation of Modern Civil Rights*, 151 U. PENN. L. REV. 1977, 1979 (2003).

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<sup>47</sup> For a similar effort to recover post-war challenges to job discrimination, but focused on constitutional claims brought before the NLRB, see SOPHIA Z. LEE, *THE WORKPLACE CONSTITUTION: FROM THE NEW DEAL TO THE NEW RIGHT* (2014) and Sophia Z. Lee, *Hotspots in a Cold War: The NAACP's Postwar Workplace Constitutionalism, 1948-1964*, 26 LAW & HIST. REV. 327 (2008).

<sup>48</sup> See note \_\_ *supra*.

<sup>49</sup> See ANTHONY CHEN, *THE FIFTH FREEDOM: JOBS, POLITICS, AND CIVIL RIGHTS IN THE UNITED STATES, 1941-1972* 115-19 (2009); THOMAS SUGRUE, *SWEET LAND OF LIBERTY: THE FORGOTTEN STRUGGLE FOR CIVIL RIGHTS IN THE NORTH* 119-120 (2008).

<sup>50</sup> See MORENO, *supra* note \_\_, at 145-46; SKRENTNY, *supra* note \_\_, at 222-25; STEIN, *supra* note \_\_, at 125-26; see also Hill, *supra* note \_\_, at 24 (reviewing FEPC's work and calling for "affirmative action based upon pattern centered approaches instead of the individual complaint procedure" (capitalization omitted)); *To Push Quota Hiring*, N.Y. AMSTERDAM NEWS, Aug. 16, 1969, at 2 (noting Urban League and NAACP approval of quota approach).

<sup>51</sup> The rumblings of that shift in thinking could be heard as far back as the 1950s when even a stalwart FEPC supporter like the Urban League's Lester Granger published an editorial arguing against handing adjudication of public accommodation suits to New York's SCAD. Lawsuits for damages were "10 times as impressive as a complaint of discrimination placed by a Negro with some state agency," Granger noted, and were the best way to "keep agencies our servants, not our guardians." Lester B. Granger, *Rights Our Business*, N.Y. AMSTERDAM NEWS, Jan. 12, 1952, at 14.

<sup>52</sup> Joseph B. Robinson, *Comment*, 14 BUFF. L. REV. 121, 123 (1964).

<sup>53</sup> See CHEN, *supra* note \_\_, at 6-7; SUGRUE, *supra* note \_\_.

<sup>54</sup> See CHEN, *supra* note \_\_, at 6-7; FRYMER, *supra* note \_\_, at 6-7; JOHN DAVID SKRENTNY, *THE IRONIES OF AFFIRMATIVE ACTION: POLITICS, CULTURE, AND JUSTICE IN AMERICA* 223 (1996). For other analyses of affirmative action's origins, see, for example, HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960-1972*, at 28, 33-35 (1990); PAUL D. MORENO, *FROM DIRECT ACTION TO AFFIRMATIVE ACTION: FAIR EMPLOYMENT LAW AND POLICY IN AMERICA, 1933-1972* (1997); ROBERT J. WEISS, "WE WANT JOBS": A HISTORY OF AFFIRMATIVE ACTION (1997); Nicholas Pedriana, *The Historical Foundations of Affirmative Action 1961-1971*, 17 RES. SOC. STRATIFICATION & MOBILITY 3, 26-27 (1999); Thomas J. Sugrue, *Affirmative Action from Below: Civil Rights, the Building Trades, and the Politics of Racial Equality in the Urban North, 1945-1969*, 91 J. AM. HIST. 145, 145-47, 173 (2004).

<sup>55</sup> 401 U.S. 424, 431-32 (1971).

<sup>56</sup> See, e.g., CHEN, *supra* note \_\_, at 26 ("Had conservatives not been so successful in opposing FEP legislation, affirmative action might have taken on a vastly different legal and political meaning, and job discrimination might have become regulated through a federal administrative agency that sought only to ensure equal treatment.").

<sup>57</sup> See WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 39-46 (1987); see also JUDITH STEIN, *RUNNING STEEL, RUNNING AMERICA: RACE, ECONOMIC POLICY, AND THE DECLINE OF LIBERALISM* 314-16 (1998) (discussing early implementation of Title VII alongside deskilling and declining industrial employment).

<sup>58</sup> This follows at least in part from the view advanced in a substantial body of scholarly work that suggests that a group can only gain organizational voice and influence once they have achieved a critical mass of representation. See, e.g., ROSABETH MOSS KANTER, *MEN AND WOMEN OF THE CORPORATION* 209 (1977) (advancing "critical mass" theory in which groups need 15 to 35 percent representation in order to influence organizational culture).

<sup>59</sup> See, e.g., *Antidiscrimination in Employment: Hearings on S. 984 Before the Subcomm. on Labor & Pub. Welfare*, 80th Cong. 745 (1947) (statement of Tyre Taylor, General Counsel, Southern States Industrial Council) (noting resource constraints would prevent the proposed FEPC from adjudicating complaints "on a single-shot basis" and would inevitably lead to industry-by-industry enforcement and, with it, "some sort of quota system").

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<sup>60</sup> See SUBCOMM. ON LABOR, COMM. ON LABOR & PUB. WELFARE, 92D CONG., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 261 (Comm. Print 1972) (statement of Rep. Shirley Chisholm).

<sup>61</sup> See, e.g., PA. HUMAN RELATIONS COMM'N, EIGHTH ANNUAL REPORT 8, 31 (1963) (announcing commission's intention to initiate broad investigations on a "local, regional, or state-wide basis" and to use its subpoena power to identify regulatory targets with gross underrepresentation of black workers and then draw a strong inference of discrimination from any "patterns of discrimination" found); see also Hill, *supra* note \_\_, at 62 (recounting Pennsylvania commission's move against a half dozen major unions alleging patterns of discrimination); Wolfinger, *supra* note \_\_, at 92-93 (noting budgetary assault on Pennsylvania FEPC).

<sup>62</sup> See, e.g., Griggs v. Duke Power Co., 401 U.S. 424, 434 n.10 (1971) (discussing Illinois FEPC decision in *Myart v. Motorola*); see also Brief for Petitioner at 23, 49 Griggs v. Duke Power Co., 401 U.S. 424 (1971) (citing published guidelines and decisions of the Pennsylvania, Illinois, California, and Colorado FEPCs); Brief Amicus Curiae on Behalf of the Chamber of Commerce of the United States of America at 14-17 Griggs v. Duke Power Co., 401 U.S. 424 (1971) (discussing Illinois FEPC's decision in *Myart*); Brief for Respondent at 28, 32, 33, 35 Griggs v. Duke Power Co., 401 U.S. 424 (1971) (same); Brief of the Attorney General of the State of New York as Amicus Curiae in Support of Reversal at 2-3 Griggs v. Duke Power Co., 401 U.S. 424 (1971) (discussing decisions of New York's SCAD deploying a disparate-impact approach to job discrimination).

<sup>63</sup> See, e.g., Johnson Kanady, *Stevenson Aid Sets Up Illegal 'FEPC' Is Charge*, CHI. TRIB., Feb. 22, 1952, at B7 (raising specter of "government by bureau"); *Dangerous Precedent*, DETROIT FREE PRESS, Feb. 5, 1952, at 6 (denouncing administrative body with "quasi-judicial" authority "remote from public control"); Legislative Journal—House—State of Pennsylvania, May 23, 1951, at 2519 (branding proposed FEPCs as "the opening wedge for the development of a bureaucracy without end"). For other examples, see Chapters Four and Five.

<sup>64</sup> See generally EDWARD G. CARMINES & JAMES A. STIMSON, *ISSUE EVOLUTION: RACE AND THE TRANSFORMATION OF AMERICAN POLITICS* (1989) (theorizing about the causes and consequences of post-war partisan realignment on race issues).

<sup>65</sup> See THOMAS F. BURKE, *LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY* 6-13 (2002); ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 36 (2001). See generally SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* (2010) (charting rise of "private enforcement regimes" in the postwar American regulatory state).

<sup>66</sup> For an overview of explanatory theories, see Sean Farhang, *Public Regulation and Private Lawsuits in the American Separation of Powers System*, 52 AM. J. POL. SCI. 821, 823-28 (2008). On the latter theory, see John Fabian Witt, *The King and the Dean: Melvin Belli, Roscoe Pound, and the Common-Law Nation*, in PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW (2007). A further theory holds that the agency-courts choice turns on a legislative preference for consistency of interpretation over time (which courts deliver relative to an agency subject to partisan control) or consistency of interpretation across regulatory areas (which a centralized agency delivers relative to decentralized courts). See Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1036, 1045-46 (2006).

<sup>67</sup> See Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 394 (1978); see also Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 928 (2003) (asserting that judicial statutory interpretation tends to be harder-edged than agency interpretation).

<sup>68</sup> This idea is a pervasive one. For a concise overview of the evolution of American administrative law, from the common-law and traditional model of the pre-New Deal era to the New Deal model of regulatory management, to the interest-representation model of the 1960s, and the cost-benefit state beginning in the 1980s, see Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437 (2003).

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<sup>69</sup> Compare Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849, 851-54 (2007) (arguing that employers who “facilitate” discriminatory workplace decisionmaking, even if rooted in broader societal influences, should be subject to liability under antidiscrimination laws) with Bagenstos, *supra* note \_\_, at 40 (noting that “many of the problems that lead to workplace inequalities are problems of society-wide scope for which many legal actors will find it difficult to attribute blame to any particular employer,” and suggesting that “we may be asking antidiscrimination law to do too much of the work of responding to society’s inequalities”); Richard Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 157-58 (2009) (summarizing the debate about where to locate the wrong of discrimination and likening the core legal question raised to that of “enabling torts” in terms of how to adjudicate liability of a defendant accused of facilitating the wrongful injuring of the plaintiff by a third party).

<sup>70</sup> As many commentators have noted, when it comes to structural enforcement efforts, the procedural question—whether geographic dispersion or other differences across plaintiffs defeats certification under Rule 23’s strictures—almost entirely merges with the question of whether, to use *Wal-Mart* as an example, a common policy of unguided discretion can be conceptualized as actionable discrimination at all. See Nagareda, *supra* note \_\_, at 153 (arguing that the debate over class certification in the job discrimination context “is, at bottom, a debate over an implicit reconceptualization of discrimination under Title VII”).

<sup>71</sup> These ideas are being explored by a new generation of legal scholars. See, e.g., K. SABEEL RAHMAN, *DEMOCRACY AGAINST DOMINATION* (2017).

<sup>72</sup> A number of other legal scholars have remarked on the evolution of multi-enforcer regimes and begun to explore the legal and political forces that have fueled their rise. For a sampling, see BURKE, *supra* note \_\_; FARHANG, *supra* note \_\_; Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486 (2012); Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698 (2011); Reza Rajabian, *Private Enforcement and Judicial Discretion in the Evolution of Antitrust in the United States*, 8 J. COMPETITION L. & ECON. 187 (2012); and Amanda M. Rose, *The Multienforcer Approach to Securities Fraud Deterrence: A Critical Analysis*, 158 U. PA. L. REV. 2173 (2010). For a helpful recent overview, see Sean Farhang & Miranda Yaver, *Divided Government and the Fragmentation of American Law* (unpublished manuscript 2014). For an earlier account of fragmentation, see JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* 297-301 (1989) (likening American policy implementation to a “barroom brawl” relative to centralized European administration).

<sup>73</sup> Engstrom, *supra* note \_\_, at 623..

<sup>74</sup> For a sampling, see Martin Landau, *Redundancy, Rationality, and the Problem of Duplication and Overlap*, 29 PUB. ADMIN. REV. 346 (1969); Christopher Busch, David Kirp, & Daniel Schoenholz, *Taming Adversarial Legalism*, 2 NYUJ. LEG. & PUB. POL’Y 179 (1999); Michael M. Ting, *A Strategic Theory of Bureaucratic Redundancy*, 47 AM. J. OF POL. SCI. 274 (2003); Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in American Law*, 2006 SUP. CT. REV. 201; Anne Joseph O’Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CAL. L. REV. 1655 (2006); Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422 (2011); Eric Biber, *The More the Merrier: Multiple Agencies and the Future of Administrative Law Scholarship*, 125 HARV. L. REV. 78 (2012).

<sup>75</sup> See Keith Bradley, *The Design of Agency Interactions*, 111 COLUM. L. REV. 745 (2011).

<sup>76</sup> See, e.g., Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 AM. POL. SCI. REV. 251 (2000); Margaret Weir, & Theda Skocpol, *State Structures and Possibilities for ‘Keynesian’ Responses to the Great Depression in Sweden, Britain, and the United States*, in BRINGING THE STATE BACK IN, (Peter Evans et al., eds., 1985).

<sup>77</sup> See *Fiscal Year 2012 Performance and Accountability Report*, U.S. EQUAL EMP. OPPORTUNITY COMM’N 26 (Nov. 15, 2012), [http://www.eeoc.gov/eeoc/plan/upload/2012par\\_1.pdf](http://www.eeoc.gov/eeoc/plan/upload/2012par_1.pdf) (noting total conciliation settlements of \$71 million, as compared to the \$197 million the EEOC budgets for charge processing).

<sup>78</sup> EEOC and FEPC claim adjudication also almost certainly incentivizes more, and more marginal, claims by offering a low-cost initial evaluation of case merit, particularly in jurisdictions where EEOC

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“cause” findings are admissible in litigation. One study goes further and argues that EEOC charge processing generates a type of adverse selection problem in which claimants with non-meritorious claims are *most* likely to heavily engage the EEOC process. See Alberto Dávila & Alok K. Bohara, *Equal Employment Opportunity Across States: The EEOC 1979-1989*, 80 PUB. CHOICE 223 (1994). For debate over the admissibility of EEOC “cause” determinations, see Leslie Abbot, *Out of Balance: Excluding EEOC Determinations Under Federal Rule of Evidence 403*, 24 LOY. L.A. L. REV. 707 (1991).

<sup>79</sup> See Engstrom, *supra* note \_\_\_\_ (laying out the details of such a procedure).

<sup>80</sup> See generally David L. Noll, *Regulating Arbitration*, 105 CAL. L. REV. 985 (2017) (exploring when arbitration warrants regulation through legislative and administrative action in order to calibrate the implementation of specific statutes).

## CHAPTER FIVE – BREAKING FEPC: *MYART V. MOTOROLA* AND THE TRANSFORMATION OF AMERICAN JOB DISCRIMINATION LAW

When still more legislative wins followed those in the industrial strongholds of Pennsylvania, Michigan, and Ohio, nearly three-dozen states had enacted versions of FEPC, each armed with a baseline set of powers to receive complaints of job discrimination, attempt informal “conciliation,” and, where those efforts failed, hold public hearings and order an employer to “cease and desist” from a discriminatory practice and restore complainants to their rightful position but-for the discrimination. By 1964, as Congress began debate of what would become Title VII of the Civil Rights Act, this growing bureaucratic archipelago had processed some 25,000 complaints of job discrimination.<sup>1</sup> But as the fight over Title VII unfolded on Capitol Hill, only a single one of them would draw mention by name: *Myart v. Motorola*.

The facts of the case did not make it an obvious candidate for national prominence. A black television repairman from Chicago’s South Side brought a complaint against Motorola, a large Chicago electronics manufacturer with a lily-white workforce and a checkered reputation on civil rights. A hearing examiner appointed by the Illinois FEPC found that Motorola had discriminated against Myart when he applied for a job at Motorola’s Franklin Park plant in Chicago’s northwest suburbs, because, though Motorola officials claimed Myart had failed an employment test, they could not produce the actual test paper. The Illinois FEPC affirmed the decision and added a \$1,000 award to Myart in light of Motorola’s record-keeping failures and other seeming evasions—a modest slap on the wrist looking back from an era of six- and seven-figure class action settlements.

Many observers, however, thought the case far from ordinary. The *Motorola* decision, Senator John Stennis of Mississippi thundered from the U.S. Senate floor, signified “the dangers inherent in this type of legislation” and the “unlimited and unreasonable power” that Title VII would give to the federal government. Republican Senator Everett Dirksen of Illinois—in offering an eleventh-hour raft of the amendments that would denude the Equal Employment Opportunity Commission (EEOC) of any FEPC-like powers in favor of private lawsuits in federal court—reprinted in full the *Motorola* hearing examiner’s decision in the Congressional Record.<sup>2</sup> And Arthur Krock, Pulitzer Prize-winning columnist for the *New York Times*, saw in the case the natural tendency of administrative agencies toward “autocratic rule” and barked that Title VII threatened “to project the rationale of the Illinois F.E.P.C. ruling throughout the free enterprise system of the United States.”<sup>3</sup> So potent were the frequent mentions of the case that a provision of Title VII governing job tests was labeled the “Motorola amendment.”<sup>4</sup>

Why did *Motorola* command such attention? Part of the answer is its visceral appeal and high political drama. The case was thrust into the center of the state’s 1964

gubernatorial race because of what one account at the time referred to as a “Harlequinesque” love triangle among three of the drama’s leading cast members: Charles Gray, the chairman of the Illinois FEPC, was on leave from a top executive position at Bell & Howell, another Chicago-based electronics company; Bell & Howell was in turn owned by leading Republican gubernatorial candidate Charles Percy, who was one of the *Motorola* decision’s harshest critics; and Percy’s campaign finance chair was none other than Motorola’s outspoken President and CEO, Robert Galvin. It also surely helped that the *Motorola* case arose in Dirksen’s home state of Illinois. Indeed, Senator Hubert Humphrey’s chief of staff would later note that Dirksen “appeared to base most of his judgment on the parochial experiences of Illinois.”<sup>5</sup> With Dirksen already thinking ahead to his next re-election bid, using examples close to home was good politics. Finally, *Motorola* gained outsize attention because it was the first salvo in what would be a fiercely argued, decades-long debate about whether and when job tests, especially intelligence tests used as a “low level” employment screen, were really just a discriminatory front. *Motorola* thus anticipated one of the most consequential litigation battles of the Title VII era, culminating in the Supreme Court’s decision in *Griggs v. Duke Power*.

But a deeper understanding of the *Motorola* case and the context in which it spilled into the public eye and onto the floor of Congress also helps us to see the case’s position as a pivotal moment in the evolution of American fair employment law. Looking back, *Motorola* was a fiery culmination of slow-motion trends that had long been in the works. The case exposed—indeed, burst wide open—the tensions long latent in the FEPC model. In its wake, American job discrimination law moved off the equilibrium that had held for some 20 years and shifted into an entirely new mode. Coercion replaced persuasion. Aggregation and “pattern-based” enforcement replaced individuation. Damages replaced injunctive cease-and-desist orders. A focus on intermediate job structures and pathways replaced a focus on primary employer decision-making. And the goal of promoting economic opportunity replaced maintenance of social order and harmonic inter-group relations. Most important of all, a new, hard-edged legalism replaced administrative discretion, interest-group bargaining, and democratic deliberation as the moral center of American fair employment law. As it did, the FEPCs came to be something that its progenitors at the dawn of the movement had darkly warned against: a case-level policing operation. *Motorola*, in short, was the fulcrum upon which American fair employment law moved to a new conceptual foundation.

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Compared to other large, industrial, heavily black states like New York, Michigan, Ohio, and Pennsylvania, FEPC arrived late to Illinois.<sup>6</sup> As recounted previously, an initial burst of FEPC laws came during the period 1945 to 1947 in the liberal northeast, beginning in New York and following soon after in New Jersey, Massachusetts, Connecticut, and Rhode Island. A second surge followed in the mid- to late-1950s and was much more varied geographically. It was then that industrial centers like Pennsylvania, Michigan, and Ohio, and also California, Colorado, Minnesota, and Wisconsin, enacted FEPCs, bringing the number of non-southern African-Americans living in states with such a law to nearly 60 percent. It was only during a third round of fevered legislative activity, between 1961 and 1963, that Illinois joined a group of mostly rural states that included Kansas, Indiana, Missouri, and Hawaii in enacting an FEPC law.<sup>7</sup>

FEPC also arrived listless in Illinois relative to its peers.<sup>8</sup> As already noted, a select few states like Connecticut, Pennsylvania, and Ohio built relatively powerful and agile FEPCs with few procedural encumbrances and a full complement of enforcement powers, including the power to initiate complaints rather than waiting for complainants to come forward. But Illinois's FEPC was anemic compared even to weak-FEPC states like Michigan. While Illinois joined Michigan and most other states in permitting only individuals aggrieved by a discriminatory action to initiate complaints, the Illinois FEPC was even feeble than this lack of initiatory powers suggests. For instance, under the Pennsylvania Fair Employment Practices Act, the state's FEPC could order a respondent "to take such affirmative action including but not limited to hiring, reinstatement or upgrading of employes [sic], with or without back pay, admission or restoration to membership in any respondent labor organization as, in the judgment of the Commission, will effectuate the purposes of this act." When combined with the Pennsylvania FEPC's power to file complaints "upon its own initiative," the agency's remedial toolkit could easily be trained on groups of a company's employees or, via serial complaints, an entire industry or industry segment. In stark contrast, the Illinois FEPC Act narrowly tethered the FEPC's cease-and-desist authority to "the unfair employment practice complained of," and it also limited the other remedies the agency could order to "actions with respect to the complainant as will eliminate the effect of the practice originally complained of."<sup>9</sup> Illinois law thus made doubly clear that its FEPC should not stray beyond the allegations set forth in a formal, individualized complaint. Far from the Pennsylvania Human Rights Commission's prowling predator, the Illinois FEPC was, nearly unique among FEPCs, more of a blindered horse.

Illinois's FEPC was also uniquely limited in its regulatory reach. Bureaucratic power in strong-FEPC states meant, first and foremost, an agency with jurisdiction over most of a state's employers, including any employer with more than a set number of (in most states, between 6 and 15) employees. A few states set somewhat higher

thresholds of 15 or even 25 employees. But no state got close to Illinois's threshold of 100 employees (to be gradually reduced to 50 during a statutory phase-in period), ensuring that only a small proportion of employers—as few as two percent, based on one estimate at the time<sup>10</sup>—were subject to regulation at all.<sup>11</sup> To be sure, an entity with only 100 employees did not exactly sit at the commanding heights of the state's economy. But the Illinois law's high threshold nonetheless ensured that the Illinois FEPC could only square off against larger and comparatively resourceful entities during the fraught early years of implementation.

Still other design features pushed Illinois's FEPC to the weak end of the spectrum of state designs. For instance, while decisions of the Illinois FEPC were not, as in Michigan, subject to *de novo* judicial reconsideration, the law nonetheless imposed a demanding review standard, requiring that agency findings be found “*prima facie* true and correct” in order to survive judicial scrutiny. Further, while Illinois joined the overwhelming majority of states in structuring its FEPC as a multi-member commission, Illinois was virtually unique in imposing a strict quorum requirement, mandating full-body votes ratifying almost any form of agency action, whether determining probable cause, calling a public hearing, or concluding conciliation agreements.<sup>12</sup> Compared to strong-FEPC states where a single commissioner could initiate a complaint, serve subpoenas, determine probable cause, and then call a public hearing, FEPC case processing in Illinois could be flat-footed and, at times, painfully protracted.<sup>13</sup> Finally, Illinois was nearly alone, joined only by Kansas, among the more than two dozen states enacting FEPC laws prior to 1964 in mandating adherence to the formal rules of evidence that applied in state courts when adjudicating complaints at the public hearing stage. This requirement deprived the agency of the streamlined and open-ended taking of evidence that has typically characterized agency adjudication in the American administrative state.<sup>14</sup>

A final weakness of the Illinois FEPC would only become apparent in the months and years after its creation: its stingy budgetary allocation. Throughout the 1950s, the New York SCAD's budget of \$1.5 million dwarfed that of FEPCs in Pennsylvania (\$655,000), Michigan (\$390,000), and Ohio (\$205,000).<sup>15</sup> Big budgets translated into more extensive professional staff and field offices. Upon its creation in 1946, New York's SCAD had an executive secretary, a general counsel, a public relations director, an administrative secretary, three “legal” staff, ten field representatives, and a clerical staff of 24.<sup>16</sup> By 1960, the SCAD had built a half dozen field offices beyond New York City, in Albany, Buffalo, Rochester, Syracuse, Hempstead, and White Plains, and had a working staff of 80.<sup>17</sup> Even Ohio, with its comparatively meager budget, maintained four regional offices, in Columbus, Cleveland, Toledo, and Cincinnati. By contrast, in states like Illinois, the FEPC's starting budget was only “fractionally adequate,” as one study put it.<sup>18</sup> Indeed, in its first year of operation, the Illinois FEPC received a paltry \$100,000—or roughly 10

cents for each African-American Illinois resident—making even the hiring of anything beyond skeletal staff, let alone creation of field offices, a difficult task. Small budgets could be especially limiting in states that otherwise lacked significant administrative capacity: FEPC officials in some states were reduced to meeting with complainants in rented hotel rooms outside state capitals because there were not government buildings in which commission members could squat.<sup>19</sup>

TABLE 1 – SELECTED STATE FEPC BUDGETS AND STAFF, CIRCA 1965

State	Total Budget in 1965	A/A Pop. (1960)	Budget/A-A	Staff Size
California	\$566,381	883,861	\$0.64	57
Colorado	\$84,856	39,992	\$2.12	10
Connecticut	\$102,720	107,449	\$0.96	16
Delaware	\$10,500	60,688	\$0.17	3
Illinois	\$75,000	1,037,470	\$0.07	6.5
Indiana	\$60,315	269,275	\$0.22	7
Kansas	\$58,349	91,445	\$0.64	6
Kentucky	\$42,200	215,949	\$0.20	5
Maryland	\$54,532	518,410	\$0.11	8
Massachusetts	\$169,651	111,842	\$1.52	18
Michigan	\$266,000	717,581	\$0.37	29
Minnesota	\$52,529	22,263	\$2.36	7
Missouri	\$24,029	390,853	\$0.06	2
New Jersey	\$203,227	514,875	\$0.39	23
New York	\$1,700,000	1,417,511	\$1.20	195
Ohio	\$205,000	786,097	\$0.26	21
Oregon	\$36,088	18,133	\$1.99	4
Pennsylvania	\$655,878	852,750	\$0.77	53
Rhode Island	\$33,119	18,332	\$1.81	5
Washington	\$52,877	48,738	\$1.08	5
West Virginia	\$16,300	89,378	\$0.18	3
Wisconsin	\$43,813	74,546	\$0.59	4

Data taken from Budgets and Staffs of State Fair Employment Practice Commissions, Missouri Commission on Human Rights, in Helen Cleary Foreman, Box 2 (“Fair Employment Practices Commission—Annual Reports & Financial Statements, 1962-63”), Lincoln Archives.

Budget size also drove professionalization via commissioner salaries. At its founding in 1945, SCAD commissioners earned generous annual salaries of \$10,000 (or roughly \$125,000 in present-day terms), rising to a truly princely sum of \$20,475 (or roughly \$160,000 today) by 1965.<sup>20</sup> Massachusetts and Ohio paid substantially less, at \$5,000 per year, and Rhode Island less still at a mere \$2,500, making the position look more part-time.<sup>21</sup> Illinois, however, joined a small group of states that did not compensate FEPC commissioners at all, reimbursing them only for expenses incurred in connection with official duties. This was important. In more professionalized FEPCs, “working commissioners” performed collective duties and also personally

directed and conducted conciliation efforts.<sup>22</sup> But in most others, commissioners were “laymen occupied with other affairs,”<sup>23</sup> functioning as a collective to approve proposed actions during occasional meetings, particularly if scattered throughout a large state.<sup>24</sup> In some of these states, the lack of consistent connection to the work of the agency left commissioners “at the mercy of the staff.”<sup>25</sup> In others, however, small budgets meant that part-time commissioners could not hire substantial staffs in the first place, and so simply had to do the work themselves despite other professional obligations. Despite the many paeans to expertise that often accompanied the FEPC choice over regulatory alternatives at the dawn of the movement in the 1940s, many FEPCs, especially in late-enacting states like Illinois, were lay-directed, shoe-string operations run by citizen-administrators with little organizational leverage at their disposal.

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Less clear is *why* the Illinois FEPC arrived late and listless compared to its peers.<sup>26</sup> One possibility was noted previously: Illinois, unlike other large industrial states such as New York or Pennsylvania, had conservative “border” cities and surrounding rural “down-state” regions with racial mores closer to those found south of the Mason-Dixon.<sup>27</sup> This role was played well in Illinois by East Alton, just across the Mississippi River from St. Louis and the site of a near-riot by white AFL members during wartime COFEP hearings on discriminatory practices at the Western Cartridge Company,<sup>28</sup> and also by Cairo, the state’s southernmost city and, at just forty miles from the Tennessee border, part of the state’s “cotton belt.”<sup>29</sup> This geography mattered because racially conservative downstate areas provided an especially bountiful source of legislative bottlenecks—anti-FEPC legislators, some of them “Dixiecrat” Democrats, who could withstand electoral heat, and might even enjoy a boost at the polls, by blocking civil rights bills at the committee stage. As a result, the drive to enact FEPC in Illinois followed an even stronger version of the script that played out in other states in which senate committees kept bills bottled up long after a state legislature’s lower house became a rubber stamp for passage. Indeed, Illinois civil rights groups saw a stream of bills “anaesthetized” by senate committees via “gentleman’s agreements,” in the words of an NAACP memorandum at the time, long after the Illinois House began to regularly pass FEPC bills.<sup>30</sup>

Another likely factor in Illinois was the Chicago political machine’s famously strong grip on state politics, but without the special conditions in Pennsylvania, including a late Republican-to-Democrat transfer of power in Philadelphia, that inflated the value of black votes and yielded that state’s super-strong FEPC in 1955.<sup>31</sup> Instead, Illinois perfectly embodied the view that a “traditional” political system built around patronage—the *sine qua non* of machine politics—tends to blunt the receptivity of a political system to “pressure politics” by single-issue groups by suppressing

political competition, placing tight constraints on black leaders in particular.<sup>32</sup> So powerful was Chicago's hegemonic Democratic machine that even influential black leaders like William Dawson, who defected from the Republican to the Democratic party in 1939 and built a black "sub-machine" on Chicago's South Side, famously toed the machine line in favor of urban renewal, scrupulously avoiding any public statement that reflected his personal opposition to the policy.<sup>33</sup> The reason can be glimpsed in the electoral fate of those within the civil rights community who dared oppose it: When black labor leader Willoughby Abner mounted a rare primary challenge to a white machine candidate in a heavily black senate district that included Bronzeville and the University of Chicago—a seat later occupied by Barack Obama—and ran on a platform that the machine was stifling "the natural expression of the needs and aspirations of Negroes,"<sup>34</sup> he was trounced by a 2-1 margin.<sup>35</sup> And when a black office-holder became too active in protest politics from his perch on the Chicago Urban League board, he was unceremoniously "dropped from the machine," which simply "refused to slate him for re-election."<sup>36</sup> Given the Chicago machine's stranglehold, it should not surprise that Illinois civil rights groups gained less traction than their brethren in other states.

Beneath these state-specific possibilities, however, is a more general explanation for Illinois's anemic legislative effort: By the late 1950s, sentiment was slowly but perceptibly moving away from the FEPC approach, draining key reservoirs of support within the already fragile fair employment coalition while emboldening opponents within the Republican Party and industry. On one side, civil rights groups were growing increasingly skeptical of FEPC as the civil rights movement accelerated. This is not to deny earlier strains of skepticism. As Chapter One noted, plenty of civil rights leaders raised concerns about FEPC's likely efficacy at the dawn of the movement in the mid-1940s as the nascent fair employment coalition parsed the regulatory options. But by the time FEPC bills gained momentum in laggard states like Illinois in the later 1950s and early 1960s, the critique of FEPC had begun to run deeper and more mainstream among northern civil rights groups. The main reason was that a sufficient body of evidence had accrued such that stakeholders could render the beginnings of an empirical judgment on the regime's output. The first systematic efforts to evaluate the FEPCs began to arrive in the mid-1950s, many of them the self-serving product of FEPC commissioners. Chief among these was a rosy 1954 account of the SCAD's workings by its chairman, Elmer Carter.<sup>37</sup> But soon another round of evaluations began to emerge, most penned by academics in the nation's law schools and schools of industrial relations, that provided a more arm's-length, and less cheering, account of FEPC's workings.<sup>38</sup>

As with any wide-scale policy evaluation, the emerging portrait of FEPC implementation was not without its ambiguities. On the one hand, the FEPCs' output was sizeable: As previously noted, state FEPCs had by 1960 processed roughly 25,000

cases, an impressive tally for a regime that had not even existed in most states only a few years before. Early FEPC enforcement efforts also brought swift and seemingly painless victories. Indeed, just one year after it opened its doors, New York's SCAD could confidently announce that "progress has been made in wiping out discriminatory practices" by way of agreements with some 30 unions, with total membership of 750,000, removing discriminatory provisions in by-laws and constitutions.<sup>39</sup> Many state FEPCs likewise moved quickly to abolish outwardly discriminatory help-wanted ads in newspapers and other job listings as well as problematic "pre-employment inquiries," including application forms requiring disclosure of religious affiliation or racial identity plus a photograph as verification.<sup>40</sup> These and other triumphs were frequently trotted out as examples of the magic of "the Dewey method," as a 1948 article in *U.S. News and World Report* invoking Republican governor Thomas Dewey's role in New York's pioneering legislative effort in 1945, called FEPC's focus on non-confrontational "conciliation" of disputes.

The crystallizing empirical portrait contained other flashes of the virtues of an agency-centered approach that had pushed the fragile fair employment coalition toward FEPC back in the 1940s. A headline-grabbing example came two years into the New York SCAD's life when seven black "sandhogs" — New York's legendary tunnel and sewer workers — filed complaints against several contracting companies and Local 147 of the International Hod Carriers Union, AFL, alleging discrimination in connection with city projects, among them New York's Brooklyn-Battery Tunnel.<sup>41</sup> The main charge was that the companies and local had discriminated by preventing black "hogs" from applying for jobs on the projects. But the case quickly expanded when the NAACP's Marian Wynn Perry, a newly hired LDF lawyer, became involved.<sup>42</sup> Soon after, one of the hogs, who already held a project job but filed a charge alleging demotion to a lower-paying job based on a rule that only one black worker per gang could earn a higher amount, was summarily fired and, after union officials read his SCAD complaint aloud at a membership meeting, his union card threatened. When the dust finally settled in 1949, the case became the first in which a state FEPC complainant received substantial relief: Under threat of a public hearing, the employer agreed to a pair of settlements, one of them granting the demoted hog reinstatement and \$3,000 in backpay, a substantial sum at the time.<sup>43</sup> But more salient than the backpay award, SCAD appeared to cut through what many saw at the time as the Gordian knot of job discrimination: employers and unions who pointed the finger at one another in an effort to evade liability. Despite the skeptical claim by George Weaver at the dawn of the drive for fair employment that the involvement of multiple actors made it "humanly impossible to define discrimination (much less prove it),"<sup>44</sup> early efforts in New York seemed to lend credence to the claim that FEPC, perhaps alone among regulatory alternatives, could unravel multi-faceted, "polycentric" problems like job discrimination.

Early FEPC enforcement efforts also proved that the agencies could make inroads into the highest of societal precincts. Few FEPC efforts proved this more powerfully—or garnered more press attention—than efforts by New York’s SCAD and the Massachusetts Commission Against Discrimination to integrate professional baseball. Indeed, it was at a joint conference between SCAD officials and the managers of the New York-based Dodgers, Yankees, and Giants that Dodgers officials announced the team’s intention to sign Jackie Robinson, the first African-American to play in the major leagues in the modern era, to the team’s Montreal farm team.<sup>45</sup> The same could be said of years of high-profile efforts to integrate airlines in New York, Minnesota, and Colorado throughout the late 1940s and 1950s, which finally bore fruit in 1957 with the employment, by regional Mohawk Airlines, of the nation’s first African-American flight attendant.<sup>46</sup>

Most important of all, early enforcement efforts embodied FEPC’s promise of sustained, industry-wide efforts to combat discrimination while finessing long-simmering concerns about “quota” hiring. Exhibit A was the New York SCAD’s development of a “backslider” system to monitor compliance with the terms of conciliation agreements, in many cases even requiring a respondent to file periodic hiring reports.<sup>47</sup> This was the kind of expert engagement by “ever vigilant administrative commissions,” as one author put it in praising SCAD’s “check-ups,” that would be hard to achieve in a court-centered system presided over by generalist judges juggling crowded dockets.<sup>48</sup> Exhibit B was more specific and took the form of a series of SCAD enforcement actions against New York City’s lily-white brewery industry in 1953. The food and beverage industry had long been a glaring symbol of discrimination because of the stark contrast between the industry’s large and growing black customer base and its publicly visible, lily-white delivery operations.<sup>49</sup> When ten black brewery workers filed complaints, SCAD quickly made its presence known, warning that a private agreement previously reached among the breweries, the union, and a consortium of civil rights groups providing for hard-edged hiring targets—including the immediate addition of 100 black workers to permanent positions and half of all seasonal hires going forward—was an illegal “quota.” “The Commission does not,” SCAD announced to the public once it had negotiated a series of conciliation agreements to replace the private one, “look with favor on any agreement designed to promote integration in employment of minority groups which is instinct with the concept of quota employment.”<sup>50</sup> In place of the numerical mandates, the release continued, was a hope and a warning. The hope was that “all elements of the brewing industry” would work “to improve the historic and presently existing patterns of employment in the industry.”<sup>51</sup> The warning, nearly lost in the rhetoric, was that the industry’s commitment to a “non-discriminatory policy” would be “best evidenced by the integration of previously excluded groups” as measured in regular reports on hiring practices that the breweries and unions would be required to file.<sup>52</sup> Though

SCAD's anti-quota stance drew the usual criticism from the more militant civil rights groups,<sup>53</sup> the weight of opinion among commentators saw the brewery cases as a "triumph for the 'industry-wide conference' approach" that had helped drive the FEPC consensus at the dawn of the movement.<sup>54</sup>

But these successes also contained the seeds of a critique. Bureaucratic timidity was its core—the other side of the coin of "the Dewey method." Despite the fact that the FEPCs had collectively entered into thousands of conciliation agreements following behind-the-scenes negotiation of disputes, only a small handful of cases had advanced to a public hearing: a grand total of seven, to be exact, in an oft-cited 1953 study of 6,000 cases in ten different state FEPCs.<sup>55</sup> Even fewer had generated a judicial review proceeding.<sup>56</sup> Throughout the 1940s and early 1950s, FEPC's champions could argue that this was a good thing—proof that the FEPC approach's value-added was its power to "sensitize and educate," as Henry Spitz, SCAD's General Counsel and an architect of New York's SLAD, would later put it in a law review article.<sup>57</sup> Indeed, by 1950, this view of FEPC was so well ensconced that many accounts of the implementation of the new fair employment laws in states like New York and Massachusetts minimized the notion that a bureau would ever have to use coercion at all. An article in early 1950 in *Business Week* perfectly captured other popular treatments in early-enacting states, suggesting without any hint of irony that the lack of an outcry from business could be taken as evidence of FEPC's success. "Does State FEPC Hamper You?," the article's title asked. "No, say employers in states where job-bias bans are in effect." "Employers agree," the article continued, "that FEPC laws haven't caused near the fuss that opponents predicted," particularly because "[c]rackdown methods are frowned upon."<sup>58</sup> Two years later, a profile in *Look* magazine described the "easy-does-it approach" that the FEPC model now embodied in the legislative and popular mind:

Though aware of widespread evasions, FEPC's seldom blow "boots and saddles" for punitive crusades. Instead, they insistently nudge conspicuous holdouts, encourage further integration among compliers and, in general, play for a gradual change in the local employment climate that will eventually drift the recalcitrants into line without their quite knowing how they got there.<sup>59</sup>

Within only a few years of the first legislative campaigns, FEPC had been reduced in the popular press to a "nudge"—and thus something decidedly softer than FEPC's advocates had initially envisioned.<sup>60</sup>

Accompanying this was a pronounced change in the rhetoric animating debate inside legislative halls. FEPC proponents in early legislative drives in critical industrial states like New York, Michigan, and Pennsylvania often emphasized a bill's "teeth," including fines of up to \$500 upon a court's finding of failure to comply with an

FEPC's order. And many early FEPC bills advanced in critical industrial states like New York, Michigan, and Pennsylvania made no provision whatsoever for the process of informal "conciliation" of discrimination disputes.<sup>61</sup> By 1950, however, legislators introducing bills on house and senate floors began to emphasize the conciliation process above all other design features, almost reflexively noting that the enforcement provisions of those bills called for a "minimum of compulsion." An early sign of this shift came March 1947 when United States Senator Irving Ives—who, as a state senator just two years before, had piloted the Law Against Discrimination through the New York General Assembly—rose before his colleagues and announced a new federal FEPC bill. Ives explained:

Heretofore, as I understand it, legislation on this subject which has been proposed has contained a large measure of legal compulsion. I do not believe in legal compulsion in dealing with problems of this kind. It is necessary to have a certain amount of it, a minimum, otherwise no attention whatever is paid to that which it is attempted to do. To that extent, this bill has a minimum of legal compulsion, with very minor penalties. What this bill does is to pave the way to a new approach by mediation and by conference.<sup>62</sup>

Others soon followed his lead. One by one, the state-level organizations pressing for fair employment in later-enacting states outside the liberal northeast revised their legislative offerings to take account of the emerging consensus that the principal role of the FEPCs would be "educative." In Pennsylvania, for example, that moment came in 1950 when Clarence E. Pickett, chairman of the State Council for a Pennsylvania FEPC, announced that his organization would soon offer a new draft bill that "would require the FEPC to use 'conference, conciliation, and persuasion'" to settle discrimination disputes before turning to more coercive commission powers.<sup>63</sup> "All this bill is is compulsory education," explained an Illinois legislator upon introducing an FEPC measure a few years later.<sup>64</sup> By then, the earlier hopes of the more militant segments within the civil rights community that the new agencies' exercise of their softer convening powers would be backstopped by "strong civil damages and penalties" or "double back pay without any deductions for interim earnings"<sup>65</sup> had long since fallen away. Conciliation was now king.

By the mid- to late-1950s, however, odes to "the Dewey method" were wearing thin, even among the old guard civil rights groups that had formed the core of the FEPC consensus a decade earlier. Early rumblings came from New York, perhaps reflecting the proximity and close involvement of the national offices of the NAACP, Urban League, and American Jewish Congress. "We are not interested in having hearings for their own sake," a joint report of the three organizations noted in 1948.

"However it seems difficult to avoid the suspicion that SCAD is willing to settle for less than full compliance with the letter and spirit of the law, in order to avoid the public hearing stage."<sup>66</sup> It continued across the pages of the nation's most influential black newspapers throughout the 1950s. An especially bracing line of criticism came from *New York Amsterdam News* editor Earl Brown, who upbraided the SCAD for having "shunned a more vigorous course,"<sup>67</sup> declared SCAD "a dumping ground for political hams and hacks,"<sup>68</sup> and concluded that the agency had "done very little to get rid of job discrimination."<sup>69</sup>

Perhaps the most telling expression of growing concern about FEPC came in 1952, when New York faced the question whether to extend the SCAD's authority to discrimination in public accommodations or instead to retain the lawsuit- and court-centered approach that had long been on the books.<sup>70</sup> As the debate unfolded, even an old-guard leader like the National Urban League's Lester Granger, a staunch advocate of "education and persuasion" as the best way to counter discrimination, expressed doubts about expanding SCAD's bailiwick.<sup>71</sup> In an editorial titled "Rights Our Business," Granger passionately argued that litigation was "10 times as impressive as a complaint of discrimination placed by a Negro with some state agency" and the best way to "keep agencies our servants, not our guardians." As his primary evidence, Granger noted that New York's public accommodations statute "began to function at the moment when Negroes began to take it seriously, by filing suits against offending parties—and making those suits stick, with cash."<sup>72</sup> This, he concluded, was "the chief reason why our civil rights code works much better in matters affecting service in public places than in matters affecting employment."<sup>73</sup>

This gathering critique of administration, and the growing allure of a more aggressive litigation-centered alternative, was not just rhetorical. Caught in an increasingly frustrating dance with cautious FEPC administrators, civil rights groups began to explore lawsuits as a prod or even a substitute. A good example came roughly a year before Granger's column when a black schoolteacher on Long Island filed a lawsuit against the Nassau County school board asserting claims under the State Law Against Discrimination after the SCAD had failed, after several months of effort, to make any concrete progress in the matter.<sup>74</sup> Hailed as the "first lawsuit on hiring bias,"<sup>75</sup> the litigation effort—which harked back to Florence St. John's common-law damages action against General Motors in Lansing, Michigan more than ten years earlier—was a pointed rebuke of SCAD's efficacy. And it proved a particular black eye for the agency when a state trial court found sufficient evidence to proceed after SCAD, having sat on the case for months, had found a lack of probable cause and dismissed it.<sup>76</sup>

A second tenet of the gathering critique was a sense that the FEPCs, while notching notable successes, had mostly plucked the low-hanging fruit. Few could fault the initial path the newly created FEPCs had charted. After all, eliminating blatantly

discriminatory language in union by-laws and newspaper help-wanted ads, though plainly the beginning and not the end of the regulatory task, was still an obvious first move. Similarly, even the most hard-boiled critics of FEPC could not disagree that high-profile efforts to integrate professional baseball and the airline industry generated useful publicity and raised public awareness of the FEPCs and the laws they administered. But the emerging empirical portrait of FEPC implementation efforts also made clear that many of the more workaday cases sprinkled across the FEPCs' annual reports and press releases involved placement of African-Americans in white- or pink-collar jobs in public utilities, banks, department stores, and insurance companies.<sup>77</sup> The resulting critique was emphatically not a lack of results. A string of reports from New York, New Jersey, and Massachusetts throughout the 1950s found that black employment had increased as much as three-fold in the public utilities industry, going from 1 to 2 percent of the total workforce in 1950 to 5 percent by 1960 in New York alone.<sup>78</sup> Growth in black employment in generic managerial positions was also significant, at more than 150 percent.<sup>79</sup> However, black job gains lagged far behind in less public labor markets, particularly the "hot, heavy, and hard"<sup>80</sup> corners of the industrial order such as construction and manufacturing, where firms exhibited far less sensitivity to public relations concerns and unions—especially the more skilled craft-based unions of the AFL—exerted greater control over hiring and promotion practices. Too many "lily-white industries" remained, as a series of articles in the *New York Amsterdam News* put it in 1951.<sup>81</sup> Even Elmer Carter, the inveterately optimistic head of New York's SCAD throughout the 1950s and, along with Henry Spitz, one of the principal architects of New York's pioneering legislation in 1945, admitted in his otherwise rosy account of SCAD's accomplishments that the guts of American industry had, even after ten years of FEPC-style enforcement efforts, seen "little visible change."<sup>82</sup> This was especially true in union-controlled apprenticeship training programs, where African-Americans were subject to the "cruel paradox" that only individuals who were already employed within industry could seek training that would permit entrance into the higher-skilled crafts.<sup>83</sup> Early FEPC efforts had extinguished the most obvious manifestations of prejudice, but SCAD was now "down to the hard core of discriminatory employment patterns," where progress was more difficult.<sup>84</sup>

Perhaps most important of all, battle lines were forming throughout the 1950s around a third and seemingly simpler issue that nonetheless exposed some of the deep tensions inherent in the FEPC model: whether the FEPCs could, or should, publicize the results of conciliation efforts. In states where the FEPC law categorically required confidentiality or, as in Illinois, permitted disclosure only upon a respondent's consent, there was less room for debate.<sup>85</sup> But in states like New York, Massachusetts, and Connecticut, where disclosure was fully authorized, the publicity question quickly generated complaints from civil rights groups that a given state's FEPC was operating

behind a “veil of secrecy” or, in an edgier framing, was more a “secret society than a state agency.”<sup>86</sup> Publicity, however, was plainly a double-edged sword. On the one hand, public recounting of enforcement efforts defeated the purpose, voiced so often at FEPC’s founding in the 1940s, of quietly and gently correcting “irrational” prejudices.<sup>87</sup> It also threatened to undermine the FEPCs’ legitimacy and standing as a kind of neutral arbitrator or broker of “inter-group” peace. It would simply not do, SCAD commissioners reported in private meetings with NAACP officials in 1948, to engage in publicity efforts that could be construed as “advertising for business”<sup>88</sup> or part of an agency effort to “stir up complaints.”<sup>89</sup> “We are quite aware that we could whoop it up by adopting a type of press release such as “SCAD forces department store to hire Negro” or “SCAD gives stinging rebuke to utility,” SCAD Commissioner Caroline Simon, a Republican acolyte of Thomas Dewey and a drafter of the SLAD, noted around the same time.<sup>90</sup> “We believe, however, that our publicity program should serve a more important function than sensationalism and artificial stimulation,” she continued, particularly “establishing a solid base of understanding and acceptance of the purposes and terms of the Law.”<sup>91</sup>

A lack of publicity, on the other hand, could be equally perverse. It could deprive the regime of general deterrence by giving recalcitrant employers and unions a false sense of security while leaving more sympathetic ones in the dark about which practices were thought discriminatory and most likely to draw enforcement efforts.<sup>92</sup> Worse, non-disclosure focused public attention on only the “hard” cases that resulted in public hearings or, at the other end of the spectrum, quick dismissals of non-meritorious cases, which employers and unions were all-too-willing to publicize themselves. Finally, a policy of non-disclosure had “doubtlessly contributed to a feeling among minority groups,” as a joint report of the Urban League, NAACP, and American Jewish Congress stated in 1948, “that nothing is being done under the law.”<sup>93</sup> “[N]o news is bad news,” an early report on FEPC in New York noted, particularly when many within the civil rights community were already “receptive to rumors that SCAD is a do-nothing agency.”<sup>94</sup> Perceptions within the civil rights community was especially important, another report noted, because it “doubtless helped to discourage some potential complainants from making use of the law.”<sup>95</sup> As civil rights groups sought to boost FEPC enforcement efforts, the “veil of secrecy” over agency operations, once considered a virtue of a system designed to gently correct “irrational” prejudice, was increasingly seen as a hindrance. And without civil rights organizations willing to serve as a “clearing house for attack,” as the NAACP’s Perry put it, or some other ready source of a steady flow of privately initiated complaints, many FEPCs—particularly those without initiatory powers of their own—risked irrelevance.<sup>96</sup>

As the 1950s played out, the rising critique of FEPC was clearly beginning to take a toll. Waning interest among erstwhile FEPC supporters was most evident in the legislative drives in laggard states like Illinois. Part of this was simple dilution of

interest across different components of the civil rights project. At the dawn of the movement, fair employment was the “principal plank” of civil rights groups and the primary focus of ground-level mobilizations and lobbying efforts. But by the later 1950s, employment was fighting for space in Illinois on a crowded “six point legislative program” of asks that also included housing, education, public accommodations, insurance, and hospitals.<sup>97</sup> A more general enervation of the legislative campaigns can also be detected in a worrying decline in engagement by black civil rights groups. Early on in the drive for fair employment in Illinois, a 1953 report by the Illinois Conference of Branches of the NAACP reported that it had the active support of 41 branches and also “that of all important state-wide Negro organizations.”<sup>98</sup> But by 1959, political scientist Herbert Garfinckel, as part of a thorough study of black political organizing, remarked that black civil rights groups in Illinois had grown “astonishingly apathetic” about FEPC. Instead, “[w]hite liberal, labor, Catholic, Protestant, and, predominantly, Jewish groups provided the supporting base.”<sup>99</sup> Even in Pennsylvania, where Republicans and Democrats fought tooth and nail for black votes, FEPC lobbying efforts could be strangely white affairs. At the height of the drive for fair employment in Pennsylvania in 1954, Clarence Mitchell, then serving as Labor Secretary of the NAACP, noted with bewilderment that a delegation traveling to Harrisburg to press the governor for action on fair employment did not include among its number a single black representative.<sup>100</sup> Once upon a time, of course, this had been by design. Early discussions within the NAACP about how to initiate state-level campaigns in the 1940s explicitly addressed the wisdom of overtly black leadership. By the late 1950s, however, the lack of black participation reflected something more. Indeed, FEPC in Illinois and other holdout states had become an odd form of elite politics. FEPC campaigns were supported by old guard civil rights leaders to be sure, but with the laboring oar held most firmly by a distractible mix of the politically-oriented state central bodies of industrial unions, their eyes firmly fixed on winning black votes, and a range of mostly white civic groups interested in “inter-group relations.”

Likewise, patience and interest among the more militant civil rights rank-and-file—already in short supply—was draining away in favor of a different vision. A May 1949 NAACP news release contained more than a whiff of the battles to come when, after complaining about SCAD delays in processing a case involving black seamen, it announced that “[s]erious doubt is being cast upon the wisdom of relying solely upon the machinery of the Commission for the settlement of discrimination cases.”<sup>101</sup> The release referenced the possibility of “picketing ships refusing to employ Negroes,” and warned that further delay would leave “no alternative” but to pursue “the old methods which were proved effective prior to the adoption of the law which you administer.”<sup>102</sup> Such warnings became reality in 1960 in Chicago, Detroit, and Philadelphia when civil rights groups, led by a revived Congress on Racial Equality,

staged the first of what would soon become a wave of “direct action” protests, reviving the strategy pioneered by the NAACP and Urban League in the pre-FEPC era of the 1930s and 1940s.<sup>103</sup> By then, even the efforts of the more moderate NAACP to nudge New York’s SCAD, which had contributed to the agency’s marquee win in the Battery Tunnel “hogs” case back in 1948, had started to trail off. As head of LDF, Thurgood Marshall had allowed Marian Wynn Perry to pursue the hogs case back in the 1948 because of its proximity to LDF headquarters, and also to get FEPC laws off on the right track. But Marshall remained skeptical of the cases because they would not create substantial new legal precedent and thus could not benefit large numbers of African-Americans. All one could do after winning an employment case, he noted, was “take another case.”<sup>104</sup> As a result, a proposed NAACP project that would have resulted in the hiring of a full-time person whose sole job would be to “stimulate interest in the [SCAD] to aid people in getting their complaints filed” withered on the vine.<sup>105</sup>

The final piece of the political and legal landscape as Illinois moved toward enacting its own fair employment law in 1961 was a shift in the shape and tenor of the opposition to FEPC. Three related trends marked the change. The first of these—traced in detail in Chapter Four’s account of the legislative drives to enact fair employment laws in Pennsylvania and Michigan—was a steady maturation of the arguments leveled both inside and outside legislative halls and their convergence upon unaccountable and unchecked administrative power as the principal line of attack on FEPC.<sup>106</sup> As the 1950s unfolded, the scurrilous charges made in New York and elsewhere that FEPC had been “conceived in the halls of the Communist party”<sup>107</sup> or, as in New York, that FEPC would bring about a “Hitlerian rule of quotas”<sup>108</sup> had given way to a less dramatic, but perhaps more effective, set of claims about “bureaucracy without end,” “government by bureau”<sup>109</sup> that was “remote from public control,”<sup>110</sup> and the demise of the jury system—and, with it, the entire “framework of American justice.”<sup>111</sup> The second, whether cause or consequence of the first, was tightening cohesion within Republican ranks in opposition to FEPC. The third was a steady increase in the willingness of the regulated community—employers, employment agencies, and unions—to push back against specific FEPC enforcement efforts.

Tightening cohesion among Republican legislators was most evident in legislative battles over FEPC budgetary allocations. The clearest example came in Ohio, where a wave election in 1958 and sudden supermajority Democratic control had yielded a super-strong FEPC design and a generous budget to match. But the agency quickly fell upon hard times when Republicans swept back into office in 1962 and Governor James Rhodes appointed as one of three commissioners the principal opposition leader during the successful 1959 legislative campaign. With Republicans enjoying unified control until 1970,<sup>112</sup> civil rights groups found little support for their efforts to spur more aggressive implementation. Worse, the Commission saw its

budget slashed to the bone. As reflected in Table 1's summary of FEPC budget allocations as of 1965, Republican control of government left the Commission with just \$200,000 per year to perform its work, a level of resources that was lower than even Michigan's under-powered and perennially embattled FEPC and more on par with FEPCs in late-enacting, racially conservative states like Indiana and Kentucky. New York's SCAD, too, faced budget cuts,<sup>113</sup> leading even critics of the agency's approach to complain that Republican members of the New York Assembly were "quietly knifing SCAD."<sup>114</sup> As Republicans increasingly cast their lot with American business—and as the last of the Cramtons, the Michigan state legislator who had emotionally mourned the passing of the "Party of Lincoln" during floor debate back in 1952, moving on or marginalized—a strong FEPC design was plainly a necessary, though not a sufficient, condition for effective enforcement going forward.<sup>115</sup>

Just as important was growing combativeness by employers, employment agencies, and unions. This new resolve, when paired with growing pressure from civil rights groups demanding more aggressive regulatory action, meant a steady rise in cases brought to public hearings when conciliation efforts stalled. More public hearings, in turn, meant more judicial review proceedings sitting in judgment of the FEPCs' structure and decision-making. With positions hardening on both sides and stakeholders increasingly willing to risk public scrutiny of employment disputes, FEPC operations spilled out into public view in forms other than the carefully curated examples of successful case resolutions that populated FEPC press releases and annual reports throughout the 1940s and 1950s.

By and large, judicial review proceedings yielded clear wins for the FEPCs. Most state courts fell into line behind federal-level case law in blessing several of the core components of modern administrative law. Thus, in a 1954 case, the New York Court of Appeals, in upholding an order prohibiting a private employment agency from making inquiries about applicants' national origin or race or furnishing such information to employers in making referrals, made clear that it would not second-guess the agency's factual determinations.<sup>116</sup> "One intent on violating the Law Against Discrimination cannot be expected," the Court wrote in a celebrated passage, "to declare or announce his purpose. Far more likely is it that he will pursue his discriminatory practices in ways that are devious, by methods subtle and elusive."<sup>117</sup> Giving full weight to the SLAD's "substantial evidence" standard of judicial review, the Court looked only to see whether the evidence upon which the agency relied was sufficiently "substantial" that "the existence of the fact found may be drawn reasonably."<sup>118</sup> Perhaps more importantly, the Court blessed the SCAD's cease-and-desist order against the charge that the order, by prohibiting inquiries or disclosure of identities other than national origin, swept beyond the underlying complaint filed in the case. Citing, among other things, federal case law reviewing the actions of the Federal Trade Commission and National Labor Relations Board, the Court held that

SCAD had “wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices in question, ‘and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.’”<sup>119</sup> Other courts followed suit.<sup>120</sup>

On some issues, however, the emerging body of case law interpreting state FEPC laws was more of a mixed bag. An example was the question of whether the provisions of FEPC laws subjecting agency decisions to *de novo* review meant a full-scale trial proceeding with witnesses, documentary admissions, and the like, or whether it instead meant something akin to appellate review such that a reviewing court, while owing little or no deference to the agency’s fact-findings, would nonetheless confine itself to the record the agency had assembled. An early instance came in Minnesota just weeks after the state’s FEPC law became effective in 1955 when a black busboy at a Minneapolis restaurant filed a complaint asserting discrimination in the café’s failure to promote him to a higher-paying position as a waiter.<sup>121</sup> When a public hearing returned a finding of discrimination, the restaurant sought judicial review, and the state trial court, after taking evidence and hearing witnesses at a two-day trial, reversed the Board’s decision, finding that the restaurant’s action was “consistent either with discrimination or with other motives, and thus fails affirmatively to prove discrimination.”<sup>122</sup> The court’s analysis concluded with an evangelical flourish that underscored the importance of otherwise arcane design details:

[W]hile it is easy to be against sin, it is hard to know whether or not one has in fact caught a sinner. Until an infallible test is devised, the Court will continue to do its duty as it sees it, and will continue to require that findings that anyone has done unlawful acts, be based upon evidence, and not upon speculation, conjecture or even righteous indignation against a particular class of unlawful acts.<sup>123</sup>

After months of legal proceedings and full-scale briefing before the Minnesota Supreme Court, the Minnesota FEPC settled the case rather than risk an even higher-profile litigation loss.<sup>124</sup>

A more agency-friendly line, however, was taken a few years later in Michigan in a pair of cases asking whether a party who sought judicial review of an agency decision was entitled to a jury trial under the Michigan FEPC Act’s requirement that appeals be “tried *de novo*.”<sup>125</sup> In a 1961 decision involving an allegation of discrimination against the Wayne County Civil Service Commission, the Michigan Supreme Court answered that question in the negative. “To set up such an elaborate machinery to perform a specific administrative and quasi-judicial function,” the Court reasoned, “and then to provide for trial *de novo* and a hearing and finding of fact before

a jury in circuit court, builds an irreconcilable contradiction into the framework of the statute.”<sup>126</sup> Instead of a full-blown trial, whether before a jury or otherwise, judicial review in Michigan would from then on be a surprisingly deferential version of “certiorari review,” meaning review “for legal error” and to ensure that the agency’s fact-findings were not “arbitrary.”<sup>127</sup>

Potentially more significant was a line of decisions that went to core questions about the degree of discretion vested in FEPCs in their handling of complaints, and also the degree of formality FEPC administrators must observe in doing so. An early example came in a 1950 case raising the question whether the Connecticut Civil Rights Commission had erred in finding discrimination in a New Haven restaurant’s refusal to hire a black applicant.<sup>128</sup> One of the questions before the trial court was whether the complainant was a necessary party to the appeal proceeding and so might enjoy procedural rights during its conduct. The court brushed aside any such notion, declaring that the FEPC proceedings were “essentially inquisitorial” and so lacked “the elements of a judicial or quasi-judicial proceeding in which parties litigate adverse interests before an impartial tribunal.”<sup>129</sup> Accordingly, while a complainant could “set the machinery of the statute in motion,” he was afforded “no part in its subsequent operation” and would be given “no recourse to the courts to assert his claims.”<sup>130</sup> While the decision then carefully noted that a complainant could not be bound by a court’s decision (and so could still seek relief in a separate lawsuit),<sup>131</sup> this was still a striking degree of agency discretion and control over the enforcement process.<sup>132</sup>

Other court decisions, however, were not so protective of agency discretion in handling—and disposing of—complaints. A 1958 case that arose out of the New York SCAD’s efforts to integrate airlines raised the question whether the SCAD’s dismissal of a complaint for a lack of probable cause was appealable by the complainant.<sup>133</sup> In a short per curiam opinion, the New York Court of Appeals held SCAD dismissals fully reviewable,<sup>134</sup> thus opening up commissioner decision-making to judicial scrutiny in a huge number of cases. The bureaucratic implications of this decision became clear a couple of years later in the 1961 decision of the Michigan Supreme Court, noted previously, involving charges of discrimination against Wayne County. Having rejected the claim that the Michigan FEPC Act’s judicial review provisions mandated a full-blown jury trial and substituting instead a surprisingly deferential review standard, the Michigan Supreme Court proceeded to ask whether the appeal rights contained within the statute allowed a complainant to demand to present evidence on a written record.<sup>135</sup> The decision thus presaged a position that federal courts would arrive at in the 1970s: Not only were FEPC dismissals subject to judicial review, but the very possibility of judicial review meant that the agency was required to maintain something like a formal record of its decision-making.<sup>136</sup>

None of this would have mattered, or perhaps not mattered as much, in a world in which the FEPCs emphasized their convening power, gathering and weighing

interests on an industry-wide basis and relying upon coercive enforcement proceedings only as a last resort. But for FEPCs already buffeted by the hardening of positions on either side of the employer-employee divide, the related spike in public hearings, a more cohesive and disciplined line of political attack, and the budgetary predations of Republican-controlled state legislatures, the crystallizing body of case law imposing costly procedural obligations in processing complaints presented a substantial operational threat. Born into an “era of deference” characterized by relatively weak legal constraints on agency action,<sup>137</sup> the FEPCs were more and more finding themselves in a crush of case-level legal proceedings raising a host of new due process and related arguments that tightened the political and budgetary squeeze.

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Such were the political and legal dynamics in July 1961, when Governor Otto Kerner signed the Illinois FEPC Act into law. But the celebrations occasioned by the law’s passage after a decade-plus of failed legislative efforts quickly faded when Illinois legislators fired a shot across the agency’s bow, moving to block two of Kerner’s nominees to the Commission. Confirmation struggles of this sort were virtually unheard of in Illinois politics, as no appointee had been rejected in eleven years and only three appointees blocked in the past thirty.<sup>138</sup> The result was a full-scale political crisis that only deepened the partisan tensions that were increasingly infusing FEPC in Illinois and beyond.<sup>139</sup>

The main charge against the nominees was association with organizations tarred as subversive during the 1950s in the McCarthy-ist heyday of the House Committee on Un-American Activities (HUAC). For Ralph Helstein, a white Jewish labor leader and hard-charging president of the left-wing United Packinghouse Workers of America (UPWA), the bill of particulars took the form of a long list of UPWA associates who had invoked the Fifth Amendment and refused to answer questions during HUAC hearings.<sup>140</sup> For Earl Dickerson, a World War I veteran, prominent civil rights attorney (who argued the landmark civil procedure case *Hansberry v. Lee* before the United States Supreme Court), member of FDR’s COFEP, and general counsel of the largest black-owned insurance company in the North, the main charge was service as president of the National Lawyer’s Guild, another frequent object of HUAC attentions.<sup>141</sup> During the confirmation hearings in Springfield, the line was that these leftist associations suggested a lack of judgment and called into question both men’s fitness for a role piloting a highly sensitive new agency. Sitting either of them, a *Chicago Tribune* editorial noted, would thus be akin to launching the new FEPC in a “leaky boat.”

But the surprising presence among the fiercest confirmation opponents of legislators such as John Meyer, one of the FEPC Act’s own sponsors and part of a small

group of Republicans who had crossed the aisle to make enactment possible, suggested that there was something else behind the confirmation furor: Kerner's slate of nominees had violated what many saw as an "implicit compromise" at enactment as to how implementation of the Act would proceed.<sup>142</sup> The first point of the alleged compromise was that the Illinois FEPC would neither possess nor use initiatory powers of the sort that strong-FEPC states had vested in their agencies. The second was that complainants and respondents should be treated as adversaries before the commission, which would maintain a position of studied neutrality in passively performing its adjudicatory role. Never should the Illinois FEPC serve, as the Connecticut trial court in the *Draper Dairy* case had put it, as an "inquisitorial" body or, to use another contemporary label, a "mission agency." A third was that the Illinois FEPC should not be active or aggressive in its enforcement approach, and that it would leave even the educative function of achieving purely voluntary compliance with the new law to Illinois business associations. The choice of the forceful and envelope-pushing Helstein and Dickerson, it could be argued, risked deviation from each of these compromise terms.

Though not made explicit in the text of the Illinois FEPC Act, the terms of the alleged compromise were not hard to glimpse in the Act's legislative history. Indeed, many believed that Meyer and the four other Republicans whose support sealed enactment had turned in favor of FEPC only after a series of weakening amendments, followed immediately by the testimony of Charles Percy, President of the Bell & Howell Company and soon-to-be Illinois gubernatorial candidate and, eventually, United States Senator. Speaking before the Senate Industrial Affairs Committee, Percy assured legislative holdouts that "in practically all cases (and this is shown by experience in those states which have Fair Employment Practices Commissions) persuasion and education by government have sufficed to deal with those problems that have arisen under the law."<sup>143</sup> Even as Governor Kerner had signed the FEPC Act into law, he had hewed to a similar and now-standard script about FEPC as a soft regulatory measure: "It is my expectation that the greatest achievement of a fair employment practices commission in Illinois will be to make unnecessary any of the enforcement provisions provided in the statute."<sup>144</sup> In states like New York, Pennsylvania, and Michigan, the evolution of FEPC as an engine of conciliation and a case-level "nudge" had emerged over time. In Illinois, by contrast, it was arguably baked into the law from the start.

Whether it was rank red-baiting or non-conformance to an implicit compromise that drove the opposition to Helstein and Dickerson, the efforts from within the fair employment coalition to salvage the nominations were not enough,<sup>145</sup> and both nominees were voted down—Dickerson by an agonizing three votes shy of the 30 needed, with all Senate Democrats voting in favor and all Republicans voting against or abstaining.<sup>146</sup> But the confirmation furor also very nearly claimed a further casualty

when Kerner's nominee as chairperson of the FEPC, Charles Gray, publicly declared the blocking of Helstein and Dickerson a "travesty." The committee responded by hauling Gray back to Springfield for an unprecedented second confirmation hearing.<sup>147</sup> Born on a farm in rural Iroquois County, Illinois, Gray served in the Pacific in the Navy during World War II, then used the G.I. Bill to do doctoral coursework in economics before taking a series of jobs, one as a Director at the University of Chicago's Industrial Relations Center, before being named Director of Industrial Relations at Chicago electronics manufacturer Bell & Howell Co.<sup>148</sup> Gray did not have, as newspaper reports repeatedly noted, any prior affiliation with "anti-discrimination groups."<sup>149</sup> But he did have a pugnacious side. Indeed, Gray mostly held his ground upon his second visit to Springfield, noting in response to harsh questioning about his use of the term "travesty" that the next time he would be more "selective in my language—but not less expressive."<sup>150</sup> At the same time, Gray also told legislators perhaps what they most wanted to hear by carefully toeing the "Dewey method" line. Conciliation, Gray announced, was the "keynote" to successful implementation, and "[m]ore than 90% of all complaints and charges coming before a Fair Employment Practices Commission are settled privately between rational men of good faith."<sup>151</sup> His canned testimony made a further and even more speculative claim: "Those states in which the educational and persuasive approach to fair employment has been followed have had the greatest and most lasting successes."<sup>152</sup> Gray's confirmation was ultimately secured upon the intercession of Gray's boss at Bell & Howell, Charles Percy, whose testimony months earlier had helped swing the legislative process in favor of the FEPC Act. Nonetheless, it was plain to anyone who witnessed Gray's second turn before the committee that his tenure as chairperson was to start from a position of weakness.<sup>153</sup>

The other commissioners who survived the confirmation skirmish reflected the big-tent politics of FEPC and gave further reason to believe that moderation would be the watchword upon implementation. Two of Kerner's original nominees, both "swiftly approved,"<sup>154</sup> perfectly represented the dozens of civic organizations that formed the restrained, "inter-group relations" wing of the FEPC movement. One was Robert Meyers, a white Jewish Springfield attorney then serving as vice chair of the Springfield Commission on Human Relations, a toothless municipal-level FEPC, and a member of the national committee of the Anti-Defamation League. The other was Helen Cleary Foreman, a Republican from downstate Jacksonville. Though holding college and graduate degrees and enjoying status as something of a downstate blueblood—Foreman's brother Edward Cleary was a law professor who helped draft the Federal Rules of Evidence—she followed the path that many other upper middle class women did at the time: taught school, helped organize Girl Scouts and PTA activities, then gradually became involved in the League of Women Voters at the local, state, and ultimately national levels.<sup>155</sup> Appointed by Democratic governor Henry Horner to the Illinois Commission to Investigate the Living Conditions of the Urban

Colored Population in 1940, she also served from 1950 to 1961 on the toothless Illinois Commission on Human Relations, created in 1947 to stave off a full-scale FEPC.<sup>156</sup> Among the five commissioners, none could claim more sustained involvement in the decades-long fight to enact a job discrimination law in Illinois than Foreman.

The pair of new nominees chosen to replace Helstein and Dickerson similarly signaled a more moderate approach. George Seaton, an Illinois Bell Telephone executive, deepened the representation of business beyond Gray's position as chair. Seaton's nomination also meant that the sole representative of labor and the African-American community, bundled into a single new nominee, would be Jack Kemp, President of Local 189 of the Service Employees' International Union of the AFL-CIO. Kemp, whose physically imposing and combative style earned him the nickname "the hammer," was seen as a "black broker" within the Chicago machine who had built up a power base within his union local and so could "speak[] and fight[] for black rights inside the circles of power."<sup>157</sup> However, his outlook and his power base were both decidedly local, and Kemp plainly lacked the wider status or influence of Helstein or Dickerson within the ranks of organized labor or the civil rights community.

In the wake of the confirmation furor, it was this group of five that turned to the work of implementing an FEPC that, already hamstrung with the weakest complement of powers of any large industrial state, had moved to the "storm center" of the state's politics even before it opened its doors.<sup>158</sup>

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"Standing up" an agency—bureaucratic-speak for getting a newly minted agency up and running—is a heady task under the best of circumstances. But the confirmation storm that Gray, Foreman, and the other commissioners weathered was surely a factor in their especially light touch as agency operations began in early 1962. An initial order of business was to promulgate "provisional" rules and regulations that were then to be ventilated during public hearings in Chicago and Springfield prior to final adoption,<sup>159</sup> and the new commissioners wasted no time in falling into line behind the core of the alleged compromise. After a public and celebratory start at the agency's inaugural meeting, the commissioners ejected the press and, entering into "executive session," unanimously concluded that the commission would "do a disservice to the complainant, the respondent and to the law if Commission members were to act as investigators and then act as 'judges' on the same case." This was true, the minutes reflect, "[d]espite the fact that the law permits such a procedure."<sup>160</sup> It was also unanimously agreed that the commission "should move slowly rather than swiftly in order to assure a firm basis for present and future action and in order to assure that no improper or inappropriate decisions are arrived at under pressure."<sup>161</sup> A final and unanimous resolution called for regulations establishing that conciliations would be

entirely confidential—not just the details of agreements, but also the identities of respondents who entered into the process at all.<sup>162</sup> The result was that the bulletins and annual reports put out by the agency would present only stylized examples of cases with an accompanying assurance that the disputes presented were, as the Commission put it in a typical framing, “real and typify many resolved in the past year.”<sup>163</sup> Here, then, was a clear break from states like Massachusetts and Connecticut, where disclosure of a respondent’s identity and conciliation terms was left to the discretion of commissioners and could thus provide an additional source of agency leverage.<sup>164</sup>

Subsequent meetings deepened the new agency’s decidedly cautious approach. The Commission agreed, for instance, that it would “not issue the kind of detailed regulations on preemployment inquiries, employment application blanks, and classified advertising that has been customary in other states.” Instead, it was agreed that the Commission would issue “a general statement of practices.”<sup>165</sup> Pressed in person to reconsider its decision during a visit by a delegation from the American Jewish Congress and Anti-Defamation League, the commissioners held fast, noting that the new FEPC would not regulate “petty practices,” and that highly specific prohibitions or a “list of forbidden items” of the sort the delegation was urging would amount to unfair “harassment” of employers.<sup>166</sup> The Commission also pointedly sent Joseph Minsky, the commission’s “technical advisor” and, along with Commissioner Meyers, the only lawyer within the agency, back to the drawing board in a case in which Minsky had gone beyond the matter raised by the complainant. “It was agreed by the Commission,” the minutes note, “that it is not in the province of the Commission to go substantially beyond the matter raised by the complainant and that the Commission, in fact, should not address itself to any question other than whether an unfair employment practice had taken place.”<sup>167</sup> Finally, a clear decision was made to carefully husband the agency’s political capital, with Gray reporting in December 1962 that he was not ready to request initiatory power from the Illinois legislature.<sup>168</sup> As an extension, and in an abundance of caution, the Commission carefully avoided any kind of a compliance or other “backslider” program, lest it be seen as going beyond the four corners of individual complaints and end-running the Commission’s lack of initiatory powers.<sup>169</sup>

Even the raw regulatory output of the agency bespoke a certain degree of caution, though the public view might well have been different. The FEPC’s org-chart grew steadily and, by 1963, listed seven full-time staff.<sup>170</sup> The FEPC also moved surprisingly quickly on the enforcement front, holding its first public hearing within six months of opening its doors and, after another three months, noticing five more cases for hearing—more than New York’s SCAD held in its first ten years of operation.<sup>171</sup> However, careful examination of the Illinois FEPC’s output reveals the same pattern of many of the other more cautious FEPCs: a heavy focus on the service industry—department store clerks, airline flight attendants, and the like<sup>172</sup>—with far

fewer complaints filed against the large industrial concerns and the craft unions that constituted the guts of the Illinois industrial order, and far less commission attention paid to the harder questions raised by discrimination within those sectors. It was also the case that only two of the cases the Commission brought to a public hearing involved a private employer,<sup>173</sup> and one of these seemed a safe bet for a gun-shy agency, as the complainant was not black but rather a white female typist who alleged discharge from a Chicago branch of the Michigan Avenue National Bank in retaliation for “advocating the hiring of Negroes.”<sup>174</sup>

Instead, the Illinois FEPC appeared to reserve its most hard-charging actions for public sector cases implicating the Commission’s relationship to other parts of Illinois government. An early example came just six months into implementation when the Commission set a public hearing in a headline-grabbing case brought by a black junior college teacher candidate claiming discrimination by the Chicago Board of Education. When the Commission’s jurisdiction over municipal agencies was questioned, the Commission, over the objection of the Attorney General, held that it could take the case unless and until a court held otherwise, and then proceeded to sit on a hearing examiner’s finding of discrimination for more than a year until the Illinois legislature amended the law in its favor.<sup>175</sup> This pattern of aggressive action toward public respondents, with kid gloves reserved for dealings with private ones, may have reflected a deliberate strategy by Gray and his fellow commissioners to build trust and legitimacy among various stakeholders and constituencies. Whether or not this was its intention, the Commission was rewarded—and not just with a legislative expansion of its jurisdiction to include state agencies. The year 1963 also brought a substantial increase in the agency’s budgetary allotment, from \$100,000 to \$150,000.<sup>176</sup> In April 1963, when the United States Supreme Court handed down its decision in *Colorado Anti-Discrimination Commission v. Continental Airlines*<sup>177</sup> upholding the jurisdiction of state FEPCs over interstate businesses, the Illinois FEPC was flying high.

With the arrival of summer 1963, however, a pair of developments jolted the agency from this happy trajectory. The first was a sudden quickening of the civil rights movement. Perhaps most famously, that August featured the historic March on Washington and Martin Luther King’s iconic “I Have a Dream” speech. But that summer also brought what activists and pundits alike referred to at the time as the “Negro Revolt of 1963,”<sup>178</sup> shattering the ostensible racial harmony of the North. At one level, the revolt was just an expansion of the direct-action protests that had begun to percolate in 1960, with CORE- and NAACP-led pickets outside chain stores such as Woolworth’s and Kress in Detroit, Chicago, and Philadelphia, among many others.<sup>179</sup> But the revolt also brought a newly militant edge to the movement, as civil rights groups of all stripes unpacked heartbreaking images of police abuse against peaceful protestors in places like Birmingham, Alabama, and underwent wrenching internal

debates, edging the movement as a whole away from nonviolence and toward something that sounded as much in self-defense and self-determination.<sup>180</sup>

While northern protests had for the most part remained free of violence as the “revolt” ramped up throughout the spring, that relatively peaceful state of affairs ended in Chicago in mid-May when nearly three thousand black teenagers fought police with bricks and bottles in protest of police violence.<sup>181</sup> The unrest soon spread to other cities within Illinois, including Alton, East St. Louis, and Peoria.<sup>182</sup> With even seasoned activists surprised by the “frightening suddenness” of the new militancy among civil rights groups across the urban north,<sup>183</sup> the commissioners of the Illinois FEPC cast about for the right response. After substantial discussion, they decided to engage with protest groups in the four Illinois cities that had experienced protests and attempt to channel their energies into what they saw as more productive avenues, including the filing of formal complaints with the Illinois FEPC. But upon reaching out to those groups, the reply from the Illinois State Conference of NAACP Branches was, in keeping with the sharpening edge of black militancy, swift and dismissive. “I have been instructed. . . to inform you,” the Conference’s president noted in a letter, “that we have no confidence in the present policy of this State Commission.”<sup>184</sup> “[W]e further believe,” he continued, “you and the members of your commission have no authority to attempt to interfere in the affairs of our organization or any other. . . . [R]egretfully, I am informing you the Illinois State Conference will solve this problem of discrimination in employment in its own manner.”<sup>185</sup>

The second and related development was of a piece, at least initially, with the NAACP State Conference’s curt rejection of any engagement by the Illinois FEPC: the decision by the Negro American Labor Council to initiate a direct-action campaign against prominent Chicago-area electronics manufacturer Motorola.<sup>186</sup> The move was not without controversy within the Illinois civil rights community, however. Indeed, the NALC began to plan in earnest only after unsuccessfully pitching a Motorola campaign to the Coordinating Council of Community Organizations, a broad and quarrelsome coalition of Chicago-area groups that included under its umbrella more militant groups like CORE, the Chicago Area Friends of SNCC, and the Negro American Labor Council, along with more moderate ones like the Chicago Catholic Interracial Council and the Chicago Urban League. When the more moderate groups within the OCCO balked at the idea of a high-profile direct-action campaign—particularly the Urban League, which had been quietly working with Motorola for some time, though without much to show for it—NALC decided to go it alone.

The NALC saw Motorola as a worthy and inviting target, for the company satisfied at least two key criteria. First, a “gate census”—a practice in which direct-action planners, often white college students so as to attract less attention, sat outside factory gates and tallied up black employees entering or exiting—had revealed that Motorola employed a virtually lily-white workforce—perhaps as few as 50 African-

Americans among employees numbering more than 10,000.<sup>187</sup> Second, Motorola was thought doubly vulnerable to adverse publicity because of its status as both a defense contractor supplying military equipment to the federal government at significant taxpayer expense and also as a manufacturer of consumer products with a well-established brand.<sup>188</sup> As to the latter, it was generally understood that employers who sold services directly to the general public were easier to persuade than component manufacturers selling parts to be incorporated into the products other companies finished and marketed.<sup>189</sup> As a bonus, NALC learned that targeting Motorola brought with it ready-made examples of Motorola's discriminatory hiring practices in the form of roughly two-dozen African-Americans who, despite having completed government-approved Manpower Development and Training Administrative (MDTA) courses, had been refused employment by Motorola. Soon six of these individuals filed complaints with the Illinois FEPC. Among them was Leon Myart.

A public direct-action campaign against Motorola never happened. Instead, after the NALC served a series of demands on Motorola—among them a starkly quota-based one insisting that Motorola “employ 1,000 Negroes by August 1, 1964, and at least 100 Negroes by October 1, 1963”<sup>190</sup>—and threatened a picket and demonstration at Motorola's downtown showroom, the other members of the CCCO repeatedly prevailed upon the NALC planners to postpone any outward action and instead brought the NALC into a series of meetings between Motorola officials and the Urban League.<sup>191</sup> Those meetings stretched into September and featured discussion of a wide range of proposed measures, among them Motorola's establishment of an employment office on Chicago's South Side, its placement of want ads in the black press, a public statement that the discussions were taking place and that Motorola was committed to fair employment, and a company-sponsored training program akin to those developed by Chicago-based retailer Carson Pirie Scott and Shell Oil Co. to identify and train minority applicants. A final idea came unexpectedly from Motorola itself: the possibility of using a test procedure to identify applicants who, without relevant work experience but solid IQ scores, could qualify for on-the-job training and then employment. However, the meetings, or at least NALC's involvement in them, abruptly stopped soon after the complaints filed by Myart and the six women began to gain traction within the Illinois FEPC, decisively shifting the locus of the action. Whether it was the NALC planners, the Urban League, or the complainants themselves who drove the decision to file complaints—and here the evidence is not conclusive<sup>192</sup>—the campaign against Motorola directly engaged the new FEPC in a way that the NAACP State Conference, in its conduct of direct-action protests elsewhere in Illinois, had stoutly rejected.

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The core allegations in the complaint Leon Myart filed on July 29, 1963, were short and typical for the genre: "I applied for employment on the above date, took and passed the company test. They hired whites during this period. I believe that the reason I was not hired was because of racial discrimination. The company is widely known for racially discriminatory hiring practices."<sup>193</sup> But Myart the complainant was decidedly different from the carefully selected complainants civil rights groups often placed before newly established FEPCs throughout the late 1940s and 1950s, chosen for their unimpeachable qualifications, unbroken employment records, and intact families that brought compelling breadwinner obligations, or the similarly credentialed individuals that the NAACP, Urban League, and other old guard groups had negotiated into jobs in the pre-FEPC era. On the plus side, Myart served in Korea, then returned state-side and took classes as part of the G.I. Bill in an effort to "better himself" and "lift himself up from his bootstraps," as his lawyer put it.<sup>194</sup> But his employment history had a worrying "work gap," as trial testimony would establish, and he also had a criminal record after an arrest for sodomy in Columbus, Georgia while stationed at nearby Fort Benning. At the time Myart applied for a job with Motorola, he was living alone in the back of his brother's "dimly lit," "cluttered," and barely profitable South Side television repair shop.<sup>195</sup> In short, Myart did not quite fit the usual mold.

None of this seemed to faze the Commission. When Myart's complaint was combined with the six women who had filed complaints the same week, and then fortified further by the statements of an additional twenty-four women who had sat for the same MDTA training, some graduating atop the class but still refused employment by Motorola, the Commission was convinced that the company was not, in the words of Minsky, "giving equal employment opportunity to Negroes for routine production line jobs."<sup>196</sup> After investigation, the Commission determined that probable cause existed to support the allegations of Myart and five of the six women and moved to conciliate the disputes. A grand conciliation conference for the five women was calendared first but, when the day arrived, quickly imploded when Motorola appeared with a court reporter and demanded that a full transcript of the proceedings be made.<sup>197</sup> After heated debate, the demand was refused. The reason was that the Commission had, at the same time as its determination that it would not publicize the results of conciliation disputes save in stylized and anonymized ways, separately promulgated a regulation prohibiting stenographic reports or recordings during conciliation conferences in order to secure a free flow of communication and ensure that conferences would not devolve into pretrial depositions.<sup>198</sup> Unimpressed by these arguments, Motorola's lawyers stormed out and then failed to show up at all to the conciliation conference scheduled for Myart soon after.<sup>199</sup>

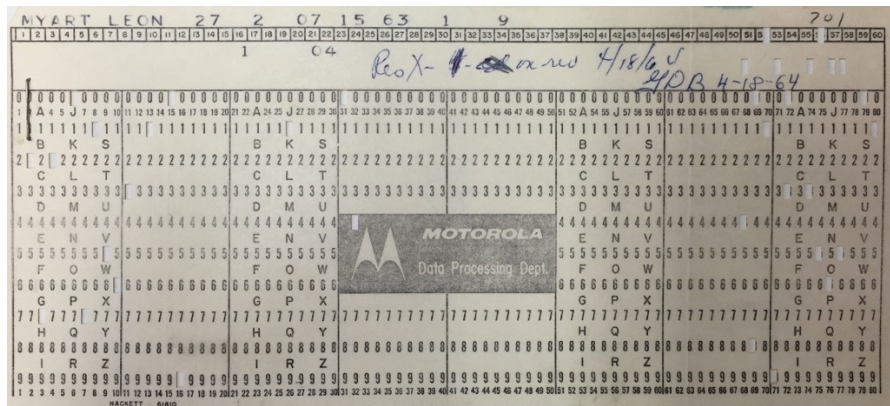
Motorola's defiance left the Commission no choice but to proceed immediately to a public hearing in both cases. But now it was Myart's case that moved more

quickly between the two—in fact, at warp speed by modern-day litigation standards—with full-scale trial hearings opening in late January 1964, just two months after the FEPC served Motorola with a formal complaint. On the first of two full days of proceedings, Myart’s recently retained lawyer<sup>200</sup>—a politically active African-American lawyer who would soon take a position on the Chicago Civil Service Commission and then, years later, be elected to the Illinois House<sup>201</sup>—walked Myart through the facts of the case before hearing examiner Robert Bryant, another black, Chicago-based lawyer. According to Myart, he had traveled to Motorola’s Franklin Park plant in the northwest suburbs in June 1963 and filled out an application for a job as an analyzer and phaser of televisions. He was given General Ability Test No. 10, a twenty-eight question multiple-choice test and perhaps the leading example at the time of short-form intelligence tests that corporate employers were increasingly using to screen job candidates.<sup>202</sup> Myart then sat for a brief interview. Barely 15 minutes after he arrived, Myart left Motorola’s offices without any indication as to whether he was hired or not. When he heard nothing, he filed a complaint with the Illinois FEPC.

In fairness, the two days of hearing testimony did not make Myart seem any more attractive as a job candidate. Testimony quickly spotlighted the gaps in his employment history and his status as a felon—though the latter was not likely known to Motorola at the time of its decision. But the hearing turned up other issues as well. Myart reportedly performed poorly in prior jobs: His former supervisor from a brief stint as a bellhop at the Chicagoan Hotel testified that Myart turned “arrogant” while working at the hotel.<sup>203</sup> He had made a hash of his written application in Motorola’s offices, leaving off key past employment and training, perhaps out of confusion and perhaps because there were not obvious blanks available to include it. And on cross-examination, Myart miserably failed to answer a series of technical questions from Motorola’s counsel relating to the position as an analyzer and phaser, mustering a correct answer to only one of the ten asked of him.<sup>204</sup>

The proceedings were tense, and Motorola repeatedly threatened to walk out, much the same as it had from the conciliation conference in the other case involving the five female wirers and solderers.<sup>205</sup> But the rest of the fireworks were reserved for issues relating to General Ability Test No. 10. Motorola contended that Myart had only managed a score of four on the test, below its cut-off of six points. In response, Myart contended that he had passed the test at Motorola’s offices. To prove it, Myart presented evidence that he had twice passed Test No. 10 when Minsky, the Commission’s technical adviser, and a professor from the Illinois Institute of Technology who had helped develop Test No. 10, administered it—though once only verbally—in the FEPC’s offices. The problem with Motorola’s claim was that it could not produce Myart’s actual test paper, but rather only an IBM punch-card on which a Motorola employee other than the one who had administered the test had recorded his score. The implication, played up repeatedly by Myart’s counsel, was that Motorola

had doctored the result, then conveniently failed to retain the original paper. But Bryant, from his perch as hearing examiner, showed interest in a further angle on Test No. 10, asking the ITT professor a series of tough questions about the possible racial effects of the test in light of “the generally low educational level of the masses of negroes.” When the expert declared that more studies of possible white-black “discrepancies” in test results were needed, Bryant then asked: “Would you say, Doctor, until that time, that [Test No. 10], as used and measured by you and your disciples, could be used regularly in excluding negroes from consideration?”<sup>206</sup>



*The IBM punchcard that Motorola used to record Myart's test score. Courtesy of Illinois State Archives.*

In March, after only a little more than a month of deliberation, Bryant issued his recommended decision, handing Myart an across-the-board win. The core finding was that Motorola had discriminated against Myart, but the path Bryant took to get there was somewhat circuitous. Bryant first seized on the circumstances and testimony surrounding Motorola's administration of the test, focusing on the fact that Motorola's sole witness at the hearing had neither given nor graded it.<sup>207</sup> Motorola's testimony was thus effectively hearsay, Bryant wrote, and so did not meet “legal requirements”—a cunning invocation of the Illinois FEPC Act's provision, surely meant to hinder plaintiffs and protect defendants, that the formal rules of evidence that applied in Illinois courts also applied in full to FEPC proceedings.<sup>208</sup> Bryant then made a finding that Myart had in fact passed Test No. 10 by drawing an adverse inference from Motorola's failure to produce the underlying test paper.<sup>209</sup> Lastly, Bryant leaned heavily on the finding of the Commission's charge report, issued prior to conciliation, that all 25 analyzers and phasers at Motorola were white, and rejected Motorola's representation that it had, in the weeks leading up to the hearing, hired several black workers into the position.<sup>210</sup> Taken together, Bryant concluded, these findings were enough to establish by a preponderance of the evidence that an unfair employment practice had been committed.<sup>211</sup>

Beyond this, however, Bryant's decision was something less than buttoned-down, and it also contained some stunning errors in judgment. At a key turn, Bryant declared that Test No. 10 placed minority test takers at a "competitive disadvantage" and did not "lend itself to equal opportunity to qualify for the hitherto culturally deprived and the disadvantaged groups." As authority, Bryant cited a book, *The Testing of Negro Intelligence*, that documented a persistent IQ gap between whites and blacks throughout the first half of the 20<sup>th</sup> century.<sup>212</sup> But there was a problem. As Motorola missed no opportunity to point out in the months to come, the book and also several other academic monographs that Bryant sprinkled throughout his decision to bolster various propositions had not been formally entered into evidence or even, for that matter, discussed at the hearing.<sup>213</sup> A second lapse in judgment was just as perplexing. At another key turn in the decision, Bryant openly editorialized about the obligations of employers to eradicate discrimination. "[P]ersonnel executives," he opined without drawing any explicit connection to the Illinois FEPC Act statutory or case law, had a "supreme responsibility to move positively to eradicate unfair employment practices" and "may have to establish in-plant training programs and employ the heretofore culturally deprived and disadvantaged persons as learners, placing them under such supervision that will enable them to achieve job success."<sup>214</sup> Finally, Bryant entered a cease-and-desist order that swept well beyond the four corners of Myart's complaint, requiring Motorola to cease and desist from the discrimination "complained of in this complaint" but also as to "all qualified applicants." Not content to stop there, Bryant ordered Motorola to "cease and desist from the use of Test No. 10 within 30 days" and, if an alternative test were to be used, to "adopt a test which shall reflect and equate inequalities and environmental factors among the disadvantaged and culturally deprived groups...."<sup>215</sup>

Bryant's decision, with its extended disquisition at the intersection of job testing, discrimination, and cultural disadvantage, was an instant sensation. Its language featured on editorial pages from coast to coast, including at the *New York Times*, where Pulitzer Prize-winning columnist Arthur Krock declared it "a direct threat to the fundamental rights of management to select employees [sic] on standards of efficiency and capability."<sup>216</sup> Issued into the teeth of the heated congressional debate over Title VII, Bryant's decision was also reproduced in full in the Congressional Record and would eventually inspire an amendment, offered in June 1964 by Senator John Tower of Texas and quickly dubbed the "Motorola Amendment," specifically approving the use of "professionally developed ability test[s]."<sup>217</sup> As dozens of accounts of Title VII's passage have since pointed out, the resulting back-and-forth among Title VII's supporters and opponents about the decision—though unhelpfully confusing Bryant for the Illinois FEPC itself—became the principal legislative history considered by the Supreme Court in *Griggs*.<sup>218</sup>

This federal-level firestorm, however, was quite restrained compared to the case's reception back in Illinois. The decision was front-page, above-the-fold news in all of Chicago's dailies. And in March 1964, the case took on a publicly participatory cast with the *Chicago Tribune's* publication of the full text of the version of Test No. 10 that Myart had taken at Motorola's offices. Thousands of telephone calls "flooded the switchboards" of both the *Tribune* and Motorola, as readers took the test on their own and sought to check their work.<sup>219</sup> But the *Tribune's* publication of the test did more than just whet the public's growing appetite for the case. By revealing the relative simplicity of many of the questions and then noting, perhaps wrongly, that Myart had never scored above a seven on the test,<sup>220</sup> the story played into Motorola's refrain both in legal proceedings and in the court of public opinion that Test No. 10 was a "low level screen" designed to select only for basic capacity and "trainability."

With public interest growing, Motorola sensed an opening and used Myart's case, and also the wirer and solderer cases still awaiting public hearing, to launch a relentless assault on the Illinois FEPC. One line of attack came in the wirer and solderer cases and was, by modern-day standards, gross overreach and downright odious: Motorola sought recusal, on grounds of racial bias, of the black hearing examiner, George Leighton, a former Assistant State Attorney General of Illinois, president of the Chicago chapter of the NAACP, and board member of the Chicago Bar Association.<sup>221</sup> "Can a Negro hearing examiner," Motorola's attorney Robert Nystrom publicly asked, "be insensitive to his own clients, who are Negroes?," not only suggesting racial bias, but also subtly implying a systematic client relationship between the FEPC and complainants.<sup>222</sup> The verdict in any such cases, Nystrom charged, was "predetermined" and a "travesty of justice."<sup>223</sup> This was particularly the case, Nystrom smugly noted, because the "extreme emotionalism in the Negro community," particularly among "the militants," was placing "extreme pressure" on civil rights leaders, who were "powerless not to yield to their followers."<sup>224</sup> The *Chicago Tribune*, now fully in Motorola's camp, piled on: Motorola was valiantly fighting "Negro Justice," screamed one newspaper headline.<sup>225</sup> The black *Chicago Defender* responded in kind with a blunt accusation: "Negro Revolt Used as Tool Against Leighton."<sup>226</sup>

Motorola also stepped up a line of attack it had begun back in January in the wirer and solderer cases when it had accused the Commission itself of prejudgment and bias and sought to subpoena the Commission's internal investigatory records in every case it had handled to that point in order to prove it. "Are they (the commissioners and staff) spending the taxpayers' money only for the complainant?" Motorola's attorney had asked hearing examiner Leighton at the time. "Are they (the commissioners) working for just one side or are they working for both sides?"<sup>227</sup> Now, Motorola went a step further in the Myart case, seeking to subpoena the employment records of Gray's employer, Bell & Howell, which Nystrom claimed had "less than 20

Negro workers" in its employ.<sup>228</sup> Motorola also leveled a direct personal attack on Gray himself, stating that, by taking temporary leave from Bell & Howell and serving as the FEPC chairman, Gray was "trying to serve two masters," and "hiding behind the skirts" of both institutions.<sup>229</sup> As with the recusal request against Leighton in the wirer and solderer cases, such tactics was more public relations stunt than legal strategy—and bore an ugly resemblance to efforts in 1945 to impugn FDR's war-time COFEP for its lack of black employees.

In the wirer and solderer cases, hearing examiner Leighton's response to Motorola's efforts to delegitimize the FEPC was measured and effective. "Vague and general allegations of bias," he wrote, "no matter how many fears they may inspire, do not furnish legal grounds for a change of judge or Hearing Examiner."<sup>230</sup> As to the subpoena request, Leighton coolly invoked federal case law establishing that parties to an adjudication before the National Labor Relations Board were not entitled to indiscriminate inspection of the agency's internal work product.<sup>231</sup> But the Commission's response to the attacks was less deft, and some of the Commission's actions, quickly seized upon by Motorola, reflected bad judgment by Gray and company, even if they were entirely legal as a matter of administrative law at the time. A good example was Gray's announcement via press release soon after the Bryant's recommended decision that the Commission would "seek expert advice and opinions on the matter of pre-employment testing in order that we will not be acting in a vacuum."<sup>232</sup> Ex parte contacts of this sort were not illegal and would likely not constitute violations of federal administrative law even today under the more demanding post-Watergate amendments to the Administrative Procedure Act.<sup>233</sup> But with the Commission soon to sit in review of a hearing examiner's decision that had relied on materials neither addressed nor entered into evidence at the initial hearing, Gray's announcement that the Commission would seek its own sources of information about testing outside the hearing process seemed an unwise doubling-down on Bryant's mistake.

Another possible misstep came when Gray, chafing at Motorola's broadsides and the unsympathetic press coverage, issued a lengthy press release and then circulated a publication containing much the same content to thousands of members of the Illinois Chamber of Commerce.<sup>234</sup> In it, Gray played up the role of the Commission, restating some of the chestnuts that had featured at his confirmation hearings, including that ninety percent of all cases could be resolved without resort to the agency's coercive powers. But he also made a series of specific factual claims—among them that Motorola had "refused to bring forward the test Myart took"<sup>235</sup>—that related to issues that the Commission would have to grapple with upon review of Bryant's decision, particularly given Bryant's drawing of an adverse inference from the lost test. This opened up the Commission to further claims of prejudgment, and Motorola eagerly seized the opportunity, calling for Gray's recusal.<sup>236</sup> The release also noted the

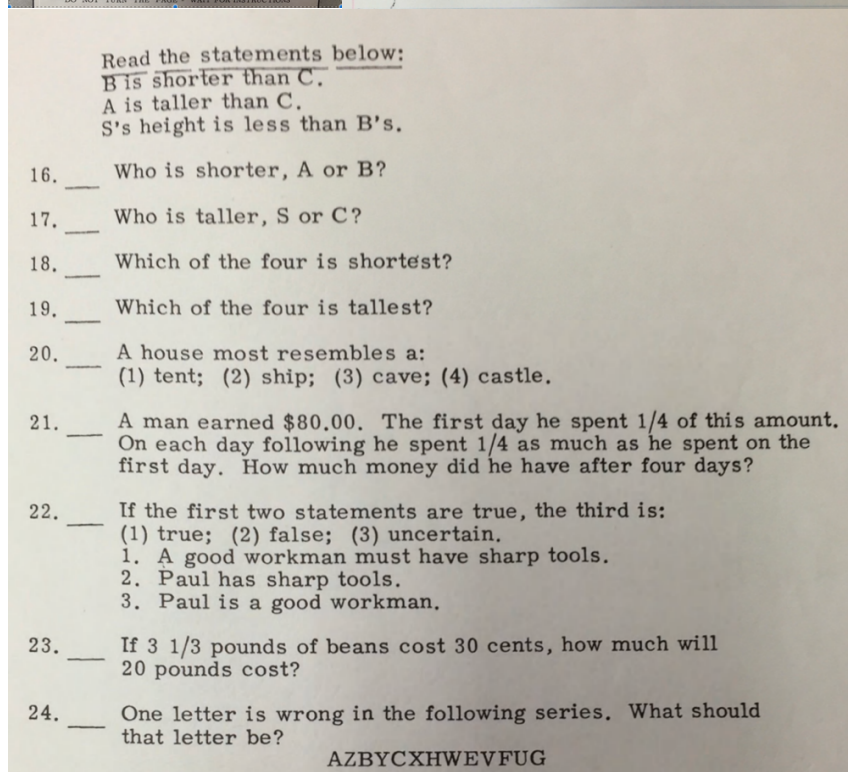
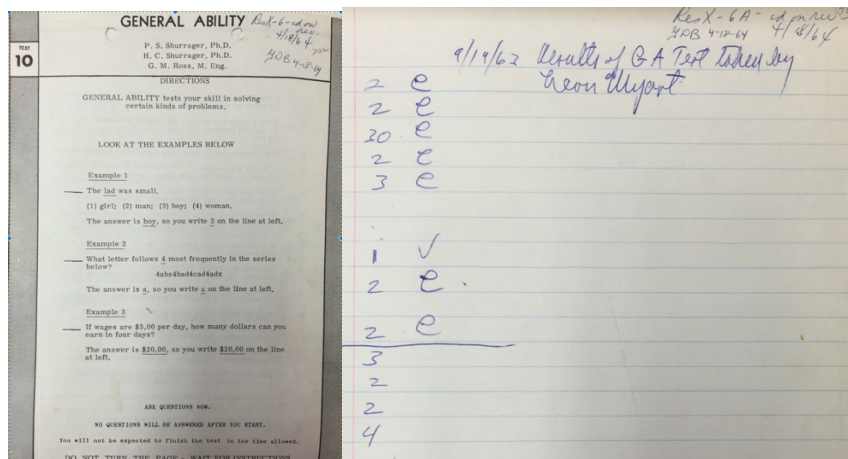
“explosive potential” of “the most pressing economic and social problem of our times,”<sup>237</sup> an odd piece of hyperbole for an agency whose role in the coming months would be to dispassionately sort out the competing claims in a particular case. The Commission’s release and publication, like Gray’s public announcement that the Commission would seek expert guidance on the science of testing, were plainly legal as part of the agency’s “educative” powers. But they also contained odd lapses for a Commission very much in the public eye.

A final piece of Motorola’s attack took a page from civil rights groups in other states in criticizing the privacy of the conciliation process. A representative example was a pamphlet titled “Motorola F.E.P.C. Case”—unsigned but almost certainly the work of Nystrom or others within his team—which harped on the secrecy of Commission proceedings and made repeated references to “secret meetings” and the “secret conciliation conference” in working its way up to a more bombastic reference to “star chamber proceedings.”<sup>238</sup> The result was an especially acute version of the squeeze that many other FEPCS had found themselves in throughout the 1950s when civil rights groups accused FEPCs of being more a “secret society than a state agency”<sup>239</sup> and called for publication of conciliated settlement outcomes. With Motorola now seeking full ventilation of the details of conciliation and settlement discussions, the agency was being hammered from two sides in a way that directly undermined a central pillar—and, for FEPC’s champions, a central virtue—of an agency approach: quiet, behind-the-scenes adjustment of disputes rooted in misunderstandings and “irrational” prejudices.

As Motorola’s campaign against the Commission gained momentum, and as if the heat was not intense enough, the *Motorola* case also soon became a central issue in the Illinois gubernatorial race. Given the intense publicity the Motorola matter was already generating, this might have happened in any event. But it became virtually inevitable when the election field narrowed in the spring to the incumbent Democrat Otto Kerner and his Republican challenger Charles Percy—the same Percy who had broken ranks with many of his fellow Republicans and testified in favor the FEPC Act’s passage at a key moment in the legislative process in 1961. But the resulting back-and-forth between the candidates had an odd feel. Kerner, needing African-American support to maintain his grip on the governor’s mansion, tried to minimize Charles Percy’s role in enacting the FEPC, suggesting that Percy had not played a decisive role in its passage. Percy’s campaign trail pitch, however, was that he had rescued the FEPC from “certain defeat.”<sup>240</sup> In the midst of this debate, Bryant’s hearing examiner decision in Myart’s case was a gift to Percy, for it allowed him to walk a politically advantageous middle line, claiming credit for the FEPC Act’s passage, but criticizing the Commission’s overzealous enforcement efforts and branding Bryant’s decision in particular as a “tragic mistake.”<sup>241</sup>

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At the middle of this maelstrom, the Commission's public hearings, held over two days in May and then July 1964,<sup>242</sup> opened the drama's final chapter. The commissioners, with Meyers running the show as "Active Chairman" because of his status as the only lawyer among the commissioners, heard testimony from a parade of psychologists who hotly debated whether Test No. 10, or any job test, was "race free."<sup>243</sup> Test No. 10 met this standard, Motorola's experts maintained, and they bolstered their conclusion via a study of roughly a thousand Motorola job candidates tested over a six-week period finding no statistically significant difference in white and black pass rates. The only discriminatory effect of the test, one of the experts noted, was to sort candidates who were "trainable" from those who were not.<sup>244</sup> A more skeptical view came from Myart's experts—a veritable who's who of leaders in the field that included Benjamin Bloom of the American Educational Research Association and creator of the widely known "Bloom's taxonomy" of learning objectives, Lloyd Humphreys of the University of Illinois (and, before that, Stanford) and past president of the Psychometric Society, and Allison Davis of the University of Chicago and one of the first African-Americans granted tenure at a non-historically black college or university. The trio agreed that a test like Test No. 10, time-pressured and keyed to "verbal facility," would systematically work against less educated black test takers.<sup>245</sup> What's more, such a test was unlikely to be predictive of mechanical skill or, as Davis put it, "blue collar job success."<sup>246</sup>



*Excerpts from a version of the General Ability Test No. 10 taken by Myart, and a handwritten answer sheet, presumably from one of the times he took the test in the Illinois FEPC's offices after initiating his complaint. Courtesy of Illinois State Archives.*

As the dust settled on the hearings and the Commissioners huddled about next steps, they found themselves in a box. Myart had not alleged in his complaint that the test was inherently discriminatory—and, in any event, the record laid during the initial hearing before Bryant was plainly insufficient to support any such finding. Nor was the additional testimony of the psychologists the Commission had heard at the review

hearing decisive in one direction or the other, and the stakes of invalidating Test No. 10 outright were plainly grave. And yet, without a finding regarding the test, it was hard to say that Motorola had discriminated, as there was very little other testimony, apart from an adverse inference from the lost test paper and Motorola's lack of black analyzers and phasers at the time Myart applied, that could support a finding of discrimination.

The reality, however, was that FEPC was in a jam with deeper roots in the powers it was accorded under the FEPC approach. The problem, as Gray and his fellow commissioners had determined, was that there was no way to impose a meaningful injunctive remedy for an individual who had secured alternative employment or, worse, outright refused to work at a firm that had discriminated against him. To require hiring only in such cases would, the Commissioners worried, mean no remedy at all, and would continue to bleed the agency's support within the civil rights community.<sup>247</sup> Injunctive relief also risked giving ammunition to employer-side critics, as had been made clear by the resolution of the wirer and solder case earlier in the summer. Back in June, as the public hearing date in the women's case rapidly approached, the commissioners and Motorola had settled and agreed—via a “gentleman's agreement,” as Nystrom later put it—that all five women could return to Motorola and take the battery of tests for wirers and solders.<sup>248</sup> This appeared to give the Commission a much-needed win, but it soon dissolved: Of the five women, only one showed up to take the tests and, to make matters worse, she “failed them miserably,” at least in Nystrom's telling.<sup>249</sup> This, Nystrom concluded in a public letter to Gray sent shortly after, proved that “the charges filed against Motorola, Inc., in these cases were completely unfounded, based on poor investigation and biased reports and information given to the Commission.”<sup>250</sup>

As the Commission internally fretted over what to do, time marched on and produced new lines of attack from Motorola, raising the temperature of a debate that was already at the boiling point. On September 30, 1964, with election day rapidly approaching, Motorola filed a mandamus action, joined by ten manufacturers' associations who claimed to speak on behalf of 90 percent of Illinois employers, accusing the Commission of sitting on its decision in advance of the gubernatorial election and requesting an immediate order either validating or invalidating the use of Test No. 10.<sup>251</sup> Another round of press attacks followed, including an editorial in the *Chicago Tribune*, published the day before the election and titled “The Cowardly Way Out,” that asked: “And how does it happen that the next meeting isn't scheduled until Nov. 10, safely after the election?”<sup>252</sup> The election results soon lent credence to the view that the agency was hoping to avoid upsetting the Democratic momentum, with Kerner narrowly edging Percy, who had increasingly staked his campaign upon criticism of the FEPC's handling of the *Motorola* case.<sup>253</sup>

The dispute reached a public crescendo when Motorola appeared at the Commission's regularly scheduled hearing one week after election day and demanded time to present its grievances. After Gray announced that Motorola's charges would be heard in the "normal manner," in a case-specific hearing and "not in open hearing," Gray gaveled down an unyielding Nystrom, who continued to shout to spectators and members of the press about, among other things, "autocratic public officials."<sup>254</sup> As later recounted by Foreman, Nystrom and company had shown up at the Commission's September and October meetings to engage in "pounding the table" and had caused the Commission "to break and run for the train" despite having 20 cases awaiting formal dismissal on their agenda.<sup>255</sup> Nystrom, for his part, was harsher, noting later that Gray "gaveled us down" and then "tore for the door as if they were already too late for the can, leaving nine State senators sitting in the hearing room and representatives of ten manufacturers associations who had come there from around the state sitting in the hearing room."<sup>256</sup> Denied the ability to present his statement, Nystrom published it instead and pressed the attack, claiming that ambiguity about the legality of Test No. 10 was costing Motorola \$10,000 per month<sup>257</sup> and complaining about imperious statements by Gray, Minsky, and others during public events<sup>258</sup> and also during the settlement discussions in the wirer and solderer cases.<sup>259</sup>

Soon after, Motorola publicly announced that it would pay the legal and expert fees incurred by any entity charged by the Commission with use of a racially discriminatory test.<sup>260</sup> "For any employer whose tests come under the long, drippy nose of the FEPC and who cannot afford the defense of the issue," a Motorola vice-president was quoted as saying, "Motorola will be happy to undertake the defense with its experienced lawyers."<sup>261</sup> The reason, Motorola stated in a separate press release, was that the FEPC was preying upon "smaller firms" that could not afford to pay litigation costs<sup>262</sup>—which the release claimed had now climbed to \$200,000—in order to "pin him with a decision which will be a precedent for all."<sup>263</sup>

As the commissioners discussed how to parry these new lines of attack, they also knew that Motorola's scorched-earth litigation tactics had begun to take a toll on the Illinois FEPC's fragile finances. As Table 1 above showed, the Commission had always been under-resourced relative to virtually all other FEPCs. "If we had one more full time staff person (there now are four in Chicago and two in Springfield)," a frequent refrain in press interviews went, "we could meet with chambers of commerce, other employer groups and labor unions."<sup>264</sup> Foreman, too, repeatedly noted the basic resource constraints. "You must realize in the first place," she noted in a letter to a friend, "that the commissioners are unpaid, and that the four men work for a living. . . . Believe me, we worked as diligently as we could, considering the number of other cases which had to be taken care of, the fact that Motorola demanded and got time on our agenda in both September and October, where they took up a considerable block of time pounding the table and screaming that we were delaying the decision."<sup>265</sup> But as

litigation continued apace throughout the summer and into the fall, the fiscal situation was becoming dire. A June 1964 memo from Ducey to all five commissioners announced that the agency's spending was continuing to run above monthly allowances because of "the cost of professional and technical services related to the public hearings."<sup>266</sup> Six months later, the Commission was taking money out of the part of its budget allocated to its educative and outreach activities in order to cover litigation costs.<sup>267</sup> The Commission, which had spent only one-third of its budgetary allocation in 1962,<sup>268</sup> was now close to operating in the red under Motorola's sustained, multi-front attack. As the Motorola matter reached seventeen pleadings and a blizzard of related motions and filings, the Commission was being buried under costly paper.

The Commission's "Decision on Review," issued on November 18, 1964, was a grand finesse of the many challenges posed by the case. The Commission found that substantial evidence supported Bryant's findings that Myart had passed the test.<sup>269</sup> The Commission also accepted Bryant's finding that Myart "was denied equal employment opportunity because of his race," and it further specified that Myart "had suffered discrimination because of his race in the first step of the Respondent's hiring process and was thereby precluded from demonstrating his merit and qualifications for the job sought."<sup>270</sup> As for Bryant's finding that Test No. 10 was inherently discriminatory, the Commission punted. Because Myart had not alleged that the test was discriminatory, and given the Commission's affirmance of the finding below that Myart in fact passed the test, Test No. 10 was "beyond the purview" of the case.<sup>271</sup> However, the Commission then put down a vague, and vaguely threatening, marker:

[I]n a future case, given the appropriate factual situation, the use of a low level screening test as an absolute screen of prospective employees might become a relevant factor in a Commission determination as to whether or not an unfair employment practice in violation of this statute was committed. The Commission does not foreclose the possibility that tests of this nature are inherently discriminatory against persons alien to the predominant middle class white culture in this society.<sup>272</sup>

In a final passage, the Commission turned to the issue of remedy. Its analysis began with a stunning admission for an agency that had just found the presence of discrimination: The record before it provided "no way to gauge the merit and qualification" of Myart.<sup>273</sup> For this reason, and also because Myart himself had disavowed any desire to work for Motorola, the Commission would not apply "its general remedial policy of placing the complainant in the same position in regard to the Respondent as if no act of discrimination had been committed."<sup>274</sup> Instead, it would use its "wide discretion in its choice of a remedy" and award Myart \$1,000 to cover the "expense and embarrassment, as well as possible loss of employment."<sup>275</sup>

The decision generated a violent response. “FEPC Fails Its Test,” a *Chicago Daily News* editorial pronounced with a harsh wit.<sup>276</sup> Hopes that FEPC could “mediate” disputes, it continued, had been “cruelly injured.”<sup>277</sup> Instead, FEPC had “tried to avoid offending anyone” by awarding Myart “a \$1,000 consolation prize,” then sought to “keep its foot in the door” with the “extraordinary sentence” that its decision did not “foreclose the possibility” that use of tests could create liability.<sup>278</sup> Motorola officials, in a relentless series of public statements and lunch speeches, attacked the Commission’s finding that Myart in fact passed the test alongside its disavowal of any jurisdiction over the question of whether the test was inherently discriminatory because of Myart’s failure to allege it in his complaint, dubbing it at one point a “paradoxical bit of commission sophistry.”<sup>279</sup> “[W]hy,” a Motorola official asked during a high-profile luncheon speech, “did the commission permit nine psychologists to testify about the test . . . when the commission knew as far back as July, 1963, when the charge was filed, that Myart had not charged the test discriminative?”<sup>280</sup> The FEPC had “contrived an order” that continued a trend in which it had “shaken down” employers via “extorted” payouts in what amounted to “unlawful blackmail” and “forced blackmail settlements.”<sup>281</sup> Filling out its attack was the same secrecy allegation, alongside a newcomer: the Commission’s lack of expertise. “In a secret FEPC meeting,” a standard line by Motorola officials went, “a lay Commissioner, untrained in evidence, decided an employer had discriminated.”<sup>282</sup>

Even the Illinois FEPC Act’s original sponsors were dismayed. Senator Russell Arrington, one of the Republicans who had been pivotal in the bill’s passage, issued a press release labeling the decision “preposterous” and “an obvious abuse of the Legislature’s intent” given assurances he himself had made at passage that “the use of normal standards of testing would not be an unfair employment practice.”<sup>283</sup> He immediately proposed amendments immunizing “the use of standard ability, achievement, intelligence or skill testing” from legal liability and also forbidding the Commission from awarding damages.<sup>284</sup>

The FEPC became even more embattled upon the bombshell news that Illinois Attorney General William G. Clark was refusing to defend the Commission’s award of \$1,000 in damages. In a series of memos, University of Chicago law professor Kenneth Culp Davis, perhaps the nation’s foremost scholar of administrative law at the time and an informal advisor to the Commission, spelled out a path that the FEPC could take in order to refashion its order that Motorola pay Myart \$1,000 as compensatory damages rather than a fine, penalty, or punitive damages. The legal problem, Davis noted, was three-fold. First was the question whether the FEPC had the power to award damages at all. Of course, the U.S. Supreme Court had long since held that the NLRB possessed such power and moved on to subtler questions, such as whether the NLRB could award interest on a backpay award.<sup>285</sup> But state-level doctrine was not as clear, particularly when backpay was, as in Myart’s case, divorced from hiring or

reinstatement.<sup>286</sup> But beyond the question of statutory authority was a second and far more concerning problem: Neither the hearing examiner nor the Commission had, during a week or more worth of hearings, taken any evidence at all on the amount of damages Myart had sustained.<sup>287</sup> One solution, Davis advised the Commission, was that the Commission could amend its findings using “extra-record facts” via an affidavit that Myart could be asked to submit in the meantime.<sup>288</sup> This approach, Davis underscored, was not “without its risks and its dangers,” but it was the best option open to the agency.<sup>289</sup> Finally, and worst of all, the Commission’s order did not say “wherein Motorola discriminated.” Because Illinois Law required an administrative agency to make “specific findings”—an “orthodox” requirement throughout American administrative law, Davis noted—“no court could sustain the order” in its current form.<sup>290</sup>

Feeling the budget crunch and wary of further publicity-producing hearings, the battered Commission instead opted, with the help of line-by-line edits from Davis, to issue a revised Decision on Review.<sup>291</sup> In place of its appellate-like affirmance of Bryant’s fact-findings, the Commission made a series of sharp fact-findings of its own:

1. That the Complainant passed General Ability Test No. 10 on July 15, 1963 when given to him by Respondent.
2. That the Respondent marked the Complainant’s application form with a failing score for General Ability Test No. 10.
3. That the intent of the Respondent in incorrectly marking the Complainant’s application was to discriminate against Complainant on account of his race.
4. That by reason of this discrimination based on race, the Respondent refused to process further the Complainant’s application for employment in the Respondent’s hiring procedure.<sup>292</sup>

The Commission also re-wrote its remedy:

Considering that, had he been given an opportunity to demonstrate his merit, he might have been hired, and that his employment thereafter by Respondent might not have been continuous throughout the period involved, the Commission finds that fair and just compensation is due the Complainant in the sum of \$1,000.00 as compensatory damages suffered by him arising out of Respondent’s act of discrimination.<sup>293</sup>

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From there, the now roughly two-year drama drew to a rapid and, for the Commission at least, demoralizing close. When Motorola sought judicial review, an Illinois trial court and then the Illinois Supreme Court—after an unusual direct appeal bypassing an intermediate appellate court<sup>294</sup>—made short work of the Commission’s order. The trial court reluctantly upheld the Commission’s core finding of discrimination,<sup>295</sup> a decision that was hailed in some quarters as a win for Myart.<sup>296</sup> But the court also vacated the \$1,000 damages award, gutting the Commission’s decision by removing the sole remedy ordered. When the Commission declined to appeal any further the question of the \$1,000 in damages, the Illinois Supreme Court was left to grapple with only the Commission’s finding of discrimination. On that issue, the Court’s analysis began positively enough for the Commission with a strong statement in favor of judicial deference. “Deference is unquestionably due the factual determinations of an agency charged with the primary responsibility for adjudication in a specialized area,” the Court wrote, especially “when the agency’s area of competence involves the subtleties of conduct often present in cases of racial discrimination.”<sup>297</sup> But from there, the Court systematically took apart the Commission’s findings. First up was the Commission’s reliance upon the lack of any black analyzers and phasers at Motorola. “While a background of prior discrimination could be taken into account in appraising other evidence,” the Court wrote, “it was not, in itself, sufficient to justify the findings of the Commission.”<sup>298</sup> Next up was Myart’s passage of the subsequently administered versions of Test No. 10. Passing scores could easily be explained, said the Court, as a “tendency to improve on successive examinations.”<sup>299</sup> Even Motorola’s destruction of Myart’s original test paper was excusable, said the Court, because the Illinois FEPC’s subpoenas could be read as not encompassing it.<sup>300</sup> Taken together, the fragments of evidence on which the Commission had relied, combined with what amounted to a spoliation finding regarding the test paper, did not add up to the “preponderance” required by the Illinois FEPC Act even with the heavy dose of deference the Court had just prescribed.

In the meantime, and even before the Illinois Supreme Court had issued its decision, Motorola continued the attack, launching a costly lobbying campaign urging a “shakeup” in the FEPC’s membership in anticipation of the imminent expiration of the four-year terms of Gray, Seaton, and Kemp.<sup>301</sup> When Kerner re-upped Gray as FEPC chairman, the stage was set for a third dramatic confirmation hearing in Springfield before a Senate committee. Numerous witnesses were called to testify, and the hearings quickly became a wide-open referendum on the Illinois FEPC. But the question that gained the most traction was the FEPC’s award of damages, fueled by claims that the FEPC had negotiated payments to complainants as part of conciliation agreements. In truth, only two cases, an internal agency audit revealed, fit this description,<sup>302</sup> along with a further pair of cases in which the Commission followed a practice, quickly discontinued, of permitting payments to local organizations such as

the Chicago Urban League—a version of a modern-day cy pres award.<sup>303</sup> Moreover, some of the critics' testimony was plainly wrong, as when one witness suggested that payments sometimes came prior to investigation, a finding of probable cause, or conciliation.<sup>304</sup> Last of all, the testimony about payments should not even have been a bombshell: The *Chicago Daily News*, among other Illinois papers, had previously covered at least one of the Illinois FEPC's prior orders awarding backpay.<sup>305</sup> Still, the examples proved more than enough to fuel heated, headline-grabbing accusations that "[e]mployers can buy their way out of charges before the Illinois Fair Employment Practices Commission"<sup>306</sup>—or, more hyperbolically, that the agency was engaged in "blackmail" and was "selling indulgences."<sup>307</sup>

For his part, Gray did what he could in what would be the final act of his public life, expressing his continuing fealty to the "Dewey method" and disavowing any need for the more aggressive regulatory efforts of the sort that many within the civil rights community, and a growing body of scholars, were calling for. Walking through statistics on filings and adjustments since 1961, Gray argued that the Commission's rejection of 319 out of 569 complaints as lacking probable cause or not within the agency's jurisdiction proved that "neither the Commission nor its staff is zealously seeking to find causes of action and that the protection of the respondent employer, employment agency, or labor union is as important to the Commission and the staff as is the protection of the rights of the individual citizen who has filed a complaint with us."<sup>308</sup> His closing statement echoed his full and unequivocal embrace, back in 1961, of the soft-edged FEPC approach: "Conciliation, communications, community action," he concluded, "these are the keys to success in fair employment practices. They have worked in Illinois. They will continue to work."<sup>309</sup>

Despite hewing to the same moderate line taken at his initial confirmation hearings four years earlier, Gray could no longer count on the political protection he had had the first time round. Charles Percy, fresh off his loss to Kerner in the gubernatorial race, once more sought to come to Gray's defense but was "humiliated," barred by the "Old Guardsmen" of the Republican Party from even testifying before the Senate committee. Soon after, Gray was unceremoniously voted down and, in a parting shot from the senators, labeled "a dangerous man"<sup>310</sup>—drawing a charge from the NAACP of "sophisticated racism."<sup>311</sup> Gray closed out his career as a department store executive in San Francisco.<sup>312</sup> Percy did better, mounting a new election campaign and defeating Democratic incumbent Paul Douglas for a U.S. Senate seat in 1966. Though the archival record is thin as to the other commissioners, Foreman resigned her position in 1966 and, as a lay commissioner without any experience in industry or law, expressed substantial relief upon her departure, reflecting on her time at the FEPC in a letter as a "really sad experience" and—perhaps lending credence to Motorola's attack on the Commission's expertise—celebrating her liberation from the "deadly reading" of legalistic decisions.<sup>313</sup>

With new leadership, the Illinois FEPC survived and even enjoyed a small reversal in its fortunes. It beat back the Arrington-sponsored amendments advanced in the wake of the Commission's *Motorola* decision, including the "Tower amendment" analogue immunizing testing from legal liability and also an amendment providing that the Illinois FEPC would "have no power to direct the payment of fines, damages, or money awards."<sup>314</sup> And going forward, the Commission was not entirely supine, continuing to process cases and even making a relatively large backpay award of \$600 in 1968. But in reality, the FEPC remained underfunded and marginalized. The Illinois Supreme Court's *Motorola* decision reversing the Commission's finding of discrimination ensured especially stringent judicial review by lower courts going forward.<sup>315</sup> And the agency carefully toed the line of the alleged "implicit compromise" at enactment, half-heartedly requesting initiatory power beginning in 1968 but not receiving it until seven years later, in 1975.<sup>316</sup> In the meantime, with the Illinois civil rights community continuing in its more militant line and pursuing direct action rather than bureaucratic action, and with Title VII enjoying ever more vigorous judicial implementation throughout the later 1960s and early 1970s, the Illinois FEPC remained largely on the sidelines.

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In April 1964, a little more than a month after Robert Bryant's hearing examiner decision in the Myart case, a group of scholars and practitioners convened a conference in faraway Buffalo, New York, on the future of American fair employment law. The gathering is best known for the searing, essay-length critique of FEPC contributed by Herbert Hill, the NAACP's fiery labor secretary and its "problem child," as Walter White once referred to him.<sup>317</sup> The force of Hill's broadside was not so much its novelty. Hill repeated many of the concerns that had been brewing for some time: that the FEPCs were run by "timid political appointees, many with little or no professional competence"; that an FEPC practice of publicizing conciliation conferences and agreements would be far more effective than the "quiet, secret meetings" and "friendly little discussions" that most FEPCs presided over; and that the FEPCs had no answer to the "structural unemployment problems" resulting from deindustrialization and deskilling within America's industrial core.<sup>318</sup> The essay's power, rather, was two-fold. One was its packaging into a single, withering statement—so much so that its publication drew column-length treatment in the *New York Times*, a rare feat for a law review analysis presented at an out-of-the-way academic conference.<sup>319</sup> Second was its militant and even martial call for extra-legal action from the normally moderate national NAACP. "If state FEP commissions continue to operate with timidity and a general reluctance to broadly and rapidly

enforce anti-discrimination statutes,” Hill wrote, “then they are obsolete, for the rising Negro mass movement will proceed to the attack in its own way.”<sup>320</sup>

Looming over the proceedings, however, was a sense among the other attendees that the state FEPCs were not just a failure but something worse: a missed opportunity, both for the cause of fair employment and for the cause of civil rights more generally. One participant asserted that FEPC enforcement efforts “should have been more decisive,”<sup>321</sup> and a second added that a regime built around private rights of action—re-directing enforcement efforts toward private lawsuits, litigated in court, as opposed to an agency-administered enforcement program—might have been the better course and would, in any event, be the best way to fortify the scheme going forward.<sup>322</sup> Still another observed that the civil rights movement’s more recent turn to the emotive issues of schools and housing was fomenting a “white backlash” and that the movement was facing “much more frequent and better organized opposition.”<sup>323</sup> This led him to wonder whether a more aggressive approach to job discrimination might have ensured that any backlash was “stimulated and met between 1945 and 1950,” thus setting “a different pattern . . . for the administration of anti-bias legislation generally.”<sup>324</sup>

More recent commentators have continued this line of inquiry and sought to unpack the effect of the FEPC experiment on the evolution of American fair employment law. A standard interpretation is that the FEPCs laid the foundation for the shift from a highly individualized and “color-blind” remedial approach to an explicitly “pattern-centered” and “race-conscious” one.<sup>325</sup> On this view, Republican opposition and a growing racial reaction in the North stymied the FEPC movement and created a “regulatory vacuum” on the job discrimination issue.<sup>326</sup> In turn, it was the lack of a federal FEPC and the inability of the hobbled state-level FEPCs to move African-Americans into labor markets that radicalized civil rights groups and pressured federal judges and federal bureaucrats to adopt a more aggressive stance.<sup>327</sup> The irony, according to these accounts, is that early Republican opposition to fair employment regulation set the stage for later and more polarizing developments: the Nixon Administration’s creation of the Philadelphia Plan in 1969 requiring federal construction contractors to establish “goals and timetables” for hiring minority workers and, soon after, the Supreme Court’s sanction of a disparate impact standard of discriminatory proof under Title VII in *Griggs v. Duke Power Co.*<sup>328</sup> If FEPC had been allowed to flourish, the story goes, these divisive developments might have been avoided.<sup>329</sup>

A detailed understanding of the *Motorola* episode, and also the broader FEPC experiment in which it was embedded, bolsters important parts of this story but also reveals its limits.<sup>330</sup> As an initial matter, and as earlier chapters showed, unions were every bit as complicit as Republicans and their business and employer constituents in the weakening of the nascent fair employment regime. Throughout the 1940s and

1950s, unions splintered the fragile fair employment coalition by advancing competing bills that were either indistinguishable from those advanced by civil rights groups or, worse, put forward symbolic and politically infeasible ones granting FEPCs jurisdiction over virtually every aspect of social and economic life and thereby sapping legislative drives of critical momentum. Labor also lobbied for union carve-outs and quietly killed bills providing for a more court- and litigation-centered enforcement approach because of a felt threat to the collective bargaining system. If a vacuum existed that affirmative action policies filled, it came as much from within the fragile New Deal coalition as from without.

More importantly, the vacuum theory misses key ways the FEPC choice itself may have directly shaped the emergence of a more pattern-centered and race-conscious approach to job discrimination. The bureaucratic pressures in evidence during the Motorola episode were plainly not unique to Illinois. As the 1950s gave way to the 1960s, FEPCs throughout the industrial north felt the same political, budgetary, and legal squeeze as did the Illinois FEPC, as an increasingly coherent political attack by FEPC's opponents and, at the same time, the withdrawal of a radicalized civil rights community focused more on "extra-legal" action in the streets and judicial action in the courts starved the agencies of needed resources and support. Minnesota's FEPC, to point to just one example, began to feel the budgetary pinch in 1959 following a series of costly public hearings and judicial review proceedings, even as it felt increasing heat from the civil rights community for not doing more.<sup>331</sup> In response, the budget-strapped Commission resolved to concentrate its efforts in the Twin Cities and Duluth to cut costs<sup>332</sup> and, soon after, grudgingly dropped an appeal to the Minnesota Supreme Court in which the Commission sought to reverse a lower court opinion giving little or no deference to agency fact-finding.<sup>333</sup> Things got worse for the Minnesota Commission when the addition of housing discrimination to its enforcement duties not only added to its workload but also activated new political opponents, including the influential St. Paul Board of Realtors, who sent a memo to key legislators in 1963 questioning the agency's efficacy and arguing against a substantial budget increase.<sup>334</sup> This was a standard pattern as states added new flavors of discrimination—such as housing and public accommodation—to their FEPCs' plates.<sup>335</sup> By 1965, even the vaunted and comparatively well-resourced New York SCAD, now renamed the State Commission on Human Rights (SCHR), was under severe attack, including a substantial hit to its budget in 1965<sup>336</sup> and an "unlovely civil war" between it and civil rights groups, featuring NAACP boycotts of public hearings<sup>337</sup> and repeated threats to bypass the agency by taking important cases "directly into court."<sup>338</sup>

That said, it is not quite right to describe the resulting state of affairs as a policy vacuum. To the contrary, many state FEPCs sought to compensate for tightening resources and a weak complement of enforcement powers in ways that pushed

American fair employment law toward a more pattern-centered approach. In Illinois, this came most prominently with the willingness of Gray and the other commissioners to rest findings of discrimination on purely pattern-based evidence of black underrepresentation in a particular workplace, department, or class of job—a position that the Illinois Supreme Court in its *Motorola* decision, and courts in other states as well, refused to accept.<sup>339</sup> Pennsylvania offers another, starker indication of a connection between agency administration and the emergence of a more pattern-centered approach. Though the archival record is sparser than in Illinois, the evidence shows that, when Republicans gained control of the state legislature and, soon after, slashed the Pennsylvania Human Relations Commission's budget,<sup>340</sup> agency administrators sought to economize on enforcement costs and contend with the loss of nearly half of the Commission's staff by adopting a "new industry-wide approach."<sup>341</sup> Henceforth, the Commission announced, it would initiate broad investigations on a "local, regional, or state-wide basis," using its subpoena and complaint-initiation power to identify and move against regulatory targets with gross underrepresentation of black workers or their concentration in "custodial or other more menial jobs" and then drawing a strong inference of discrimination from any "patterns of discrimination" found upon adjudication.<sup>342</sup>

These examples are important, for they suggest that the FEPC choice may have pushed the law down a very different path than it would have traveled if courts alone had been entrusted with enforcement duties. A court-centered approach might have, for better or worse, hewed to a more individuated approach, focused more narrowly on case-specific indicia of discriminatory intent.<sup>343</sup> This is not to suggest that courts would have shut out circumstantial evidence entirely, whether statistical or otherwise; decisions at the time suggest otherwise.<sup>344</sup> And in Ohio and Rhode Island, a pattern-centered approach to evidentiary determinations enjoyed specific legislative authorization: both agencies could "take into account all evidence, statistical or otherwise, which may tend to prove the existence of a pre-determined pattern of employment or membership."<sup>345</sup> Still, the FEPC choice ensured that the nation's first sustained legal encounter with the difficult conceptual and evidentiary questions that the new fair employment laws raised came in a deeply contested administrative context. When federal courts were asked in the later 1960s to sanction a disparate impact standard of proof under Title VII in the run-up to *Griggs*, they worked against the backdrop of a growing body of case law and a conception of discrimination and discriminatory proof that had been forged in Illinois, Pennsylvania, and elsewhere by the uniquely pressured FEPCs.<sup>346</sup> Far from merely creating a vacuum, the agency-centered FEPC approach, designed initially to blunt criticism of a more race-conscious and quota-based approach, may have actively spurred its emergence.<sup>347</sup>

While the move from a color-blind, individuated approach to job discrimination to a pattern-centered and often aggregated one was a signal development in American

anti-discrimination law, excavating the *Motorola* case also helps us to see other, equally fundamental shifts in American fair employment law's regulatory orientation. First and foremost was a dramatic increase in the use of monetary awards. At the dawn of the movement in the 1940s, the power of FEPC was thought to lie in its convening power and in its corporatist capacity to bring together and balance multiple competing interests via a go-slow, deliberative process. More specifically, for mainline civil rights organizations like the NAACP and Urban League and also the array of civic organizations who filled out the fair employment coalition, FEPC could bolster the undramatic, behind-the-scenes efforts to place well-curated African-Americans into previously segregated workplaces as the best way to advance the race and, in the process, promote sound "inter-group relations."<sup>348</sup> For the unions whose support—or, perhaps more accurately, non-opposition—was essential to passage of fair employment laws, FEPC could serve as an adjunct to a collective bargaining-based system of workplace democracy. FEPC was, as Reuther famously put it, the best way to "sweat out" the complex process, to be led by labor, of allocating benefits and burdens among African-Americans, women, and returning veterans within the post-war American industrial order.<sup>349</sup>

Throughout the 1940s and 1950s, many FEPCs hewed to this vision and steered clear of monetary awards on the theory that immediate employment was the only way to restore a civil right.<sup>350</sup> Even backpay, though authorized by nearly all FEPC laws, was not used at all in many states.<sup>351</sup> By the mid-1960s, however, the FEPCs were clearly moving onto a new regulatory footing. It was then that New York's SCAD and Massachusetts's MCAD requested and received legislative authority to award purely compensatory damages independent of whether the complainant was placed into the job she had been denied as a result of discrimination—akin to the \$1,000 award the Illinois FEPC made to Myart before its judicial invalidation.<sup>352</sup> And it was also then that the Oregon legislature granted the Oregon FEPC the power to award not just actual damages, which it and the Ohio FEPC had enjoyed statutory authority to do from the start, but also a reasonable amount of "exemplary damages."<sup>353</sup> Other state FEPCs joined the more general shift in remedial approach in their newfound willingness to authorize cash payments, often large ones, as part of conciliated settlements, or to enter formal orders after public hearings with backpay awards. For instance, at the time of the controversy in Illinois over the FEPC's award of \$1,000 in damages to Myart, the Ohio Civil Rights Commission had reportedly made "but one monetary award as a result of a public hearing."<sup>354</sup> Similarly, from its creation in 1955 until 1961, the Pennsylvania Human Relations Commission reported none. But soon after, reports of monetary awards gradually became commonplace.<sup>355</sup> In 1962, Pennsylvania's HRC reported four conciliated cases involving "cash payments," one of them a sizeable \$2,000,<sup>356</sup> and an interview with a field representative suggested that backpay awards had become routine.<sup>357</sup> By 1969, New York's SCAD was regularly

ordering payments hitting four figures,<sup>358</sup> and SCAD Commissioner Frank Mangum could publicly state that “cash awards frequently accompany the conciliation agreements worked out by this agency.”<sup>359</sup>

A second development accompanied the FEPCs’ growing use of monetary awards. As FEPC budgets tightened and complaint-processing became increasingly proceduralized and resource-intensive, many of the tools at the core of the FEPC model—industry-wide convenings, sustained administrative engagement with regulatory targets under injunctive orders, and educative and community outreach efforts—became a luxury in many states. In Illinois, even before the *Motorola* case heated up, the crush of individual case processing could warp agency priorities in this regard. In a sheaf of correspondence written in 1963, Gray repeatedly apologized for delayed responses and inattention to the agency’s educative and other community outreach efforts. The Commission, he noted, was “extremely busy,” and the agency’s “relatively infrequent meetings have been occupied almost totally in a discussion of cases.”<sup>360</sup> The Illinois FEPC’s paltry budget also meant, as Commissioner Seaton, the telephone executive, noted in a letter a couple of years later, that Commission follow-ups to ensure compliance with conciliation agreements were virtually nonexistent, coming only in response to judicial requests.<sup>361</sup> And Illinois was not alone. Indeed, these were standard laments in other states, particularly as legislatures added new flavors of discrimination—housing, public accommodation—to the budget-strapped FEPCs’ plates.<sup>362</sup> In Minnesota, budget constraints impacted nearly every aspect of the agency’s role other than case processing, as made clear in the Minnesota FEPC’s budget request for the 1963-65 biennium, which plaintively listed the operational tasks the agency had “been unable to do.” On the list were “follow-ups” to enforcement actions (which were, the agency said, “almost nil”), community outreach via education programs and citizen committees, and industry-wide conferences and other efforts to engage “labor and industry interests.”<sup>363</sup> Even in New York, with an FEPC budget topping \$1.5 million, the crush of case-processing obligations left few resources to engage in outreach and industry-wide work or even to run its case-level “backslider” program. “[O]nce the choice is made to process individual complaints as the first order of business,” Sovern’s study of New York’s SCAD noted, “little wherewithal remains for spot checking.”<sup>364</sup>

The result was a profound but unsung shift in emphasis. In 1948, in one of SCAD’s first full-scale annual reports, the new agency had carefully eschewed “punitive” measures in favor of creating “a climate of public opinion which would be favorable to the administration of the Law.”<sup>365</sup> “It would be of little avail,” the Commission continued, “if compulsive action on the basis of individual complaints resulted in temporary compliance which could only be maintained by a policing operation that in the end would assume formidable proportions.”<sup>366</sup> But by the time the dust had settled on the *Motorola* case, the FEPCs had morphed into just that: a

case-level policing operation trading in hard-edged legalisms and dishing out tort-like monetary damages. Quietly receding into the background was the softer-edged process of *ex ante* industry-wide engagement and, where necessary, a go-slow deliberative process of adjudication centered on flexible cease-and-desist orders overseen by “ever-vigilant”<sup>367</sup> commissions that had driven the FEPC consensus at the dawn of the movement.<sup>368</sup>

To be sure, the resulting change in American fair employment law’s regulatory orientation was not necessarily a good or bad thing.<sup>369</sup> On the one hand, the reorientation of American fair employment law around case-level regulatory action focused on damages without injunctive relief meant backpay without frontpay—that is, a welcome cash payout but no job placement going forward or the salutary mixing of white and black workers that went along with it—in favor of an uncertain degree of damages-based deterrence.<sup>370</sup> Moreover, perhaps the most in-depth study of FEPC as of 1965 concluded that it was the agencies’ industry-wide engagement and ability to tap “local leadership” in doing so that “has been the secret of whatever progress has been made in the North and the West.”<sup>371</sup>

And yet, even before the Illinois FEPC commissioners debated awarding damages to Myart, commentators had begun to argue that the FEPC model’s commitment to injunctive relief for particular complainants was a “serious flaw.”<sup>372</sup> As the Illinois FEPC would itself reason, injunctive relief was a poor means of vindicating the rights of a complainant who had long since found another job—an increasingly common state of affairs as proceduralization and swelling caseloads lengthened processing times<sup>373</sup>—or, as with Myart, did not relish the prospect of going to work for an employer who had previously discriminated against him. In such a case, damages were the better option, as was true in the “awkward situation” when an FEPC found a pattern of discrimination but no complainant who was qualified for a position. In all of these cases, an injunctive order prohibiting further discrimination would be “nugatory.”<sup>374</sup> Rightful-place remedies, some commentators noted, could also backfire by sowing discord. Where, for instance, a position had already been filled by the time FEPC proceedings had concluded, a monetary award was “the only practicable solution,” even if “not an ideal adjustment,” to avoid “an atmosphere fraught with bitterness and resentment, a condition which might well follow the abrupt dismissal of a person who in no way was responsible for discrimination.”<sup>375</sup> Finally, monetary awards could, despite SCAD’s earlier worry about achieving only “temporary compliance,” achieve impressive results in certain quarters. Indeed, the growing use of damages awards in FEPC proceedings throughout the 1960s—and also the award of damages and attorney’s fees in the private Title VII suits that were beginning to get off the ground at the same time—quickly strained union treasuries and began to achieve a measure of integration in even the most stubborn trade union ranks.<sup>376</sup> In short, while

the original version of FEPC had its virtues, there was surely an argument that monetary awards were the better way to move bureaucracies on behalf of the group.

One could endlessly debate these and other considerations in sketching an optimal approach to the problem of job discrimination, whether then or now. What is clear, however, is that FEPC had moved to a place that was quite different from the original vision of FEPC—and a far cry from the regulatory alternatives considered at the dawn of the movement, including, perhaps most starkly, the 1946 Taft plan's requirement that large employers immediately absorb substantial numbers of black workers into their employment ranks.<sup>377</sup> Equally clear is that the FEPCs' shift to a more damages-centered and case-focused regulatory approach shaped the terms of the debate just as American fair employment law was entering a critical stage in its development. In particular, FEPC's new regulatory footing narrowed the contrast between it and the mostly court- and litigation-centered Title VII approach that Congress had just created by way of the Civil Rights Act of 1964. As civil rights groups and organized labor gathered in the years to come and attempted to chart the future course of the regime, the debate was about whether agencies or courts were best situated to achieve efficient and accurate case processing, not the broader questions that had animated debate at the dawn of the movement: persuasion versus coercion, industry-wide convening versus a more case-focused approach, or the regime's integration with the existing system of workplace democracy. Put another way, the debate about the future of American fair employment law was now, for better or worse, about engineering rather than architecture.

Finally, none of the above should be taken to suggest that the *Motorola* case was, by itself, somehow a causal agent in the process of moving American fair employment law to a new conceptual foundation. It would be unwise to ascribe causation to a single case, even a heavily publicized one like *Motorola*. This is especially true given that Illinois and its FEPC were, in so many ways, outliers.<sup>378</sup> *Motorola* was in most ways a culmination, and an avatar, of more general trends, rather than a motive force. And yet, there remains a key sense in which the case exercised specific agency in the making of American fair employment law. Because the case played out in a series of dramatic stages, from Bryant's hearing examiner decision to the dramatic confrontation between the Commission and the Illinois courts, the case could serve as a kind of Rorschach test for one's views on fair employment. From the perspective of business, the hearing examiner's wide-open decision invalidating Test No. 10 and the Commission's equally surprising decision to award damages were white-hot examples of administrative discretion gone wrong—a costly and seemingly arbitrary imposition on business by a politically changeable bureaucracy. The case, as the *Wall Street Journal* was still noting a full year after the Commission's decision and Title VII's enactment, highlighted the “fundamental question of what standards of procedure and evidence will be used in discrimination findings” and the dangers of

“lax standards” and a politically infused process of adjudication rooted in “intuition, hearsay, personal peeve or whatnot.”<sup>379</sup> For civil rights groups, however, the case and its aftermath was an equally compelling example of regulatory capture and the ease with which politically accountable agencies could be cowed by well-heeled industry interests. *Motorola* thus mainstreamed the view of Herbert Hill that the FEPCs were an irretrievable and doomed experiment, ensuring that FEPC had little full-throated support outside the mix of elite, old guard, and mostly national civil rights groups and union leaders who continued to pursue it.<sup>380</sup> But the case would also prove important in a more specific sense, for it publicly tarnished the very idea of administrative discretion just as a pair of strikingly creative alternative versions of Title VII, neither of which would make their way into the final version of the Civil Rights Act of 1964 or the Equal Employment Opportunity Act of 1972, were winding their way through Congress.

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<sup>1</sup> For the derivation of this estimate, see Arnold H. Sutin, *The Experience of State Fair Employment Commissions: A Comparative Study*, 18 VAND. L. REV. 965, 989 (1965) (totaling cases processed through the end of 1961 at 19,349); MORROE BERGER, *EQUALITY BY STATUTE: THE REVOLUTION IN CIVIL RIGHTS* 171 (1967) (reporting 9,000 SCAD cases alone); PA. HUMAN RELATIONS COMM’N, ANN. REP., at 11, 25 (1962) (reporting that between 1956 and 1963, the Pennsylvania Human Relations Commission processed some 1,300 complaints of job discrimination).

<sup>2</sup> See *Illinois FEPC Cited in Rights Bill Debate*, CHI. TRIB., [Date].

<sup>3</sup> HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA* 149-50 (1990).

<sup>4</sup> See [##] CONG. REC. 3138 [Year].

<sup>5</sup> See John G. Stewart, *Independence and Control: The Challenge of Senatorial Party Leadership* 248 (1998) (Ph.D. dissertation, University of Chicago) (cited in JUDITH STEIN, *RUNNING STEEL, RUNNING AMERICA: RACE, ECONOMIC POLICY, AND THE DECLINE OF LIBERALISM* 83 (1998)).

<sup>6</sup> By 1960, four states—Michigan, Pennsylvania, Ohio, and Illinois—accounted for some forty percent of the non-southern black population. Adding California took the number to sixty percent. See generally DONALD B. DODD, *HISTORICAL STATISTICS OF THE STATES OF THE UNITED STATES* (1993). [In 1955, Pennsylvania’s black population was 745,000. Michigan’s was 580,000. This represents 6.8 percent and 8.2 percent, respectively, of each state’s total population at the time. Thus, in a single five-month period, the total number of African-Americans who could avail themselves of FEPC protections almost doubled—from more than 1.8 million to nearly 3.2 million. In addition, the period 1955–1961 saw fair employment laws enacted in Ohio (1959), California (1959), and Illinois (1961), bringing a total of 3.5 million African-Americans, or nearly sixty percent of the non-southern black population, within the ambit of fair employment regulation. See generally *id.*]

<sup>7</sup> As Chapter Two noted, nearly all of these opted to vest enforcement authority in an administrative agency armed with cease and desist powers. Among states enacting fair employment laws prior to 1964, only lily-white Idaho, Iowa, and Vermont, and also Delaware, granted primary enforcement authority to courts by arming aggrieved individuals with a private right of action.

<sup>8</sup> Many commentators at the time missed the substantial variation across state FEPCs. Thus, two leading commentators at the time wrote that state FEPCs were “indistinguishable” from, or “modeled closely on,” New York’s SCAD. See SOVERN, *LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT* 22 (1996) (“indistinguishable”); PAUL H. NORGREN & SAMUEL E. HILL, *TOWARDS FAIR EMPLOYMENT* 106, 144

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(1966) (“modeled closely”). But this was true only in the broadest sense. As the above discussion shows, in reality FEPC enactments in the later 1950s and early 1960s, including Illinois, tended to be, as a more critical observer put it, “ineffective expedients . . . reflecting no regard for prior experience.” See Joseph P. Witherspoon, *Civil Rights Policy in the Federal System: Proposals for a Better Use of Administrative Process*, 74 YALE L.J. 1172 (1965).

<sup>9</sup> ILL. REV. STAT. ch. 48 §§ 851-867 (1971).

<sup>10</sup> See Witherspoon, *supra* note 8, at 1187. One law review commentator reported that, in states like Michigan, Minnesota, and Washington, where the fair employment law applied only to employers with eight or more employees, the Act excepted some eighty-seven percent of all employers. See *id.* Another reported, based on an interview with the Philadelphia Supervisor of the Pennsylvania Human Relations Commission, that a twenty-five-employee threshold, as some had pressed for in the state, would have exempted sixty percent of the state’s employers. See Note, *Administrative Law—Human Relations Commission—Pennsylvania Law and Discriminatory Employment Practice*, 37 TEMPLE L.Q. 515, 526-27 (1963). The eventual cut-off of twelve employees meant that the law applied to some 38,000 employers, covering more than 3 million employees. See PA. FAIR EMP’T PRACTICES COMM’N, FIRST ANN. REP., at 3 (1957).

<sup>11</sup> The phase-in period was to end on January 1, 1965, after which the threshold would decline to fifty employees. As a side note, Illinois was more within the mainstream regarding other jurisdictional limitations, including carve-outs for religious and other nonprofit organizations, domestic and family employment, and agricultural work. See Michael A. Bamberger & Nathan Lewin, Note, *The Right to Equal Treatment: Administrative Enforcement of Antidiscrimination Legislation*, 74 HARV. L. REV. 526, 562 (1961). Both kinds of jurisdictional limits—employee thresholds and categorical exemptions—made intuitive sense: categorical exemptions for religious, fraternal, and other organizations to safeguard “particularly sensitive relationships,” PA. HUMAN RELATIONS COMM’N, ANN. REP., at 20 (1962), employee thresholds to ensure an FEPC could, as one study at the time put it, “concentrate effectively on the major offenders without being bogged down in a sea of complaints,” Meiners, *Fair Employment Practices Legislation*, 62 DICK. L. REV. 31, 32 (1957). But both also fueled arguments from legislative opponents that the new job discrimination laws were arbitrary, unprincipled, or both. One Pennsylvania legislator focused on a proposed bill’s employee threshold and sarcastically asked, “Where do they get this mythical number beyond which discrimination begins? Out of the air?” Legislative Journal—House—State of Pennsylvania, May 23, 1951, at 2521. Similarly, a letter to the Chicago Tribune asked: “What is the essential difference between an enterprise with 24 employes [sic] and one with 25 employes [sic]?” FEPC Questions, CHI. TRIB., June 4, 1959, at 16. Another legislator cleverly appropriated the antidiscrimination principle in his opposition to FEPC, declaring that a bill that purported “to eliminate discrimination” was itself “full of discriminations.” Pointing to the bill’s exemptions for religious, fraternal, charitable, and sectarian corporations, he continued: “The very same people who are in here fighting to support this bill have very definitely seen to it that they themselves are left out of the confines of this bill.” Legislative Journal—House—State of Pennsylvania, May 23, 1951, at 2518. Another Pennsylvania legislator similarly targeted a bill’s four-fold exemption of various employer types, asserting that “if we are going to open the gates of discrimination, let us open the gates. Let us not have only four doors and close all the rest of them.” Legislative Journal—House—State of Pennsylvania, May 23, 1951, at 2518. For a version of the argument in Illinois, see O.K. FEPC in State Senate: Approval by House Regarded as Certain, CHI. TRIB., May 25, 1961, at 1 (“This bill exempts church groups from its provisions, altho [sic] many of them have agitated for its passage.”).

<sup>12</sup> Note, *Right to Equal Treatment*, *supra* note 11, at 540. At least three states specifically vested the power to make probable cause determinations in the whole commission, rather than individual commissioners. SOVERN, *supra* note 8, at 23 n.15. These included Minnesota, Ohio, and Pennsylvania. Albert L. Alford, *FEPC: An Administrative Study of Selected State and Local Programs* (unpublished Ph.D. dissertation, Princeton Univ., 1953) (noting that New York and Massachusetts also have full sub-delegation of probable cause determinations). In most states, conciliation agreements were negotiated in

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the first instance by commission staff members, who were then required to submit the agreement to the commission for final approval. However, states with real “working commissioners” such as New York, followed later by California, Massachusetts, Michigan, Ohio, and Rhode Island, opted to vest the power to conduct conciliation in individual commissioners. Only a handful of these, including New York, Massachusetts, and Rhode Island, allowed such commissioners to consummate conciliation agreements without pre-approval or final ratification by members of the full board. NORGREN & HILL, *supra* note 8, at 110.

<sup>13</sup> Relatedly, the Illinois FEPC Act vested the chairman alone with the power to serve a subpoena on an uncooperative employer, union, or witness, but this could be countermanded—and, in legal terms, quashed—by the full commission. This was not as restrictive as Michigan, where the commission, denied the power to serve subpoenas on its own, could compel recalcitrant employers or unions to answer questions or provide evidentiary materials only through laborious, and sometimes unsuccessful, petitions to the courts. But it is notable that the full commission could serve as a brake on an overzealous chairman, but it could not prod an *underzealous* one.

<sup>14</sup> See, e.g., *Richardson v. Perales*, 402 U.S. 389 (1971) (holding that substantial evidence standard permits consideration of evidence that would otherwise be barred by the rules of evidence that apply in court).

<sup>15</sup> [CITES]

<sup>16</sup> N.Y. STATE COMM’N AGAINST DISCRIMINATION, ANN. REP., at 6 (1946).

<sup>17</sup> Herbert Hill, *Twenty Years of State Fair Employment Practice Commissions: A Critical Analysis with Recommendations*, 14 BUFF. L. REV. 22, 55 (1964).

<sup>18</sup> [CITE]

<sup>19</sup> [CITE]

<sup>20</sup> See JAY ANDERS HIGBEE, DEVELOPMENT AND ADMINISTRATION OF THE NEW YORK STATE LAW AGAINST DISCRIMINATION 14 (1966); Sutin, *supra* note 1, at 977a.

<sup>21</sup> See Note, *The Right to Equal Treatment*, *supra* note 11, at 568. For the statutes, see MASS. GEN. LAWS ANN. ch. 6, § 56 (1958); OHIO REV. CODE ANN. § 4112.03 (Page Supp. 1960). Note that Norgren and Hill, *supra* note 8, at 96, put the Massachusetts salary at \$4,000. All told, five states had salaried commissioners by 1965: New York, Wisconsin, Massachusetts, Ohio, and Rhode Island. In New Jersey and Oregon, as already noted, administration was in the hands of professional administrators, bringing the number of states with salaried professional administrators to a mere seven.

<sup>22</sup> NORGREN & HILL, *supra* note 8, at 97.

<sup>23</sup> See Note, *The Right to Equal Treatment*, *supra* note 11, at 568.

<sup>24</sup> See *id.* (based on interview with Pennsylvania Human Relations Commission director); see also Sutin, *supra* note 1, at 1038 (“In those states where commissioners are unsalaried, the commissioners usually are scattered throughout the state, and obtaining a necessary quorum for a hearing board may prove difficult.”); MAYHEW, PLACING PARTIES IN AMERICAN POLITICS 102 (1986) (distinguishing “strong commission” and “strong executive secretary” FEPC structures). There is some evidence that commissioners quickly became rubber stamps for staff decisions.

<sup>25</sup> See Memorandum from Charles Gray to Walter Ducey (July 24, 1964), in Lincoln Archives (FEPC–Memoranda, 1962–1964).

<sup>26</sup> There are few accounts of the politics of FEPC in Illinois. An exception is a chapter-length study focused on the role of business. See Alexander Gourse, “Such Power Spells Tyranny”: Business Opposition to Administrative Governance and the Transformation of Fair Employment Policy in Illinois, 1945–1964, in THE RIGHT AND LABOR IN AMERICA: POLITICS, IDEOLOGY, AND IMAGINATION (Nelson Lichtenstein & Elizabeth Tandy Schermer Eds., 2012).

<sup>27</sup> See Chapter Three.

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<sup>28</sup> During the war, white AFL members forcibly shut down for several hours a wartime COFEP hearing focused on discriminatory practices at the Western Cartridge Company, leading COFEP chairman Malcom Ross to remark in his memoirs that the unionists had brought their southern-style racism from the “backwater” of the “sluggish [and] cut-off bends of the Mississippi and the Missouri.” See MALCOLM ROSS, *ALL MANNER OF MEN* \_\_ (1948). See also ANDREW E. KERSTEN: *RACE, JOBS, AND THE WAR: THE FEPC IN THE MIDWEST, 1941-46* at 58 (2007) (describing unrest).

<sup>29</sup> As a report of the U.S. Commission on Civil Rights noted: “Certainly, no one who has been to Cairo would argue that it is typical of Illinois or any other area north of the Mason-Dixon line.” The report goes on to note that, as of 1972, no African-American had served on the county Housing Authority, Public Utility Commission, Welfare Commission or Library Board. The only blacks in city jobs were garbage workers. There had been only a single black City Councilman and black fireman, both named during violent civil rights demonstrations. See Paul Good, *Cairo, Illinois: Racism at Floodtide*, in U.S. COMM’N ON CIVIL RIGHTS (1973), available at <https://files.eric.ed.gov/fulltext/ED081884.pdf>.

<sup>30</sup> On the early campaigns in 1945 and 1947, see *Fair Employment Bill Loses in Illinois House*, CHI. TRIB., June 27, 1945, at 19; *FEPC Dead This Session, State Backers Decide: Plan Draws Unfavorable Votes in 2 Committees*, CHI. TRIB., Apr. 23, 1947, at 7 (including the “anaesthetized” quote). The 1945 effort failed in the House when a majority of the membership simply remained silent. For the “five consecutive” claims, see *Illinois House Votes F.E.P.C. with G.O.P. Aid*, CHI. TRIB., March 15, 1961, at A1. On the 1953 campaign, see *Stratton FEPC Bill Passed by Illinois House*, CHI. TRIB., June 18, 1953, at 3; *Senate Group Asks Defeat of Illinois FEPC: Committee Refuses Stratton Bill*, CHI. TRIB., June 24, 1953, at 18; *Fair Employment Bill Killed in Illinois*, ST. LOUIS POST-DISPATCH, June 25, 1953; Letter from Frank McCallister to “Friend” (July 9, 1953), in NAACP Papers, Library of Congress [hereinafter “LOC – NAACP Papers”] (Part II, Box A256). On the 1955 campaign, see *House Passes Illinois ‘FEPC’ Bill, 80 to 35*, CHI. TRIB., June 1, 1955, at 5. On the 1957 campaign, see *Fair Job Bills Lose and Win in Springfield: House Unit Says Yes; Senate Group No*, CHI. TRIB., May 2, 1957, at 11; *FEPC Measure Defeated in State Senate: G.O.P. Is Rebuked for Repudiating Ike*, CHI. TRIB., May 15, 1957, at 7. On the 1959 campaign, see *Senate Group Fails in Vote on FEPC Bills*, CHI. TRIB., June 23, 1959, at 3; *N.A.A.C.P. Raps Senate Defeat of F.E.P.C. Bill*, CHI. TRIB., July 2, 1959, at 2; *FEPC at Springfield*, CHI. TRIB., Mar. 18, 1961, at 8 (looking back at the 1959 campaign). This dynamic was perhaps even stronger in Illinois because of the state’s one-of-a-kind system for electing House members. Created in 1870 to bolster minority representation, that scheme subjected the entire House to a three-member multi-districting scheme with cumulative voting. Samuel K. Gove, *Inter-Party Competition*, in ILLINOIS POLITICAL PARTIES: FINAL REPORT AND BACKGROUND PAPERS, ASSEMBLY ON ILLINOIS POLITICAL PARTIES 29, 33 (Lois M. Pelekoudas ed., 1960); Clarence A. Berdahl, *Some Problems in the Legal Regulation of Political Parties in Illinois*, in ILLINOIS POLITICAL PARTIES: FINAL REPORT AND BACKGROUND PAPERS, ASSEMBLY ON ILLINOIS POLITICAL PARTIES 18 (Lois M. Pelekoudas ed., 1960). The result of the scheme was that the two parties had to decide whether to slate one, two, or three candidates in a district. In a majority of districts, one party slated two, and the other party slated one. Elections were generally competitive only in districts that departed from this state of affairs. But its real effect, some have argued, was to depress political competition and, with it, black voting power, by propping up more conservative downstate Democrats (and thereby complicating Democratic efforts to impose party discipline), and ensuring that Republicans, albeit moderate ones, controlled roughly one-third of the Chicago delegation in the Illinois House. Edwin Amenta, et al., *The Political Origins of Unemployment Insurance in Five American States*, 2 STUDS. AM. POL. DEV. 137, 172 (1987).

<sup>31</sup> On the Chicago machine, see generally JAMES Q. WILSON, *NEGRO POLITICS: THE SEARCH FOR LEADERSHIP* (1960). On the 1930s, see HAROLD F. GOSNELL, *MACHINE POLITICS: CHICAGO MODEL* (1968). On the 1950s, see MARTIN MEYERSON & EDWARD C. BANFIELD, *POLITICS, PLANNING AND THE PUBLIC INTEREST: THE CASE OF PUBLIC HOUSING* (1955). And on the later 1960s and 1970s, see THOMAS M. GUTERBOCK, *MACHINE POLITICS IN TRANSITION: PARTY AND COMMUNITY IN CHICAGO* (1980). On the organization’s loss of control of

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the black political class in the 1970s, see Michael B. Preston, *Black Politics in the Post-Daley Era*, in AFTER DALEY: CHICAGO POLITICS IN TRANSITION 88-117 (Samuel K. Grove & Louis H. Mascotti eds., 1982). A short overview of the three “eras,” including Anton Cermak’s mayoralty beginning in 1931, the reign of Edward Kelly and Pat Nash beginning in 1933, and the ascendance of Richard Daley in 1955, see JOHN M. ALLSWANG, *BOSSSES, MACHINES, AND URBAN VOTERS* (1977).

<sup>32</sup> Perhaps the best treatment of the subject, James Q. Wilson’s *Negro Politics*—which also has the virtue of focusing on Chicago—concludes that the presence of a strong machine does not have a detectable impact on the size of the Democratic vote or the incidence of straight-ticket voting among African-Americans, but rather impacts political outcomes through “the set of constraints it places on [black] leaders and members.” WILSON, *supra* note 30, at 47 (“The fundamental differences between machine and non-machine or weak-machine Negro areas consists not so much in the final election results, but in what must be done to produce those results, what obligations members acquire for having benefited by them, and what rewards exist for those who have contributed to their attainment.”). Wilson also notes: “The Negro civic leader who threatens white politicians with a popular reaction among Negroes against him if he fails to act on some race demand is largely bluffing and knows it.” *Id.* at 111. See also MAYHEW, *supra* note 23, at 242-44; Martin Shefter, *Regional Receptivity to Reform: The Legacy of the Progressive Era*, 98 POL. SCI. Q. 459 (1983). Shefter notes a further reason for the anti-reform stance of many patronage-oriented parties: in urban contexts, machines often make concessions to business interests to remain in power and so were often unable to deliver particular social policies in the collective interest of the working class or particular interest groups. *Id.* Of course, some have noted that the “patronage versus reform” perspective is too starkly drawn and that the presence of patronage parties does not rule out social reforms. In reality, according to this view, many patronage-oriented parties in the 1930s and 1940s had eclectic constituencies and, as a result, had to make gestures to particular groups, be they labor or business or others. John Buenker, among others, has therefore countered with what passes under the label of the “urban liberalism” thesis in which reformist politics pits an alliance between middle-class reformers who devise social legislation, representatives from urban and mining areas who form the principal basis for mass support for those policies against small-town and rural representatives who ally with business groups to block social legislation. JOHN BUENKER, *URBAN LIBERALISM AND PROGRESSIVE REFORM* 43-44 (1973). For an overview of the two theories, see Amenta, et al., *supra* note 29, at 166.

<sup>33</sup> WILSON, *supra* note 30, at 34, 87.

<sup>34</sup> *Id.* at 126.

<sup>35</sup> FAY G. CALKINS, *THE CIO AND THE DEMOCRATIC PARTY* 70 (1952). Abner gets whooped, 21,739 to 9,537. *Id.* at 72. For a comprehensive history the Chicago machine from the 1930s to the 1970s, see *supra* note 30, and included citations.

<sup>36</sup> WILSON, *supra* note 30, at 114. According to Wilson, pressure politics and grandstanding from voluntary associations “are resented.” *Id.* at 113. Yet persons within such associations “visualize their tasks as in great part putting ‘heat on the aldermen’ or ‘building a fire’ under the politicians.” *Id.* at 112-13.

<sup>37</sup> See Elmer Carter, *Practical Considerations of Anti-Discrimination Legislation—Experience Under the New York Law Against Discrimination*, 40 CORNELL L.Q. 40, 57 (1954); Irving Kovarsky, *A Review of State FEPC Laws*, 9 LAB. L.J. 478 (1958); Note, *The Right to Equal Treatment*, *supra* note 11 at 537.

<sup>38</sup> See, e.g., NORGREN & HILL, *supra* note \_\_; SOVERN, *supra* note 8; BERGER, *supra* note 1; Morroe Berger, *New York State Law Against Discrimination: Operation and Administration*, 35 CORNELL L. REV. 747 (1950); Kovarsky, *supra* note 36; HERBERT R. NORTHRUP, *THE NEGRO AND EMPLOYMENT OPPORTUNITY* (1965); LEON H. MAYHEW, *LAW AND EQUAL OPPORTUNITY: A STUDY OF THE MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION* (1968); JOSEPH P. WITHERSPOON, *ADMINISTRATIVE IMPLEMENTATION OF CIVIL RIGHTS* (1968); JAY ANDERS HIGBEE, *DEVELOPMENT AND ADMINISTRATION OF THE NEW YORK STATE LAW AGAINST*

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DISCRIMINATION (1967); DUANE LOCKARD, TOWARD EQUAL OPPORTUNITY: A STUDY OF STATE AND LOCAL ANTIDISCRIMINATION LAWS 16 (1968).

<sup>39</sup> See Press Release, State Commission Against Discrimination (Jan. 8, 1947), in LOC – NAACP Papers.

<sup>40</sup> See TWERSKY, A STUDY OF FAIR EMPLOYMENT PRACTICE LEGISLATION IN PHILADELPHIA: ESTABLISHMENT AND ENFORCEMENT (1958). For examples, N.Y. COMM’N AGAINST DISCRIMINATION, REP. OF PROGRESS 42-45 (1949). A later example came in Colorado and ultimately made its way to the Colorado Supreme Court in which the Commission held application blanks requiring disclosure of racial identity and/or photograph requirements to be per se discriminatory. See *Colo. Anti-Discrimination Comm’n v. Cont’l Air Lines, Inc.*, 355 P.2d 83 (Colo. 1960).

<sup>41</sup> For an excellent account of the episode, see MARTHA BIONDI, TO STAND AND FIGHT: THE STRUGGLE FOR CIVIL RIGHTS IN POSTWAR NEW YORK CITY 102-04 (2003).

<sup>42</sup> See *Bias Complaints to Get NAACP Aid*, THE REPORTER (March 10, 1946).

<sup>43</sup> *Sets Job Case for a Hearing*, State Commission Against Discrimination II (Oct. 3, 1949) in LOC – NAACP Papers; *Discrimination Victim Wins \$3,000 Settlement*, State Commission Against Discrimination II (Oct. 31, 1949), in LOC – NAACP Papers.

<sup>44</sup> See CLARENCE MITCHELL PAPERS, VOL. I, at liii.

<sup>45</sup> See Carter, *supra* note 36, at 44; see also BIONDI, *supra* note 40, at 35-36. Somewhat later, the Massachusetts Commission Against Discrimination, acting at the behest of the Boston NAACP, garnered headlines for its investigation of the demotion of a Red Sox ballplayer, Elijah “Pumpsie” Green, to a minor league farm team in Minneapolis. See Note, *The Right to Equal Treatment*, *supra* note 11, at 537; see also 14 MASS. COMM’N AGAINST DISCRIMINATION, ANN. REP., at 5 (1959).

<sup>46</sup> See James Rorty, *FEPC in the States: A Progress Report*, 18 ANTIOCH REV. 317, 322 (1958); *Mohawk Airlines Crack Sky Bias*, N.Y. AMSTERDAM NEWS, Dec. 28, 1957. For Colorado’s version, see *Colo. Anti-Discrimination Comm’n v. Cont’l Air Lines, Inc.*, 355 P.2d 83 (Colo. 1960). For Minnesota’s version, see Minutes of the Meeting of the Fair Employment Practices Commission (Apr. 22, 1961), Exhibit II – Marlene E. White v. Northwest Airlines, Inc., Case #4-ER-50, Papers of Minnesota State Commission Against Discrimination, Minnesota History Center, St. Paul, MN [hereinafter “MHC Papers”].

<sup>47</sup> See SOVERN, *supra* note 8, at 41 (using the “backslider” term); see also Sutin, *supra* note 1, at 1031 (noting SCAD’s “policy of reviewing complaints approximately six months after closing the file to determine whether additional inquiry is necessary, and the investigating commissioner may direct that there be additional reviews.”); NORGREN & HILL, *supra* note \_\_, at 118 (noting SCAD and New Jersey Division Against Discrimination use of “follow-up reviews”); HIGBEE, *supra* note 19, at 120 (noting SCAD requirement that employer file a report for a year showing compliance). However, few commissioners other than the SCAD had sufficient resources to perform such checks. See Witherspoon, *supra* note 8, at 1201 (“Most commissions, unfortunately, do not verify the extent of compliance with conciliation agreements with any regularity or thoroughness.”).

<sup>48</sup> Arthur Earl Bonfield, *States Civil Rights Statutes*, 49 IOWA L. REV. 1067, 1117 (1964); see also N.Y. STATE COMM’N AGAINST DISCRIMINATION, ANN. REP., at 12 (1947) (noting practice of Commission to review conciliation agreements six months after entry).

<sup>49</sup> BIONDI, *supra* note 40, at 256. New York’s brewery industry was one of the worst of the lot, with as few as 50 African-Americans among its 10,000 production and delivery workers. *Id.* at 257.

<sup>50</sup> HIGBEE, *supra* note 19, at 220-21.

<sup>51</sup> *Id.* at 221.

<sup>52</sup> *Id.*

<sup>53</sup> For instance, when the SCAD criticized the Urban League for privately brokering an agreement between the breweries and the unions calling for the hiring of 100 black workers, that, in SCAD’s view, thus countenanced illegal “quota employment.” The UL shot back at the SCAD with the charge of “do-

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nothingism” and a failure to advance “constructive suggestions.” *Urban League and SCAD Tangle: Brewery Jobs May Go in ‘Quota’ Feud*, N.Y. AMSTERDAM NEWS, Apr. 25, 1953. The UL, under new leadership, would soon revert to lauding SCAD efforts. See *League Raps Union, Lauds SCAD Efforts*, N.Y. AMSTERDAM NEWS, Feb. 5, 1956.<sup>53</sup> But the quota concern was never far beneath the surface, cropping up in a wide range of newspaper editorials and even more academic treatments. Even seeming virtues of FEPC, such as its “spot-checking power” to ensure compliance with an injunctive order, was thought capable of doing “real harm” by leading to “the imposition of racial quotas” if not properly restrained. SOVERN, *supra* note 8, at 46. Similarly, a purely prospective order could also “induce the respondent to seek out minority-group employees, thus discriminating in their favor.” Note, *The Right to Equal Treatment*, *supra* note 11, at 554.

<sup>54</sup> HIGBEE, *supra* note 19, at 223.

<sup>55</sup> See Wilfred C. Leland, Jr., *We Believe in Employment on Merit, But...*, 37 MINN. L. REV. 246, 263 (1953). The testimony of Wheeler, head of the Connecticut FEPC, before the United States Senate in 1963 was typical: Of 1,137 processed complaints, only three hearings. See Hearings Before the Subcommittee on Labor and Public Welfare, U.S. Senate (1963) (Clark Hearings) at 210 (also cited in HILL at 37).

<sup>56</sup> [CITES]

<sup>57</sup> See Henry Spitz, *Tailoring the Techniques to Eliminate and Prevent Employment Discrimination*, 14 BUFF. L. REV. 79, 97 (1964).

<sup>58</sup> *Does State FEPC Hamper You?*, BUSINESS WEEK, Feb. 25, 1950, at 114-17.

<sup>59</sup> LOOK (Oct. 21, 1952), at. 35-37 (available within NAACP Papers, LOC, Part II, Box A264). And many FEPCs themselves soon got into the act: A 1954 report issued by the Oregon FEPC summed up the mantra of the era in noting that its efforts had involved “no punitive spirit whatsoever” and had worked to combat discrimination “without jeopardizing the rights of anyone.” OR. FAIR EMP’T PRACTICES COMM’N, FIVE YEARS OF PROGRESS UNDER OREGON’S FAIR EMPLOYMENT PRACTICES ACT (1954).

<sup>60</sup> There are plenty of other examples. Testifying before Congress in 1962, Governor Peabody of Massachusetts noted that FEPC was once thought to be a “potent remedy,” but had since lost “some of its curative power.” See U.S. Senate Hearings, at 281-83.

<sup>61</sup> See, e.g., 1943 Mich. Senate Bill, No. 226 (providing for penal, private-civil, and administrative enforcement and nowhere mentioning “conciliation”); 1943 Pa. House Bill, No. 354, in LOC – NAACP Papers (Part II, Box A261) (providing for exclusively administrative enforcement but nowhere mentioning “conciliation”); 1944 N.Y. Senate Bill, No. 642/Int. 598 (same).

<sup>62</sup> *Ives Proposes Anti-Bias Job Bill with a ‘Minimum’ of Compulsion*, N.Y. TIMES, March 27, 1947.

<sup>63</sup> *Backers to Push State FEPC Fight*, PHILA. INQUIRER, Dec. 14, 1950. The rhetorical shift was fueled still further by the hopeful views of those directly involved with FEPC implementation efforts in early enacting states like New Jersey. Testifying before the Ohio legislature in 1947, James Kenney, Jr., a member of the advisory committee attached to the New Jersey agency charged with enforcing that state’s fair employment law, noted: “Our experience in New Jersey has convinced us that education and conciliation are the greater weapons in wiping out discrimination.” “The competent administration,” Kenney then declared, “depends on conciliation as its bulwark.” News Bulletin, *Editor Testifies*, Ohio Committee for a Fair Employment Practice Legislation (March 17, 1947), in LOC – NAACP Papers (Part II, Box A261, at 2). Even the *Cleveland Plain Dealer*, an outspoken proponent of fair employment legislation at both the state and municipal levels, had, by 1950, unabashedly joined the conciliation parade:

From our viewpoint the ordinance that was approved is a vast improvement over the version that had long been under consideration in Council committee. That version emphasized the “teeth”—compulsion and enforcement. The ordinance as passed, on the other hand, emphasizes education, conciliation, and mediation. Penalties are somewhat softer than those specified in the ordinance originally presented, and police-power features are placed at the end of a series of

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steps designed to eliminate discrimination in hiring, promotion, and admittance to trade union membership.

[Title], CLEVELAND PLAIN DEALER, Feb. 1, 1950.

<sup>64</sup> *Stratton FEPC Bills Approved by House Group*, CHI. TRIB., June 4, 1953, at 4.

<sup>65</sup> This was the remedies provision in the Fair Labor Standards Act and was the preference of some within the NAACP in the earliest stages of the movement. See Memorandum from Leslie Perry to Thurgood Marshall (Nov. 22, 1944), in LOC – NAACP Papers (Part II, Box B109). In addition, a letter from Marian Wynn Perry to Charles Houston asked what the largest constitutionally permissible monetary sanctions could be and presented research comparing penalties provided for “crimes against federal property and the punishment for violations of the Civil Rights Laws.” Letter from Perry to Houston (Jan. 17, 1947), in LOC – NAACP Papers (Part II, Box B81).

<sup>66</sup> See Report on the Experience of the Urban League, NAACP, and American Jewish Congress with the State Commission Against Discrimination, in LOC – NAACP Papers (SCAD III).

<sup>67</sup> Earl Brown, *SCAD: What Is It?*, N.Y. AMSTERDAM NEWS, June 18, 1955, at 16.

<sup>68</sup> Earl Brown, *New Life in SCAD*, N.Y. AMSTERDAM NEWS, Jan. 7, 1956, at 12.

<sup>69</sup> Earl Brown, *More on SCAD*, N.Y. AMSTERDAM NEWS, Aug. 20, 1955.

<sup>70</sup> See *Dewey Asks Legislature to End Future ‘Stork Club Incidents’: Urges More Authority for SCAD*, N.Y. AMSTERDAM NEWS, Jan. 12, 1952. The bill was referred to as the “Stork Club” bill because it came on the heels of a scandal at New York’s legendary nightclub in which Josephine Baker, an African-American jazz singer and A-list celebrity, was reportedly made to wait for more than hour to receive food she had ordered. See *Dewey Signs ‘Stork Club Bill,’* N.Y. AMSTERDAM NEWS, April 5, 1952, at 1.

<sup>71</sup> For more on Granger, see GUICHARD PARIS & LESTER BROOKS, *BLACKS IN THE CITY: A HISTORY OF THE NATIONAL URBAN LEAGUE* (1971).

<sup>72</sup> Lester B. Granger, *Rights Our Business*, N.Y. AMSTERDAM NEWS, Jan. 12, 1952, at 14.

<sup>73</sup> *Id.*

<sup>74</sup> See *Sues Nassau School on Bias: First Lawsuit on Hiring Bias*, N.Y. AMSTERDAM NEWS, Oct. 21, 1950, at 1.

<sup>75</sup> *Id.*

<sup>76</sup> The lawsuit was apparently settled nine years later and was credited with the hiring of twenty black teachers. The follow-up news report also suggests that the New York SCAD ultimately found no probable cause of discrimination, a position that was rejected by the state trial court. See James Booker, *Teacher’s 9-Year Battle Wins Twenty School Jobs*, N.Y. AMSTERDAM NEWS, Mar. 8, 1958.

<sup>77</sup> See Carter, *supra* note 36, at 41.

<sup>78</sup> See NORGREN & HILL, *supra* note \_\_, at 122 (also reported in Witherspoon, *supra* note 8, at 1184). See N.Y. STATE COMM’N AGAINST DISCRIMINATION, *THE BANKING INDUSTRY: VERIFIED COMPLAINTS AND INFORMAL INVESTIGATIONS HANDLED, 1945-1958* (1958); N.Y. STATE COMM’N AGAINST DISCRIMINATION, *THE INSURANCE INDUSTRY: VERIFIED COMPLAINTS AND INFORMAL INVESTIGATIONS HANDLED, 1945-1958* (1958); N.Y. STATE COMM’N AGAINST DISCRIMINATION *EMPLOYMENT IN DEPARTMENT STORES: COMPLAINTS AGAINST MAJOR NEW YORK DEPARTMENT STORES RECEIVED, 1945-1958* (1958).

<sup>79</sup> See Witherspoon, *supra* note 8, at 1184.

<sup>80</sup> RISA GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* 103 (2007).

<sup>81</sup> See *Lily-White Industries*, N.Y. AMSTERDAM NEWS, July 21, 1951, at 6.

<sup>82</sup> See Carter, *supra* note 36, at 57-58.

<sup>83</sup> See *id.* at 58.

<sup>84</sup> See Herbert R. Northrup, *Shall We Slow Down on FEPC?: Progress Without Federal Compulsion* COMMENTARY (Sept. 1, 1952).

<sup>85</sup> See Sutin, *supra* note 19, at 1035 (1965). See ILL. REV. STAT. ch. 48, S. 853 (1964).

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<sup>86</sup> Earl Brown, *SCAD: What Is It?*, N.Y. AMSTERDAM NEWS, June 18, 1955, at 16.

<sup>87</sup> This view continued well into the 1960s. See Note, *Pennsylvania Law and Discriminatory Employment Practice*, *supra* note 8, at 526-27 ("Ignorance, it is submitted, is the basis for most racial prejudice and discrimination.").

<sup>88</sup> See Memorandum on Conference with Commissioners Turner and Carter at the Office of the State Commission Against Discrimination (March 18, 1946), in LOC – NAACP Papers (SCAD I).

<sup>89</sup> See Letter from Marian Wynn Perry to Arthur H. Harlow, Jr. (Jan. 14, 1948), in LOC – NAACP Papers (SCAD III).

<sup>90</sup> See HIGBEE, *supra* note 19, at 71 (also in MORROE BERGER, *EQUALITY BY STATUTE* 162 (1952 Edition)).

<sup>91</sup> *Id.*

<sup>92</sup> This logic was set forth most vividly in a 1948 book, *All Manner of Men*, in which Malcolm Ross reflected upon his time as chairperson of the federal COFEP. It is worth quoting at length:

If the names of the companies and unions sometimes do not appear, that is because these cases were settled without benefit of publicity. FEPC did not run with unproven charges to the newspapers, and wever [sic] after cases were settled, they were usually kept quite out of deference to the feelings of those who agreed to stop discriminating, and did not like to have it appear that they had discriminated in the first place.... That restraint helped to settle other FEPC cases, but it left the public usually in ignorance that employers and workers could be persuaded to change their habits. It concentrated all the newspaper notices on those tough cases where employers and unions decided to tell FEPC to go to the devil and forthwith did so in the public prints and on the floor of Congress.

MALCOLM ROSS, *ALL MANNER OF MEN* \_\_ (1948).

<sup>93</sup> See Report on the Experience of the Urban League, NAACP, and American Jewish Congress, in LOC – NAACP Papers (SCAD III) .

<sup>94</sup> Herbert R. Northrup, *Proving Ground for Fair Employment: Some Lessons from New York State's Experience*, COMMENTARY (Dec. 1947) at 552, 554.

<sup>95</sup> See Report on the Experience of the Urban League, *supra* note 92.

<sup>96</sup> See Letter from Marian Wynn Perry to Arthur H. Harlow, Jr. (Jan. 14, 1948), in LOC – NAACP Papers (SCAD III).

<sup>97</sup> See New from Illinois Conference of Branches of the NAACP (Mar. 20, 1955), in LOC—NAACP Papers (Illinois).

<sup>98</sup> See Letter from A.L. Foster to Roy Wilkins (June 30, 1953), in LOC—NAACP Papers (Illinois).

<sup>99</sup> See HERBERT GARFINKEL, *WHEN NEGROES MARCH* 10 (1959).

<sup>100</sup> [CITE]

<sup>101</sup> See *SCAD Inaction Hit by NAACP* (May 5, 1949), in LOC—NAACP Papers (SCAD III).

<sup>102</sup> See *id.*

<sup>103</sup> See THOMAS J. SUGRUE, *SWEET LAND OF LIBERTY: THE FORGOTTEN STRUGGLE FOR CIVIL RIGHTS IN THE NORTH* 281-82 (2008).

<sup>104</sup> See MARK TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961*, at 46 (1994).

<sup>105</sup> See Memorandum to Mr. Marshall from Marian Wynn Perry (September 23, 1947), in LOC – NAACP Papers (SCAD III).

<sup>106</sup> See Alexander Gourse, *"Such Power Spells Tyranny": Business Opposition to Administrative Governance and the Transformation of Fair Employment Policy in Illinois, 1945-1964*, in *THE RIGHT AND LABOR IN*

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AMERICA: POLITICS, IDEOLOGY, AND IMAGINATION (Nelson Lichtenstein & Elizabeth Tandy Schermer eds., 2012).

<sup>107</sup> Here there is a discrepancy between Fine's article and the *Detroit News*. The *Detroit News* makes no mention of Van Valkenburg's dramatic taking to the floor, and it attributes the "conceived in the halls of the Communist Party" comment to Betz, chair of the State Affairs Committee. *House Refuses, 43-53, to Revive FEPC Bill*, DETROIT NEWS, Mar. 31, 1954, at 41.

<sup>108</sup> For "Hitlerian quotas," see Anthony Chen, "The Hitlerian Rule of Quotas: Racial Conservatism and the Politics of Fair Employment in New York State, 1941-1945," 92 J. AM. HIST. \_\_ (2006).

<sup>109</sup> See, e.g., H. JOURNAL, 1951 Leg., Reg. Sess. 2519 (Pa. 1951) (branding proposed FEPCs as "the opening wedge for the development of a bureaucracy without end"). See also Johnson Kanady, *Stevenson Aid Sets Up Illegal 'FEPC' Is Charge*, CHI. TRIB., Feb. 22, 1952, at B7 (raising specter of "government by bureau").

<sup>110</sup> *Dangerous Precedent*, DETROIT FREE PRESS, Feb. 5, 1952, at 6 (denouncing administrative body with "quasi-judicial" authority "remote from public control"). For discussion within the movement, see Memo from Olive R. Beasley to Executive Committee and Co-operating Organizations (Feb. 12, 1952), in LOC - NAACP Papers.

<sup>111</sup> Journal of the House—State of Michigan, April 13, 1955, at 877. FEPC opponents in Illinois also made the argument that enactment "would lead to the creation of an all-powerful government employment agency that would become the greatest political instrumentality in the state." *Senate Group Against FEPC Measure*, CHI. TRIB., May 17, 1945, at 11.

<sup>112</sup> The only exception was 1965-66, when Democrats managed to pull even in the state senate.

<sup>113</sup> *Groups Protest Proposed Budget Slash on SCAD*, N.Y. AMSTERDAM NEWS, Mar. 10, 1956, at 3; *Let SCAD Alone!*, N.Y. AMSTERDAM NEWS, Mar. 17, 1956, at 10 (noting effort to cut \$38,122 from SCAD budget).

<sup>114</sup> *The Plight of SCAD*, N.Y. AMSTERDAM NEWS, Mar. 17, 1956; see also *State Griders Kick SCAD Aroun' in Legislature*, N.Y. AMSTERDAM NEWS, Mar. 31, 1956 (noting that SCAD had become a "political football").

<sup>115</sup> Norman Dorsen, *The Model Anti-Discrimination Act*, 4 HARV. J. LEG. 212, 216 (1967) ("In other words, the lesson to be derived from the undoubted fact that administrative vigor and political support are important is not that a good law is irrelevant or unimportant, but that it may not be enough.").

<sup>116</sup> *Holland v. Edwards*, 119 N.E.2d 581, 584 (N.Y. 1954).

<sup>117</sup> *Id.* at 584.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 585.

<sup>120</sup> See *International Brotherhood of Electrical Workers Local 35 v. Comm'n on Civil Rights*, 102 A.2d 366 (Conn. 1953) (reviewing the order of the Commission on Civil Rights requiring Local 35 of the International Brotherhood of Electrical Workers to admit a black member and making clear an intention to defer to the agency's fact-findings if supported by "substantial evidence," and also blessing the FEPC law's relaxation of procedures and rules, including the rules of evidence, that would normally apply in one of the state's trial courts). A later example was a 1963 case in Wisconsin, *Kenosha Cty. Dept. of Public Welfare v. Indus. Comm'n of Wis.*, No. 112278, 1963 WL 1608 (Wis. Cir. Ct. Apr. 30, 1963), which upheld a Commission determination of discrimination using a forgiving version of the "substantial evidence" standard.

<sup>121</sup> *Carter v. McCarthy's Café, Inc.*, No. 532616, 1959 WL 1289 (Minn. 4th Dist. June 29, 1959).

<sup>122</sup> *Id.* at \*2. The finding of discrimination came from an ad hoc Board of Review, as appointed by the Governor upon a recommendation from the FEPC under Minnesota's unique law.

<sup>123</sup> *Id.*

<sup>124</sup> Minutes of the Meeting of the Fair Employment Practices Commission (May 20, 1961), in MHC Papers (Exh. I) (noting Commission decision to drop appeal).

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<sup>125</sup> See *Lesniak v. Fair Emp't Practices Comm'n*, 111 N.W.2d 790 (Mich. 1961); *Estate of Ragland v. City of Detroit*, No. 287, 1960 WL 1379 (Michigan Cir. Ct. Dec. 23, 1960). Interestingly, both cases involved accusations of discriminatory hiring against local governments.

<sup>126</sup> *Lesniak*, 111 N.W.2d at 795. Interestingly, the Court went on to examine the question through the lens of a kind of reverse delegation doctrine, asking whether a de novo trial provision, if interpreted to require a full-scale and redundant trial proceeding, would violate the Michigan constitution as an improper delegation of the administrative fact-finding function to courts. *Id.*

<sup>127</sup> *Id.* at 506.

<sup>128</sup> *Draper v. Clark Dairy, Inc.*, 17 Conn. Supp. 93 (Super. Ct. 1950).

<sup>129</sup> *Id.* at 96.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> The same year, a Pennsylvania trial court arrived at a similar position in the municipal FEPC context with regard to the Philadelphia Human Rights Commission, holding that the use of the phrase “shall have the power” in the agency’s organic statute meant that the holding of a public hearing, even upon a finding of probable cause, was permissive and not required. See *Fetterholf v. Josephs*, C.P. #6, March Term, 1950, No. 7290 (as cited in Yale B. Bernstein, *Fair Employment Practice and the Courts*, in Lincoln Archives (FEPC-Conferences and Workshops, 1962-1966, Box 2).

<sup>133</sup> *Jeanpierre v. Arbury*, 149 N.E.2d 882 (N.Y. 1958).

<sup>134</sup> See *Jeanpierre*, 149 N.E.2d at 883 (rejecting the contention that a dismissal was not a reviewable “order” within the meaning of New York administrative law and holding that “in the absence of a ‘clear expression by the Legislature to the contrary’, the courts may review the discretionary act of an administrative officer or body to determine whether the discretion has been exercised in an arbitrary or capricious manner”). A state appellate court reached a similar conclusion in holding the SCAD’s dismissal of a complaint—on the ground that religion was a bona fide occupational qualification for a position sought by a Jewish applicant with an oil company doing business in Saudi Arabia—was arbitrary and capricious. *Am. Jewish Cong. v. Carter*, 199 N.Y.S.2d 157 (App. Div. 1960), *aff’d*, 173 N.E.2d 788 (N.Y. 1961).

<sup>135</sup> *Lesniak*, 111 N.W.2d at 796.

<sup>136</sup> See, e.g., *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); *United States v. Nova Scotia Food Prod. Corp.*, 568 F.2d 240 (2d Cir. 1977). These examples hardly exhaust the cases in which parties raised new due process and related claims before FEPCs. In Michigan, for instance, respondents raised a DP challenge to a commission’s power to find PC without first granting the employer the right to a preliminary hearing in which witnesses would be put on. See *Sutin*, *supra* note 1, at 1025 (citing *Cohen v. River Rouge Savings Bank*, Claim No. 1050, Mich. FEPC).

<sup>137</sup> See Reuel Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399 (2007).

<sup>138</sup> See *Dickerson Rejected for FEPC*, CHI. TRIB., Nov. 2, 1961; *Warn Kerner on Two Nominees*, CHI. TRIB., Oct. 12, 1961.

<sup>139</sup> *Kerner Delays Choosing New FEPC Members*, CHI. TRIB., Nov. 17, 1961, at 7 (“Kerner is the first Illinois governor to have any nominee turned down in more than 10 years.”); see also *Senate Bars Helstein as FEPC Member: Accused of Red Front Ties*, CHI. TRIB., Nov. 10, 1961, at 1; *Balk Two FEPC Nominees: Committee Turns Down Helstein*, 11-9; *Recalls Gray for Quiz on Gibe*, CHI. TRIB., Nov. 9, 1961, at 1; *Dickerson Rejected for FEPC*, CHI. TRIB., Nov. 2, 1961, at 2.

<sup>140</sup> See HALPERN, DOWN ON THE KILLING FLOOR (1997); HALPERN & HOROWITZ, MEATPACKERS (1996); CYRIL ROBINSON, MARCHING WITH DR. KING: RALPH HELSTEIN AND THE UNITED PACKINGHOUSE WORKERS (2011). On Helstein’s rejection, see *Senate Bars Helstein as FEPC Member*, CHI. TRIB., Nov. 10, 1961; *Gratuitous Handicap for FEPC*, CHI. TRIB. (Nov. 7, 1961); *Balk Two FEPC Nominees*, CHI. TRIB., Nov. 9, 1961.

<sup>141</sup> *Warn Kerner on Two Nominees*, CHI. TRIB., Oct. 12, 1961.

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<sup>142</sup> See *Dickerson Rejected for FEPC*, CHI. TRIB., Nov. 2, 1961 (quoting Mayer as saying that “hundreds of other Negroes are qualified to serve” and so it would be “senseless to get FEPC off to a bad start”). For the “implicit compromise” idea, see Joseph Minsky, *FEPC in Illinois: Four Stormy Years*, 41 NOTRE DAME LAW. 152, 157 (1965).

<sup>143</sup> See Minsky, *supra* note 142, at 155.

<sup>144</sup> See *Kerner Signs Anti-Bias Bill*, CHI. TRIB., July 22, 1961.

<sup>145</sup> Caught off-guard, fair employment supporters were reduced to meekly arguing that Helstein should not be held accountable for the 100,000 meatpacker union members and that Dickerson was “definitely a capitalist.” See *Balk Two FEPC Nominees*, CHI. TRIB., Nov. 9, 1961; *Probes Ties of Appointee to State FEPC*, CHI. TRIB., Oct. 26, 1961. A shower of last-minute telegrams from the American Jewish Congress and other key organizations within the fair employment coalition also lacked much punch, praising Kerner for the “balanced composition” of his appointments and imploring Senator Merritt Little, chairman of the Senate Executive Committee with the authority to confirm or reject the new appointees, to confirm all five nominees without delay. See, e.g., Telegram from Elmer Gertz, American Jewish Congress, to Gov. Otto Kerner (Oct. 24, 1961), in Helen Cleary Foreman Papers, Abraham Lincoln Presidential Library and Museum [hereinafter “Lincoln Archives”]; Telegram from Elmer Gertz, American Jewish Congress, to Hon. Merritt J. Little, Chairman, Senate Executive Committee (Oct. 24, 1961), in Lincoln Archives (Fair Employment Practices Commission, Correspondence 1961-1964, Box 2); see generally *Blast Illinois Smear Against Earl Dickerson*, CLEVELAND CALL & POST, Nov. 11, 1961 (noting crush of telegrams).

<sup>146</sup> See *Dickerson Rejected for FEPC*, CHI. TRIB., Nov. 2, 1961; *Senate Bars Helstein as FEPC Member*, CHI. TRIB., Nov. 10, 1961. For “storm center,” see *Balk Two FEPC Nominees*, CHI. TRIB., Nov. 9, 1961.

<sup>147</sup> *Senate Bars Helstein as FEPC Member*, CHI. TRIB., Nov. 10, 1961; *Balk Two FEPC Nominees*, CHI. TRIB., Nov. 9, 1961.

<sup>148</sup> See Statement of Charles W. Gray Before the Executive Committee of the Illinois State Senate (Nov. 15, 1961), in Lincoln Archives (F.E.P.C.—Motorola, Gray Hearings and Statements, Box 3).

<sup>149</sup> *State’s FEPC to Take Cases in Two Months*, CHI. TRIB., Sept. 25, 1961.

<sup>150</sup> *Senate Confirms Gray for FEPC Chairman*, CHI. TRIB., Nov. 16, 1961.

<sup>151</sup> See Statement of Charles W. Gray, *supra* note 148.

<sup>152</sup> *Id.*

<sup>153</sup> On intercession, see Minsky, *supra* note 142, at 158.

<sup>154</sup> See *Dickerson Rejected for FEPC*, CHI. TRIB., Nov. 2, 1961.

<sup>155</sup> See The Facts in This Case (draft copy of FEPC statement designed to clear up “misconceptions”), in Lincoln Archives (F.E.P.C.—Motorola and Leon Myart Transcripts, Box 3, Folder 2).

<sup>156</sup> See *id.*

<sup>157</sup> See “Hammer” James Kemp Still Wielding Political Tools at Age 67; Black Labor Leader’s Savvy Keeps Him Within Circle of Power, THE CHI. REPORTER, [DATE], 1978, at 8.

<sup>158</sup> *Balk Two FEPC Nominees*, CHI. TRIB., Nov. 9, 1961.

<sup>159</sup> See ILL. FAIR EMP’T PRACTICES COMM’N, FIRST ANN. REP. 4 (1962).

<sup>160</sup> See Minutes, Fair Employment Practices Commission Meeting, [DATE] in Lincoln Archives (FEPC—Correspondence 1961-1964, Box 2).

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> See Draft—Newsletter, Fair Employment Practices Commission, Correspondence 1961-1964, in Lincoln Archives (Box 2).

<sup>164</sup> See Sutin, *supra* note 1, at 1035. See Ill. Rev. Stat. ch. 48, S. 853 (1964).

<sup>165</sup> See Minutes, Fair Employment Practices Commission (Mar. 21, 1962), in Lincoln Archives (Minutes and Agendas, 1962-1966, n.d., Box 2), at 1.

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<sup>166</sup> See Minutes, Fair Employment Practices Commission (Dec. 13, 1962), in Lincoln Archives (Minutes and Agendas, 1962-1966, n.d., Box 2), at 1.

<sup>167</sup> See Minutes, Fair Employment Practices Commission (Mar. 30, 1962), in Lincoln Archives (Minutes and Agendas, 1962-1966, n.d., Box 2).

<sup>168</sup> See Minutes, (Dec. 13, 1962), *supra* note 166.

<sup>169</sup> Minsky, *supra* note 142, at 160.

<sup>170</sup> ANNUAL REPORT? Staff included Minsky, John Ducey (who had spent eight years as Director of Employment Services for the Chicago Commission on Human Relations), John Cheeks (newly hired as Springfield "Director"), a "Field Representative," and three stenographers. See also The Facts in This Case, *supra* note 155.

<sup>171</sup> For the Illinois cases, see *Illinois FEPC Rules in Teacher Bias Case*, CLEVELAND CALL & POST, Nov. 10, 1962; Comparative Case Chronologies, Public Hearing Cases, in Lincoln Archives (F.E.P.C.-Memoranda, 1962-1964) (noting public hearings against the Chicago Board of Education, the Sealy Mattress Company, the Chicago Transit Authority, and the Illinois Department of Public Safety). The claim about New York comes from JAY ANDERS HIGBEE, DEVELOPMENT AND ADMINISTRATION OF THE NEW YORK STATE LAW AGAINST DISCRIMINATION 169-77, 218-23 (1966) (noting three completed hearings and two hearings terminated by consent order prior to 1955).

<sup>172</sup> See ILL. FAIR EMP'T PRACTICES COMM'N, SECOND ANN. REP. 4 (1964) ("Negroes began to be employed for the first time in local retail stores in sales capacities...").

<sup>173</sup> See Comparative Case Chronologies, Public Hearing Cases, *supra* note 171 (noting public hearing against the Sealy Mattress Company and its quick settlement, alongside hearings against the Chicago Board of Education, the Sealy Mattress Company, the Chicago Transit Authority, and the Illinois Department of Public Safety).

<sup>174</sup> See Press Release (Nov. 9, 1963), in Illinois State Archives (Illinois FEPC Papers, Box 5).

<sup>175</sup> See Sylvia Taylor, Illinois FEPC No. 62-1, in 9 Race Rel. L. Rep. 414, 415 (1964) ("It is not the function of the Commission as an administrative agency to impose self-limitations upon its scope or upon its jurisdictional limitation in the first instance."); see generally Minsky, *supra* note 142, at 159.

<sup>176</sup> See SECOND ANN. REP., *supra* note 172, at 18.

<sup>177</sup> 372 U.S. 714 (1963).

<sup>178</sup> SUGRUE, *supra* note 102, at 289.

<sup>179</sup> *Id.* at 290.

<sup>180</sup> *Id.* at 288.

<sup>181</sup> *Id.* at 291.

<sup>182</sup> See SECOND ANN. REP., *supra* note 172, at 1.

<sup>183</sup> SUGRUE, *supra* note 102, at \_\_.

<sup>184</sup> See Letter from L.H. Holman to W.J. Ducey (May 11, 1963), in Lincoln Archives (FEPC - Correspondence 1961-1964, Box 2).

<sup>185</sup> See *id.*

<sup>186</sup> See ROBERT B. MCKERSIE, A DECISIVE DECADE: AN INSIDER'S VIEW OF THE CHICAGO CIVIL RIGHTS MOVEMENT DURING THE 1960S 43 (2013).

<sup>187</sup> *Id.* at 29 (noting gate census and statistics).

<sup>188</sup> *Id.*

<sup>189</sup> See, e.g., Sutin, *supra* note 19, at 1029 ("[E]mployers who sell services and products directly to the general public under brand names or trade marks are more amenable to conciliation, at least at the outset, than industrial manufacturers selling small metal parts indirectly to the grade for further processing.").

<sup>190</sup> See MCKERSIE, *supra* note 186, at 30 (noting demand letter and Motorola's public statement, by way of an ad in the New York Times, a few days later on July 24, 1963).

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<sup>191</sup> *Id.* at 33-36.

<sup>192</sup> See Kovarsky *supra* note 36, at 536 (“There is a possibility that the complaint in Motorola was institutionally inspired.”); MCKERSIE, *supra* note 186, at 30 (noting that Myart and the others “intended” to file with the FEPC); *Leon Myart – He Tuned in a U.S. Furor*, CHI. DAILY NEWS, May 16, 1964 (reporting that Urban League had advised Myart to take his case to the Illinois FEPC).

<sup>193</sup> See Charge of Unfair Employment Practice, No. 63C-127, Transcript of Record to Supreme Court, Motorola, Inc. v. Illinois Fair Employment Practices Commision [sic] and Leon Myart, No. 64 L 27747 (filed May 14, 1965) at 27, in Illinois State Archives, Springfield, Illinois [hereinafter “Myart Record”].

<sup>194</sup> Myart Record at 343. Some of the best biographical information comes in *Leon Myart—He Tuned in a U.S. Bias Suit*, CHI. DAILY NEWS, May 16, 1964.

<sup>195</sup> See *Leon Myart—He Tuned in a U.S. Bias Suit*, CHI. DAILY NEWS, May 16, 1964.

<sup>196</sup> Minsky, *supra* note 142, at 162.

<sup>197</sup> See Myart Record at 702 (noting aborted conciliation conference on October 15, 1963).

<sup>198</sup> See Illinois FEPC Rules & Regulations, Art. II, § B(5).

<sup>199</sup> See Myart Record at 702. (noting that Motorola stood up Gray, Ducey, and Minsky on November 18, 1963).

<sup>200</sup> Goodwin appears to have been a last-minute retention because, on the first day of the hearing on January 14, 1964, Goodwin represented that he had only had one week to prepare and asked for a two-week continuance. See Myart Record at 62.

<sup>201</sup> See *Quentin J. Goodwin, 81 Onetime State Legislator*, CHI. TRIB. (Jan. 13, 2000), [http://articles.chicagotribune.com/2000-01-13/news/0001130186\\_1\\_mr-goodwin-democratic-illinois-house](http://articles.chicagotribune.com/2000-01-13/news/0001130186_1_mr-goodwin-democratic-illinois-house).

<sup>202</sup> For an excellent overview of General Test No. 10, including its creation in 1949, and the state of debate at the time on issues relating to testing and discrimination, see Todd E. Fandell, *Testing & Discrimination: Issue in Motorola Case: Do Job Tests Penalize Negroes?*, WALL ST. J., Apr. 21, 1964.

<sup>203</sup> See Myart Record at 319 (testimony of Sally Abelman, manager of the Chicagoan Hotel).

<sup>204</sup> Among the questions were: What’s the resistance color code? What is Ohm’s law? What are three basic formulas (for direct current circuits, etc.)? What’s a “phase angle”? Also: “What is the inductance of a choke if the impedance is 8000 ohms, the resistance is 100 ohms, and the frequency is 60 cycles?” See Myart Record at 113-15.

<sup>205</sup> Thus, when Myart’s counsel asked a Motorola official about its number of black employees, Nystrom shot back, “Well, is Motorola being tried for the practice of discrimination per se, or are they being tried for discriminating against one Leon Myart? And if we are on trial for alleged discrimination of the whole negro race, then we will just get up and walk out of here, because that’s not my understanding of the hearing.” See Myart Record at 295.

<sup>206</sup> See Myart Record at 277-78.

<sup>207</sup> See Decision and Order of Hearing Examiner, Myart Record at 362.

<sup>208</sup> See *id.*

<sup>209</sup> See *id.* 363 (“The Hearing Examiner is persuaded therefore, that had Respondent produced the test administrator to testify, the test No. 10 which the Complainant took, his test score, and the overlay key from which comparisons with, and checking of Complainant’s answers might have been made, the showing would have been adverse to the Respondent.”).

<sup>210</sup> *Id.* at 364.

<sup>211</sup> *Id.* at 366.

<sup>212</sup> *Id.* at 364. AUDREY M. SHUEY, *THE TESTING OF NEGRO INTELLIGENCE* (1958). Perhaps unbeknownst to Bryant, the book was in fact part of a well-funded bid by the white supremacist Pioneer Fund to counter school desegregation in the years following *Brown v. Board of Education*.

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<sup>213</sup> See K. M. Piper, Vice President, Motorola, Inc., Speech Given to Chicago Kiwanis Club, Sherman House, Chicago, Illinois (1965), in Lincoln Archives (F.E.P.C.—Motorola v. F.E.P.C., Box 3) (bitter complaint here).

<sup>214</sup> Decision and Order of Hearing Examiner, Myart Record at 365.

<sup>215</sup> *Id.* at 366.

<sup>216</sup> See *Illinois FEPC Action Hurts Rights Bill*, DECATUR REVIEW, June 1, 1964.

<sup>217</sup> 110 CONG. REC. 13,492 (1964). Without language specifically overruling the position in *Motorola* and thus bolstering the legality of job testing, Tower explained, the effect would be “to invalidate tests of various kinds of employees by both private business and Government to determine the professional competence or ability or trainability or suitability of a person to do a job.” *Id.*

<sup>218</sup> See, e.g., GRAHAM, *supra* note 3, at 387; DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY 14-15 (1977); Gary Bryner, *Congress, Courts, and Agencies: Equal Employment and the Limits of Policy Implementation*, 96 POL. SCI. Q. 411, 423 (1981); Hugh Steven Wilson, *A Second Look at Griggs v. Duke Power Company: Ruminations on Job Testing, Discrimination, and the Role of the Federal Courts*, 58 VA. L. REV. 844, 852-58 (1972).

<sup>219</sup> See *Test Answers Are Provided by Motorola*, CHIC. TRIB., Mar. 20, 1964.

<sup>220</sup> See *Biased Under FEPC Ruling*, CHI. TRIB., Mar. 19, 1964; D.L. WESTBERG, PRESS SWALLOWS MOTOROLA HOAX, FOCUS MIDWEST/65, VOL. IV, Nos. 1 & 2 (1965), at 11.

<sup>221</sup> See *Motorola, Inc. Seeks to Get FEPC Records*, [UNCLEAR], in Lincoln Archives (FEPC—Motorola, Newspaper Clippings, Box 3, Folder 2) (noting that “a Negro examiner could not give a fair, objective ruling when the complainants are Negroes”). On Leighton’s career, see Press Release (Nov. 9, 1963), in Illinois State Archives (Illinois FEPC Papers, Box 5).

<sup>222</sup> See *Motorola Fights Negro Justice*, CHI. DEFENDER (Mar. 12, 1964), in Lincoln Archives (FEPC—Motorola, Newspaper Clippings, Folder 1).

<sup>223</sup> See *id.*

<sup>224</sup> See *id.*; *Charges Firm Can’t Get Fair Hearing*, CHI. TRIB., Mar. 12, 1964.

<sup>225</sup> See *Motorola Fights Negro Justice*, *supra* note 222.

<sup>226</sup> *Negro Revolt Used as Tool Against Leighton*, CHI. DEFENDER, Mar. 11, 1964.

<sup>227</sup> See *FEPC Records Denied to Defendant’s View in Grievance Hearing*, CHI. SUN-TIMES (Jan. 21, 1964).

<sup>228</sup> See *Motorola, Inc. Seeks to Get FEPC Records*, *supra* note 221; *Charges Firm Can’t Get Fair Hearing*, CHI. TRIB. (Mar. 12, 1964).

<sup>229</sup> See *Motorola, Inc. Seeks to Get FEPC Records*, *supra* note 221; *Motorola Fights Negro Justice*, [UNCLEAR], *supra* note 222.

<sup>230</sup> See Press Release, State of Illinois Fair Employment Practices Commission (Jan. 17, 1964), in Lincoln Archives (FEPC—Motorola and Leon Myart Transcripts, Box 3, Folder 2).

<sup>231</sup> See *FEPC Records Denied to Defendant’s View in Grievance Hearing*, CHI. SUN-TIMES, Jan. 21, 1964.

<sup>232</sup> See Press Release, State of Illinois Fair Employment Practices Commission (Mar. 31, 1964), in Lincoln Archives (FEPC—Speeches and Press Releases, 1962-1966, n.d.) (“As the Commission sets about to seek a just and equitable outcome of this matter, it will seek expert advice and opinions on the matter of pre-employment testing in order that we will not be acting in a vacuum.”).

<sup>233</sup> See Administrative Procedure Act, 5 U.S.C. § 557(d)(1) (barring contacts with persons outside the agency on matters “relevant to the merits of the proceeding,” but applying only to “interested persons”).

<sup>234</sup> [CITE]

<sup>235</sup> See Robert Nystrom, Statement to the Fair Employment Practices Commission (Nov. 10, 1964), in Lincoln Archives (F.E.P.C.—Correspondence 1961-1964, Box 2).

<sup>236</sup> See K.M. Piper, Speech, *supra* note 213.

<sup>237</sup> See Press Release (Mar. 31, 1964), *supra* note 232.

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<sup>238</sup> See Motorola F.E.P.C. Case, Attached to Letter from Elizabeth J. Miller to “Gentlemen” (June 17, 1964), in in Lincoln Archives (F.E.P.C.–Correspondence, 1961-1964, Box 2).

<sup>239</sup> Earl Brown, *SCAD: What Is It?*, N.Y. AMSTERDAM NEWS (June 18, 1955), at 16.

<sup>240</sup> [Title], CHI. TRIB. (Oct. 13, 1964).

<sup>241</sup> See FEPC to Hold Public Hearing for Motorola, [UNCLEAR], in Lincoln Archives (FEPC—Motorola, Newspaper Clippings, Box 3, Folder 2).

<sup>242</sup> The reason for the separation between the two hearing days was apparently because Myart’s counsel had been unable to find an expert willing to testify against Motorola. Indeed, at the May 25 hearing, Myart’s counsel requested a continuance because, while he had interviewed “six or seven technical advisors,” none wanted the job: “They find out the respondent is Motorola and say, ‘Oh, Motorola, with millions of dollars.’” Myart Record at 590.

<sup>243</sup> The view seemed to be that the degree of racial or cultural discrimination would tend to exist along a continuum and, with proper construction, could be reduced to a low level. For instance, Humpreys: “You could construct a test that would—an intelligence test, so-called—that would give higher scores to females and another one that would give higher scores to males. You could accentuate racial differences, or you could bring them somewhat closer together.” Myart Record at 875.

<sup>244</sup> *Id.* at 556-59. Interestingly, even Motorola’s experts, several of whom had helped developed the test, conceded under questioning that minority test-takers might fear testing as a result of a “general self-depreciation”—a concept paralleling the modern-day notion of “stereotype threat.” See #664.

<sup>245</sup> *Id.* at 911.

<sup>246</sup> *Id.* at 871, 930; see also *id.* at 830 (Bloom testimony) (“My opinion on the particular General Ability Test is that it would be quite possible for a person to be highly successful in this job [as analyzer and phaser] and still have a very low score on this particular test.”).

<sup>247</sup> Minsky, *supra* note 142, at 169.

<sup>248</sup> See Settlement Order (May 5, 1964), in Illinois State Archives (Illinois FEPC Papers, Box 5); Memorandum from Ducey to Gray et al. (July 1, 1964), in Lincoln Archives (FEPC – Memoranda, 1962-1964).

<sup>249</sup> See Letter from Robert V. Nystrom to Charles W. Gray (July 6, 1964), in Lincoln Archives (FEPC – Correspondence 1961-1964, Box 2).

<sup>250</sup> *Id.*

<sup>251</sup> See Robert Nystrom, Statement to the Fair Employment Practices Commission (Nov. 10, 1964), in Lincoln Archives (FEPC–Correspondence 1961-1964, Box 2); see also *Support Motorola in Bias Suit*, CHI. DAILY NEWS (Sept. 30, 1964) (noting claim by intervenor industry associations that they represent “90 per cent of the manufactureres [sic] in the state”).

<sup>252</sup> See *The Cowardly Way Out*, CHI. TRIB., Nov. 2, 1964.

<sup>253</sup> At the national level, President Lyndon Johnson handily defeated Barry Goldwater despite George Wallace’s Democrat-splitting segregationist run.

<sup>254</sup> See *Argument Erupts at FEPC Hearing*, ILL. STATE J., Nov. 11, 1964.

<sup>255</sup> See Letter from Foreman to “Laura” (Mar. 8, 1965), in Lincoln Archives (FEPC–Correspondence, 1965-1968, 1970, n.d.). Motorola had been angling for an opportunity to speak for months—including a telegram to U.S. Senator Paul Douglas noting the Commission’s refusal to permit Motorola to appear at the November 10 meeting and claiming that the Commission’s inaction had caused it to adopt “employment procedures which substitute for Test No. 10” at a cost of \$10,000 per month. See Telegram from K.M. Piper to Paul H. Douglas (Nov. 5, 1964), Attached to Letter from Paul H. Douglas to Charles W. Gray (Nov. 9, 1964), in Lincoln Archives (FEPC–Correspondence, 1961-1964, Box 2).

<sup>256</sup> See what appear to be Piper luncheon remarks, in Lincoln Archives (FEPC—Motorola—Affidavits, Statements, Subpoenas, Box 3).

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<sup>257</sup> Here, Nystrom focused on the Commission's refusal to answer—"cannot answer"; "don't have a ready answer"—regarding the legality of General Ability Test No. 10. See Robert Nystrom, *Statement to the Fair Employment Practices Commission* (Nov. 10, 1964), *supra* note 251. As Meyers had told Cronin at the hearing: "I obviously cannot answer your question, although I guess you, as counsel for the Company, will just have to give them the best advice you are able to give on that." Letter from Piper to Gray (Oct. 23, 1964), in Lincoln Archives (FEPC–Correspondence and Memoranda, 1964-1965, Box 3). In an October 1964 letter, Piper had asked for Gray's view as to whether Motorola could re-commence use of Test No. 10. *Id.*

<sup>258</sup> In particular, Nystrom laid into Minsky's comment at gathering of National Conference of Christians and Jews that "the so-called 'Anti-Motorola amendment' is going to stop discriminatory testing practices." Robert Nystrom, *Statement to the Fair Employment Practices Commission* (Nov. 10, 1964), *supra* note 251.

<sup>259</sup> Here, Motorola claimed further imperious and even threatening behavior from Minsky in particular, who claimed during conciliation in the Thornton case that he was the author of the Act and that it permitted general surveys of a respondent's employment practices, and also issued something that seemed like a threat: "Employers would never proceed to a public hearing on a complaint case because of the adverse publicity in the community, and further a company which proceeded in these ways would run the risk of Negro picket lines and Negro boycotts." "This is how Minsky introduced the F.E.P.C. to Motorola. Integrity, not coercion, is needed," Nystrom noted in an unctuous blaze. "This man should be removed from the state payroll for threatening an employer." Robert Nystrom, *Statement to the Fair Employment Practices Commission* (Nov. 10, 1964), *supra* note 251; *see also* K.M. Piper, Speech, *supra* note 213. A final line of attack was prejudgment as a result of Gray's imprudent comments in a publication sent to the Illinois Chamber of Commerce for distribution to its members, and also Kemp's similar failure to recuse as result of Bryant having served as Kemp's "personal attorney" in a divorce proceeding. Robert Nystrom, *Statement to the Fair Employment Practices Commission* (Nov. 10, 1964), *supra* note 251; *see also* K.M. Piper, Speech, *supra* note 213 (noting Gray statement).

<sup>260</sup> *See Motorola Offers Legal Help to Firms in FEPC Cases*, CHI. SUN-TIMES, Nov. 25, 1964.

<sup>261</sup> *See id.*

<sup>262</sup> *See Senate Unit Now Free for FEPC Hearing; Motorola Demands Shakeup* (UNCLEAR), in Lincoln Archives (FEPC—Motorola, Newspaper Clippings, Folder 1).

<sup>263</sup> *See Motorola Offers Legal Help to Firms in FEPC Cases*, CHI. SUN-TIMES, Nov. 25, 1964.

<sup>264</sup> *See FEPC Role in Illinois: Its Achievements and Goals*, CHI. SUN-TIMES, Dec. 15, 1963.

<sup>265</sup> *See* Letter from Foreman to "Laura" (Mar. 8, 1965), in Lincoln Archives (FEPC–Correspondence, 1965-1968, 1970, n.d.).

<sup>266</sup> *See* Memo from Walter J. Ducey to Chairman Gray, Commissioners Foreman, Kemp, Myers, and Seaton (June 3, 1964), in Lincoln Archives (FEPC–Memoranda, 1962-1964).

<sup>267</sup> *See* Minutes, Jan. 12, 1965 (noting movement of money out of the agency's "Contingencies and Printing" category to its "Contractual Services and Travel" category).

<sup>268</sup> *See* ILL. FAIR EMP'T PRACTICES COMM'N, FIRST ANN. REP. 6 (1962).

<sup>269</sup> Commission Decision on Review, Myart Record at 1086-87.

<sup>270</sup> *Id.*

<sup>271</sup> *Id.* at 1088.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> *Id.* at 1089.

<sup>275</sup> *Id.*

<sup>276</sup> *FEPC Fails Its Test*, CHI. DAILY NEWS, Nov. 23, 1964.

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

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<sup>279</sup> See Piper luncheon remarks, *supra* note 255.

<sup>280</sup> See *id.*

<sup>281</sup> See K. M. Piper, Speech, *supra* note 213.

<sup>282</sup> See *id.*

<sup>283</sup> See Memo from John G. Cheeks to Gray et al. (Dec. 18, 1964), in Lincoln Archives (FEPC–Correspondence 1961-1964, Box 2).

<sup>284</sup> See *The Arrington Bill*, CHI. DEFENDER, Dec. 22, 1964, at 13. Motorola likewise pressed the attack legislatively, approaching the chair of the Labor Law section of the Illinois State Bar Association with a laundry list of measures that included a carve-out for felony commission, deletion of “technical advisors” from section 6(c), a requirement that hearing examiners be drawn from a roster prepared by the Illinois State Bar Association rather than the FEPC itself, a clarification that “research” or “survey” does not bring with it access to employer records, a requirement that employers be permitted to make a record of conciliation proceedings, and deletion of “take such further affirmative action.” See Letter from William K. Cavanaugh to Robert V. Nystrom (Oct. 23, 1964), in Lincoln Archives (FEPC–Memoranda, 1962-1964); see also Memo from John G. Cheeks to Gray et al., Meeting of October 23, 1964 in Office of Attorney William K. Cavanaugh, Attended by Commissioner Myers and J. Cheeks, (Oct. 26, 1964), in Lincoln Archives (FEPC–Memoranda, 1962-1964).

<sup>285</sup> *Republic Steel Corp. v. NLRB*, 311 U.S. 7 (1940) (holding that “affirmative action” was remedial not punitive and so couldn’t support fines but could support remedies designed to make complainants whole); *International Brotherhood of Operative Potters v. NLRB*, 320 F.2d 757 (D.C. Cir. 1963) (back pay within scope of remedies authorized under NLRA).

<sup>286</sup> See Cook County Circuit Court Transcript at 13, in Lincoln Archives (FEPC; Motorola vs. FEPC) [hereinafter Trial Court Transcript]. The issue in the Motorola case was also different because it came in the somewhat different context of backpay for loss of employment rather than, say, union dues paid to an illegal company union. See, e.g., *Virginia Electric and Power Co. v. NLRB*, 319 U.S. 533 (1943) (passing on meaning of “affirmative action” but sustaining order requiring recompense of union dues paid to an illegal company union”); *NLRB v. Seven-Up Bottling*, 344 U.S. 344 (1953) (???).

<sup>287</sup> See Trial Court Transcript at 10 (trial court judge notes that, even if FEPC has damages power, “there would have to be some evidence in the record to justify the finding”).

<sup>288</sup> See Letter from Kenneth Culp Davis to Charles W. Gray (Dec. 14, 1964), in Fair Employment Practices Commission, Memoranda, 1962-1964, Lincoln Archives.

<sup>289</sup> *Id.*

<sup>290</sup> See Kenneth Culp Davis to Joseph Minsky (Dec. 7, 1964), in Lincoln Archives (FEPC–Correspondence and Memoranda, 1964-1965, Box 3).

<sup>291</sup> See Kenneth Culp Davis to Joseph Minsky (Dec. 11, 1964), in Lincoln Archives (FEPC–Correspondence and Memoranda, 1964-1965, Box 3). On the Commission’s wariness of more hearings, see Minsky, *supra* note 142 at 168.

<sup>292</sup> See Order Modifying Commission Decision on Review, Myart Record at 1084.

<sup>293</sup> *Id.* at 1085.

<sup>294</sup> See Circuit Court Order, Myart Record at 1106 (authorizing direct appeal because “the constitutional questions are of such a public interest as to require” it).

<sup>295</sup> The trial court’s opinion was transmitted orally from the bench. See *Motorola, Inc. v. Ill. Fair Emp’t Practices Comm’n*, No. 64L 27747, 1965 WL 1335 (Ill. Cir. Ct. Mar. 5, 1965); see also Opinion, Myart Record at 1119. The judge expressed his reluctance as follows: “Arriving at a decision in this case has been a particularly difficult one for the Court, because I am frank to say that had this been a trial de novo before me, my judgment of what has been established by the competent evidence in this record would have been different than that arrived at by the Commission, but I am not the trier of the facts, the Commission was.” 1965 WL at \*2.

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- <sup>296</sup> See *Court Upholds FEPC in Discrimination Case*, CHI. DEFENDER, July 26, 1965.
- <sup>297</sup> *Motorola v. Ill. Fair Emp't Practices Comm'n*, 215 N.E.2d 286, 291 (Ill. 1966).
- <sup>298</sup> *Id.* at 292.
- <sup>299</sup> *Id.*
- <sup>300</sup> *Id.* at 293. Upon filing of charge, the Commission had requested "copies of the application forms and test scores of those persons hired as analyzers and phasers by the company during the months of July and August for 1963." See Myart Record at 31.
- <sup>301</sup> See Senate Unit Now Free for FEPC Hearing; Motorola Demands Shakeup (UNCLEAR), in Lincoln Archives (FEPC—Motorola, Newspaper Clippings, Folder 1).
- <sup>302</sup> See Memo from Ducey to Gray et al. (Mar. 31, 1965), in Lincoln Archives (F.E.P.C.—Motorola, Gray Hearings and Statements, Box 3). In one of those, payment was deemed appropriate because no opening had come available and so "respondent would have had to fire an employee to hire complainant which neither complainant nor Commission insisted upon." In the other, the complainant had secured alternative employment in the meantime. *Id.*
- <sup>303</sup> See *id.* (noting termination of practice at August 16, 1963 meeting).
- <sup>304</sup> See Fact Sheet, In RE: Testimony by Mr. Douglas Stevenson before the Executive Committee of the Illinois State Senate on March 30, 1965, in Lincoln Archives (FEPC—Motorola, Gray Hearings and Statements, Box 3).
- <sup>305</sup> See *Bank Pays \$1,000 Settlement in Fired Typist's Bias Suit*, CHI. DAILY NEWS, Dec. 10, 1963.
- <sup>306</sup> See Fact Sheet, In RE: Testimony by Mr. Douglas Stevenson *supra* note 302.
- <sup>307</sup> Minsky, *supra* note 142, at 173.
- <sup>308</sup> See Charles W. Gray, Statement Before the Executive Committee of the Senate of the State of Illinois (Mar. 30, 1965), in Lincoln Archives (F.E.P.C.—Motorola, Gray Hearings and Statements, Box 3).
- <sup>309</sup> *Id.*
- <sup>310</sup> See *Illinois Senate Rejects Appointment of Gray; He's Called Dangerous*, PEOIRIA JOURNAL STAR (Apr. 22, 1965).
- <sup>311</sup> *Resist Senate Decree to Drop FEPC Head*, CHI. DEFENDER, Apr. 22, 1965.
- <sup>312</sup> See ROBERT B. MCKERSIE, A DECISIVE DECADE: AN INSIDER'S VIEW OF THE CHICAGO CIVIL RIGHTS MOVEMENT DURING THE 1960s 43 (2013).
- <sup>313</sup> See Letter from Foreman to "Laura" (Mar. 8, 1965), in Lincoln Archives (FEPC—Correspondence, 1965-1968, 1970, n.d.).
- <sup>314</sup> *The Arrington Bill*, CHI. DEFENDER, Dec. 22, 1964.
- <sup>315</sup> See *Chicago Transit Auth. v. Fair Emp't Practices Comm'n*, 243 N.E.2d 638 (Ill. App. Ct. 1968) (overturning Commission fact-finding and citing *Motorola* for proposition that preponderance standard, not "competent evidence" standard, is the operative one).
- <sup>316</sup> See John Philbin, Initiatory Powers for the F.E.P.C. (Dec. 10, 1968), in Lincoln Archives (FEPC—Contracts, 1967-1968, Box 2) (noting 1968 request for initiatory powers); Governor Signs Legislation Adding Muscle to FEPC in Illinois, Illinois Manpower Impressions (Sept. 5, 1975), in Illinois State Archives (Illinois FEPC Files, Box 9 & 10) (noting grant of initiatory powers).
- <sup>317</sup> See Hill, *supra* note 16. For the "problem child" label, see PAUL FRYMER, AFRICAN AMERICANS, THE LABOR MOVEMENT, AND THE DECLINE OF THE DEMOCRATIC PARTY 44 (2008).
- <sup>318</sup> Hill, *supra* note 16, at 43. On the latter, Hill astutely mapped the combination of deskilling (via automation) and hyperskilling (from plant to office) as creating the great paradox of the post-war economy: a shortage of skilled labor amidst rising unemployment. *Id.* at 59. As a result, while FEPCs could "call for equal opportunity," this was a meaningless abstraction without structural economic interventions.
- <sup>319</sup> See *Negro Sees State FEPC Laws Failing*, N.Y. TIMES, Apr. 27, 1964.
- <sup>320</sup> See Hill, *supra* note 16, at \_\_\_\_.

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- <sup>321</sup> John G. Field, *Hindsight and Foresight About FEPC*, 14 BUFF. L. REV. 16, 18 (1964).
- <sup>322</sup> Sol Rabkin, *Enforcement of Laws Against Discrimination in Employment*, 14 BUFF. L. REV. 100, 111 (1964).
- <sup>323</sup> Joseph B. Robinson, *Comment*, 14 BUFF. L. REV. 121, 123 (1964).
- <sup>324</sup> *Id.*
- <sup>325</sup> See ANTHONY CHEN, *THE FIFTH FREEDOM: JOBS, POLITICS, AND CIVIL RIGHTS IN THE UNITED STATES, 1941-1972* 6-7 (2009); Frymer, *supra* note 315, at 6-7; JOHN DAVID SKRENTNY, *THE IRONIES OF AFFIRMATIVE ACTION* 223 (1996). For other analyses of affirmative action's origins, see, for example, GRAHAM, *supra* note 3, at 33-35; PAUL D. MORENO, *FROM DIRECT ACTION TO AFFIRMATIVE ACTION: FAIR EMPLOYMENT LAW AND POLICY IN AMERICA, 1933-1972* (1997); ROBERT J. WEISS, "WE WANT JOBS": A HISTORY OF AFFIRMATIVE ACTION (1997); Nicholas Pedriana, *The Historical Foundations of Affirmative Action 1961-1971*, 17 RES. SOC. STRATIFICATION & MOBILITY 3, 26-27 (1999); Thomas J. Sugrue, *Affirmative Action from Below: Civil Rights, the Building Trades, and the Politics of Racial Equality in the Urban North, 1945-1969*, 91 J. AM. HIST. 145, 145-47, 173 (2004).
- <sup>326</sup> See CHEN, *supra* note 323, at 6-7.
- <sup>327</sup> *Id.* On expansive judicial interpretations of Title VII, see Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417, 1428-29 (2003).
- <sup>328</sup> 401 U.S. 424, 431-32 (1971).
- <sup>329</sup> See, e.g., CHEN, *supra* note 323, at 26 ("Had conservatives not been so successful in opposing FEP legislation, affirmative action might have taken on a vastly different legal and political meaning, and job discrimination might have become regulated through a federal administrative agency that sought only to ensure equal treatment.").
- <sup>330</sup> Most notable in this regard is the Illinois FEPC's promotion, first floated in 1962 but turned to in earnest during the "Negro revolt" of 1963, of compliance programs aimed at public contractors as a more efficient way to combat discrimination and create employment opportunities for black workers. Such programs "can achieve immediate results," Gray noted in a letter to Kerner, "and can successfully forestall charges of indifference by members of minority groups." See Letter from Charles Gray to Otto Kerner (July 9, 1963), in Lincoln Archives (FEPC–Correspondence 1961-1964, Box 2).
- <sup>331</sup> On the fiscal pinch more generally, see Minutes of the Meeting of the Fair Employment Practices Commission (Apr. 12, 1957), at 3, MHC Papers (noting the "very limited budget available for the remainder of the fiscal year"); Minutes of the Meeting of the Fair Employment Practices Commission (May 24, 1957) at 3, in MHC Papers (noting need for "supplemental appropriation" to "cover the extra costs of the public hearing"); State of Minnesota Fair Employment Practices Commission, Program for 1957-1959, MHC Papers (noting plans for "educational programs" to be pursued "[w]ithin the limitations of budget funds available for this purpose"); Minutes of the Meeting of the Fair Employment Practices Commission (Apr. 18, 1958) at 2, MHC Papers (noting that plan to establish local citizen committees but concluding "it does not appear feasible to do so now in view of the limitations of the Commission's budget and staff" and instead concluding the "staff members should proceed to arrange individual conferences with the major employers in the suburban areas to discuss their employment policies in relation to the Fair Employment Practices Law"); Minutes of the Meeting of the Fair Employment Practices Commission (May 27, 1960) at 2, in MHC Papers (noting need to shift funds between accounts in order to cover "additional expenditures" associated with McCarthy's Café case before the Minnesota Supreme Court).
- <sup>332</sup> See Minutes of the Meeting of the Fair Employment Practices Commission (September 18, 1959) at 2; and Index of Minutes (July, 1959 – May, 1960), at 2, both in MHC Papers (noting ways to solve the "operating budget problem" and listing reduction in "travel expenditures within the state" and "[c]oncentration of Commission's work in suburban areas around Twin Cities and Duluth for next two years" as steps to be taken).

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<sup>333</sup> See note 124 *supra*.

<sup>334</sup> All told, four organizations engaged in a letter-writing campaign to key legislators, including the St. Paul Board of Realtors, the St. Paul Rental Property Association, Minnesota Home Owners, and the United Citizens League. See Letter from James C. McDonald, FEPC Executive Director to Legislators (Apr. 8, 1961), in MHC Papers. For other documents, see Memo from St. Paul Board of Realtors to “the Honorable Committeemen and Legislators of the State of Minnesota” (“Biennium Appropriation for State Commission Against Discrimination and Governor’s Human Rights Commission”) (“We feel there is no necessity for an increase in appropriations....”); Memo from James C. McDonald to St. Paul Board of Realtors (Apr. 9, 1963), in MHC Papers (offering point-by-point refutation of memo arguing against budget increase); see also Memo from St. Paul Rental Property Association to “Honorable Governor, Committeemen, Legislators and Citizens of Minnesota” (“Budget Request for Housing Discrimination Law”), in MHC Papers (requesting that budget be appropriated “only for Educational Expenses”). This pattern repeated in other states as FEPCs were handed a raft of new rights—housing and public accommodation being the main ones—to enforce, but without proportionate increases in budget. This came relatively early in Massachusetts, with the MCAD receiving jurisdiction over education, public accommodation, and public housing in 1956.

<sup>335</sup> See Minutes of the Meeting of the [Minnesota] Fair Employment Practices Commission (January 18, 1957), at 3, in MHC Papers (noting budgetary pressures that will come with the “increased responsibility” resulting from amendments adding housing to the FEPC’s responsibilities).

<sup>336</sup> See *Dem Leaders Hit for SCHR Cuts*, N.Y. AMSTERDAM NEWS, Apr. 10, 1965.

<sup>337</sup> *NAACP Boycotts SCHR Hearings*, N.Y. AMSTERDAM NEWS, Feb. 11, 1967.

<sup>338</sup> *NAACP, SCHR at Odds*, N.Y. AMSTERDAM NEWS, Feb. 11, 1967. Perhaps the best overall assessment of the cooling of the relationship between New York civil rights groups and SCAD came from Berger. As Berger put it, SCAD’s relations with civil rights groups seemed “to have stabilized over the years at a certain lukewarm level, except for an occasional public outburst of impatience.” BERGER, *supra* note 1, at 197. Civil rights groups, Berger continued, had “worked hard and well” around the time of enactment but then “in the ensuing decades they have neglected to exert adequate effort.” *Id.* at 202. See generally Witherspoon, *supra* note 8, at 1193 (predicting that delays and anemia meant that civil rights groups would “inevitably be moved to bypass the commission”).

<sup>339</sup> See *Draper v. Clark Dairy*, 1950 WL 326 (Conn. Super. Ct. Oct. 10, 1950); *Carter v. McCarthy’s Café, Inc.*, No. 532616, 1959 WL 1289 (Minn. 4th Dist. June 29, 1959).

<sup>340</sup> See James Wolfinger, “An Equal Opportunity to Make a Living--and a Life”: The FEPC and Postwar Black Politics, 4 LABOR 65, 92-93 (2007) (noting budgetary assault on Pennsylvania FEPC).

<sup>341</sup> See 1960 Annual Report at 1 (noting budget cuts forcing termination of 11 of 23 staff members).

<sup>342</sup> See, e.g., PA. HUMAN RELATIONS COMM’N, EIGHTH ANN. REP., at 7-8 (1963). Soon after, the HRC targeted a half-dozen major unions alleging patterns of discrimination. See Hill, *supra* note 16, at 62 (recounting Pennsylvania commission’s move against a half-dozen major unions alleging patterns of discrimination).

<sup>343</sup> There are a number of reasons to believe that courts, not agencies, would have remained more faithful to the retail, individuated thrust of the FEPC approach. One reason is that courts had fewer workarounds, and a norm of remaining more faithful to statutory directives. Another reason is that generalist courts, as opposed to specialized, purpose-built agencies, are thought to be less vulnerable to runs on their case-processing and adjudicatory capacity. See RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 259-60 (1996); Nora Freeman Engstrom, *A Dose of Reality for Specialized Courts: Lessons from the VICP*, 163 U. PA. L. REV. 1631 (2015) But see Bert I. Huang, *Lightened Scrutiny*, 124 HARV. L. REV. 1109, 1111 (2011) (finding that a run on resources affects generalist courts, too).

<sup>344</sup> When considered “singly,” a New York appellate court noted in 1957, various aspects of a discriminatory scheme could seem innocent. But the “true nature of the plan or scheme is revealed only

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when the various aspects are viewed as a totality.” See *Castle Hill Beach Club, Inc. v. Arbury*, 142 N.E.2d 186, \_\_ (N.Y. 1957). Or, as the Second Circuit put it in *F.W. Woolworth v. NLRB*, “[p]ersons engaged in unlawful conduct seldom write letters or make public announcements explicitly stating their attitudes or objectives; such facts must usually be discovered by inference; the evidence does not come in packages labelled ‘use me,’ like the cake bearing the words ‘eat me’ which Alice found helpful in Wonderland.” 121 F.2d 658, 660 (2d Cir. 1941).

<sup>345</sup> See Note, *The Right to Equal Treatment*, *supra* note 11, at 552-53. For statutes, see Ohio Rev. Code Ann. Section 4112.05(E) (1960) and R.I. Gen. Laws Ann. Section 28-5-22 (1956).

<sup>346</sup> See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 434 n.10 (1971) (discussing Illinois FEPC decision in *Myart v. Motorola*, 110 CONG. REC. 5662 (1964)); see also Brief for Petitioner at 23, 49, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (No. 124) (citing published guidelines and decisions of the Pennsylvania, Illinois, California, and Colorado FEPCs); Brief for Respondent at 28, 32, 33, 35, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (No. 124) (discussing Illinois FEPC decision in *Myart*); Brief of the Attorney General of the State of New York as Amicus Curiae Supporting Petitioners at 2-3, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (No. 124) (discussing decisions of New York’s SCAD deploying a disparate-impact approach to job discrimination); Brief of the Chamber of Commerce of the United States of America as Amicus Curiae Supporting Respondents at 14-17, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (No. 124) (discussing Illinois FEPC decision in *Myart*).

<sup>347</sup> At least one observer in 1947 predicted as much. See *Antidiscrimination in Employment Hearings Before a Subcommittee of the Committee on Labor and Public Welfare*, U.S. Senate, 80<sup>th</sup> Cong., 1<sup>st</sup> Session., on S. 984 (1947) at 745 (statement of Tyre Taylor, General Counsel, Southern States Industrial Council) (noting resource constraints would prevent the proposed FEPC from adjudicating complaints “on a single-shot basis” and would inevitably lead to industry-by-industry enforcement and, with it, “some sort of quota system”).

<sup>348</sup> *Id.*

<sup>349</sup> See Chapter One.

<sup>350</sup> See Carter, *supra* note 36, at 48 (noting, in his capacity as SCAD chairman, that immediate employment was “the only adequate restoration of a civil right”).

<sup>351</sup> See Note, *The Right to Equal Treatment*, *supra* note 11, at 555.

<sup>352</sup> See, e.g., *Sign 1st Revision in 20 Years for New York Anti-Bigotry Law*, CHI. DEFENDER, July 29, 1965 (noting addition of provision permitting the CCHR to “direct the collection of compensatory damages from a person found guilty of discrimination at a public hearing”). For the Massachusetts Act, see Mass Acts OF 1965 ch. 569 and also Mayhew, *supra* note 23, at 289 (granting MCAD authority to make awards of up to \$1,000 damages to successful complainants). The Commission’s first chairman, Elmer Carter, had long expressed a presumption against “compensation for loss of earning by reason of discrimination” on the ground that “immediate employment of the aggrieved person is the only adequate restoration of a civil right.” Carter, *supra* note 36, at 48.

<sup>353</sup> Oregon Laws 1963, ch. 622, § 10.

<sup>354</sup> See Trial Court Transcript at 5, in Lincoln Archives (F.E.P.C.—*Motorola v. F.E.P.C.*, Box 3). Though the case was not named, it appears to be *In re The Van Cleve Hotel Co.*, 18 O.O.2d 229, 1961 WL 12249 (Ohio Civil Rights Comm’n Jan. 3, 1961). In the case, the Commission faced a situation in which a black musician had been barred from playing a two-week gig at a Cleveland hotel, leaving few options in terms of injunctive relief and making a backway award the most logical remedy. But the Commission drew the line at awarding “consequential” backpay for a subsequent gig, noting: “No case has been found involving the issue—involved in this case—of whether Civil Rights Commissions under FEPA laws have remedial authority to extend a back-pay award to consequential loss of employment in an engagement succeeding the engagement relative to which the unlawful discriminatory practice occurred.”

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<sup>355</sup> See, e.g., *Kenosha County Dept. of Public Welfare v. Industrial Commission of Wisconsin*, 1963 WL 1608 (Cir. Ct. Wis. 1963).

<sup>356</sup> PA. HUMAN RELATIONS COMM'N, 1962 ANN. REP., at 8-9. For other evidence of an uptick in the use of monetary awards, see *FEPC Cracks Two Pa. Job-Bias Cases*, PITTSBURGH COURIER, Apr. 8, 1961 (awarding \$175 plus reinstatement to black applicant for bank clerical job); *Bias Ruling Challenged in Connellsville*, PITTSBURGH COURIER, July 28, 1962 (awarding \$2,208 and ordering hiring of black schoolteacher).

<sup>357</sup> See Note, *Pennsylvania Law and Discriminatory Employment Practice*, *supra* note 8, at 526-27. Note that the Pennsylvania HRC also had the authority to assess fines of \$100 to \$500 for each act of discrimination. For the relevant statutory authority, see Pa. Stat. Ann. tit. 43, §961 (1961).

<sup>358</sup> See *Awarded \$2,500 From SCHR*, N.Y. AMSTERDAM NEWS July 13, 1968, at 3; *SDHR Helps Man Get Job Back*, N.Y. AMSTERDAM NEWS, May 10, 1969 (describing backpay award of \$212); *CCHR Makes \$1,226 Award in Job Bias Case*, N.Y. AMSTERDAM NEWS, Nov. 22, 1969.

<sup>359</sup> See *Criticism Heaped on SDHR*, N.Y. AMSTERDAM NEWS (Dec. 20, 1969). A clear exception is CA, which maintained a steady rate of backpay in conciliated dispositions of roughly 6-8 percent from 1959 into the 1970s. See FAIR EMPLOYMENT PRACTICE COMMISSION, STATE OF CALIFORNIA, FEPC: FIRST ANNUAL REPORT (1960) at 27, tbl. 10 and various annual reports thereafter.

<sup>360</sup> See also Letter from Charles W. Gray to Frank C. Mansfield (Oct. 28, 1963), in Lincoln Archives (FEPC–Correspondence 1961-1964, Box 2).

<sup>361</sup> See Letter from George L. Seaton to Jerrold L. Sager (Aug. 24, 1966), in Lincoln Archives (FEPC–Correspondence, 1965-1968, 1970, n.d.).

<sup>362</sup> See, e.g., Minutes of the Meeting of the [Minnesota] Fair Employment Practices Commission at 3 (Jan. 18, 1957), in MHC Papers (noting budgetary pressures that will come with the “increased responsibility” resulting from amendments adding housing to the FEPC’s responsibilities); *SCAD Seeking*, N.Y. AMSTERDAM NEWS, Oct. 28, 1961 (noting 1961-62 SCAD budget increase of only \$100,000—compared to \$200,000 asked for—to cover new jurisdiction over housing discrimination).

<sup>363</sup> 1963-65 Tentative Proposal for Biennial Budget Request For Funds to Administer the Minnesota State Act Against Discrimination, at 3, in MHC Papers.

<sup>364</sup> SOVERN, *supra* note 8, at 41.

<sup>365</sup> See N.Y. STATE COMM'N AGAINST DISCRIMINATION, ANN. REP., at 7 (1948); see also N.Y. STATE COMM'N AGAINST DISCRIMINATION, ANN. REP., at 2 (1946) (noting that SCAD saw its work as “a cooperative enterprise rather than a punitive expedition”).

<sup>366</sup> See 1948 ANN. REP., *supra* note 363, at 9. Sixteen years later, Spitz published an article sounding the same themes, noting that the Commission “has tried to administer the law in an atmosphere of cooperation, not conflict. It has tried to obviate the need of a police operation so extensive as to make enforcement impossible.” Moreover, it had steadfastly resisted “the pressure of those who would attain the objectives of the Law by the quick resort to punitive features and those who stubbornly oppose any governmental intervention in the conduct of their business affairs.” Instead, SCAD had chosen to regulate in an “atmosphere of cooperation” rather than an “atmosphere of conflict.” Spitz at 97.

<sup>367</sup> Bonfield, *supra* note \_\_, at 1117.

<sup>368</sup> *Id.*

<sup>369</sup> A long law review literature questions the “tortification” of employment discrimination law, beginning with Justice O’Connor’s labeling Title VII as a “statutory employment tort” in her concurrence in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 264 (1989). See, e.g., William R. Corbett, *What Is Troubling About the Tortification of Employment Discrimination Law?*, 75 OHIO ST. L.J. 1027, 1077 (2014); William R. Corbett, *Unmasking a Pretext for Res Ipsa Loquitur: A Proposal to Let Employment Discrimination Speak for Itself*, 62 AM. U. L. REV. 447 (2013); Sandra F. Sperino, *Discrimination Statutes, The Common Law, and Proximate Cause*, 2013 U. ILL. L. REV. 1; Sandra F. Sperino, *The Tort Label*, 66 U. FLA. L. REV. 1051 (2014); Charles A. Sullivan,

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*Tortifying Employment Discrimination*, 92 B.U. L. REV. 1431 (2012); Martha Chamallas, *Discrimination and Outrage: The Migration from Civil Rights to Tort Law*, 48 WM. & MARY L. REV. 2115, 2180-81 (2007). However, this literature focuses on the wisdom of the Court's importation of specific tort concepts governing causation, intent, and harm into federal employment discrimination law—for instance, the doctrines of proximate cause, proportional liability, and lost chance—not the more basic move from a mostly injunctive to a mostly damages-based regulatory regime and the benefits and costs of each approach.

<sup>370</sup> See the discussion of the law review literature on the “tortification” of employment discrimination law, *supra* note 368.

<sup>371</sup> See Witherspoon, *supra* note 8, at 1175.

<sup>372</sup> See Note, *The Right to Equal Treatment*, *supra* note 11, at 557.

<sup>373</sup> The former situation was increasingly common as proceduralization and a rise in filings lengthened the time it took for FEPCs to process cases. In 1947, SCAD reported that a complaint was resolved in an average of less than three months. By 1964, that number was closer to five months—a seemingly trivial increase, though not to the typical victim of discrimination who cannot, as Berger put it, “afford to be unemployed for more than a few weeks.” Berger at 184. Similarly, a study of New Jersey’s FEPC law revealed that, of 120 employment complaints initiated over a 12-month span beginning July 1962, only six were completed within one month and 31 within two months, with the remaining 83 taking up to nine months or more. *Id.* at 189.

<sup>374</sup> See Note, *The Right to Equal Treatment*, *supra* note 11, at 554.

<sup>375</sup> See Sutin, *supra* note 1, at 1033. One way FEPCs sought to steer between these concerns and prevent enforcement burdens from falling on innocent third parties was through “next vacancy” decrees. But such decrees were hardly perfect, as they could leave complainants in limbo, often for long periods of time. Roscoe Blaine Ballard, *A Study of “Race-Hire” Claims Processed by the Michigan Fair Employment Practices Commission* (Unpublished M.A. Thesis, Wayne State Univ., 1961), AT 35.

<sup>376</sup> See FRYMER, *supra* note 315; Paul Frymer, *Acting When Elected Officials Won’t: Federal Courts and Civil Rights Enforcement in U.S. Labor Unions, 1935-85*, 97 AM. POL. SCI. REV. 483 (2003).

<sup>377</sup> See Chapter One.

<sup>378</sup> As noted previously, the Illinois FEPC was the weakest version of FEPC among industrial states. On the other hand, a case could be made that the Illinois FEPC was also in many ways the movement at its fullest flowering, with a mix of lay commissioners deliberately chosen in a heated confirmation process to embody a middling mix of social and political views.

<sup>379</sup> See *Rep. Powell’s Price*, WALL ST. J., Aug. 2, 1965.

<sup>380</sup> Beginning in late 1964, soon after the Commission handed down its first decision in review, the black press in particular saw a pronounced shift. The Defender was representative, arguing in an editorial that the “provisions” of the FEPC Act were “too loose to permit strict enforcement of the broad principles of equal job opportunity.” Editorial, *Job Bias*, CHI. DEFENDER, Dec. 16, 1964. The editorial instead approvingly noted New York’s first attempt at criminal prosecution under Sections 8001 and 801 of the New York state penal law and Section 291 of the State Executive Law. *Id.*