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# Beyond the Private Attorney General: Equality Directives in American Law

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BEYOND THE PRIVATE ATTORNEY GENERAL:  
EQUALITY DIRECTIVES IN AMERICAN LAW

OLATUNDE C.A. JOHNSON\*

*American civil rights regulation is generally understood as relying on private enforcement in courts, rather than imposing positive duties on state actors to further equity goals. This Article argues that this dominant conception of American civil rights regulation is incomplete. Rather, American civil rights regulation contains a set of “equality directives,” whose emergence and reach in recent years has gone unrecognized in the commentary. These federal-level equality directives use administrative tools of conditioned spending, policymaking and oversight powerfully to promote substantive inclusion with regard to race, ethnicity, language, and disability. These directives move beyond the constraints of the standard private attorney general regime of antidiscrimination law. They engage broader tools of state power just as recent Supreme Court decisions have constrained private enforcement. They require states to take proactive, front-end, and affirmative measures, rather than relying on backward-looking, individually-driven complaints. And, these directives move beyond a narrow focus on individual bias to address current, structural barriers to equality. As a result, these directives are profoundly transforming the operation and design of programs at the state and local levels, and engaging both traditional civil rights groups and community-based groups in innovative and promising new forms of advocacy and implementation.*

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INTRODUCTION

States and localities receiving federal transportation funds must include minority groups in their planning, assess the racial impacts of their programs, and adopt nondiscriminatory alternatives.<sup>1</sup> State and local governments that receive federal housing funds must promote integration on the basis of race, ethnicity and disability in their

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<sup>1</sup> See Federal Transit Administration (FTA), 49 C.F.R. §21 (1994) (“Nondiscrimination in Federally-Assisted Programs of the Department of Transportation-Effectuating Title VI of the Civil Rights Act of 1964”); Implementing Circular FTA C 4702.1A (2004) (objectives of the regulation and guidance include: ensuring access to transportation by all groups; preventing racial, ethnic, and class disparities in the environmental effects of transportation; promoting full and fair participation in transportation of all affected populations; and ensuring access to programs and activities by persons with limited English proficiency). These provisions, which apply to the federal Department of Transportation (DOT) and its state and local grantees implement Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*

programs by analyzing barriers to fair housing and removing those barriers.<sup>2</sup> Federal agencies administering programs related to food, nutrition, forestry and agriculture must conduct a “civil rights impact analysis” to ensure that minorities and people with disabilities fairly benefit from federally-funded programs, and must take steps to mitigate any adverse impacts on these groups.<sup>3</sup> Federal agencies must take affirmative steps to provide persons with limited English proficiency “meaningful access” to federally-funded programs.<sup>4</sup>

These statutes and regulations do not fit into the classic conception of modern American civil rights regulation. Commentators have come to understand civil rights statutes in the American context as achieving their public ends (nondiscrimination, equity, integration) by delegating private parties to serve as enforcers through individual enforcement litigation.<sup>5</sup> Political development scholars highlight American civil rights law’s emphasis on private enforcement, contrasting it to European models of civil rights regulation that place greater reliance on the state’s administrative apparatus to advance equity.<sup>6</sup> Unlike in Europe or the United Kingdom, it is said, the American state does not

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<sup>2</sup> See 24 C.F.R. §570.487(b)(1)-(4) (2011) (requiring, *inter alia*, that local governments receiving community development block grants certify that they will affirmatively further fair housing, conduct an analysis of “impediments to fair housing choice” within the State; and take “appropriate actions to overcome the effects of any impediments identified through that analysis”). See also 24 C.F.R. Part 91 (requiring certification of duty to affirmatively further for recipients of certain community planning and development grants); 24 C.F.R. §91.225(a) (requiring analysis of impediments to fair housing choice by certain community development programs). Additional guidance from HUD provides that jurisdictions participate with citizens to develop the plans to further fair housing, detail fair housing goals, and report on steps undertaken to meet those goals. See United States of Housing and Urban Development, Office of Fair Housing & Equal Opportunity, Fair Housing Planning Guide, Vol. 1 (1996), available at <http://www.nls.gov/offices/fheo/images/fhpg.pdf>. These directives implement section 3608 of the Fair Housing Act (FHA) which requires federal agencies and grantees to administer programs “in a manner affirmatively to further the policies of the Fair Housing Act.” See 42 U.S.C. §3608(e)(5) (2010); 42 U.S.C. §3608(d) (requiring the same of federal grantees).

<sup>3</sup> See U.S. DEPARTMENT OF AGRICULTURE, OFFICE OF CIVIL RIGHTS, CIVIL RIGHTS IMPACT ANALYSIS (May 30, 2003), available at <http://www.ocio.usda.gov/directives/doc/DR4300-004.htm> (last visited Aug. 11, 2011).

<sup>4</sup> Exec. Ord. 13166 (“Improving Access to Services for Persons with Limited English Proficiency” (2000)); Policy Guidance: *Enforcement of Title VI of the Civil Rights Act of 1964; National Origin Discrimination Against Persons With Limited English Proficiency*, 65 Fed. Reg. 50123 (Aug. 11, 2000).

<sup>5</sup> See Robert C. Lieberman, Private Power and the EEOC (2010) (unpublished manuscript on file with the author) (documenting this view); SEAN FARHANG, THE LITIGATION STATE; PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. 1-2 (2010) [hereafter “LITIGATION STATE”] (describing civil rights statutes like Title VII as entailing a “legislative choice [by Congress] to rely upon private litigation in statutory implementation”).

<sup>6</sup> See Robert C. Lieberman, Weak State, Strong Policy: Paradoxes of Race Policy in the United States, Great Britain and France, *STUD. IN AM. POL. DEV.* 16 (2002).

impose positive duties on state actors to further equity goals.<sup>7</sup> For scholars of American political development, this facet of American civil rights law is consistent with the “weak,” fragmented nature of the American state: in the formative period of civil rights regulation, the United States consciously rejected centralized, bureaucratic forms of civil rights governance to instead rely on a fragmented system of private enforcement through courts.<sup>8</sup>

This dominant narrative is not inaccurate -- particularly as compared to European models of governance -- but it is incomplete. American civil rights regulation also operates by placing a set of positive duties on state actors to promote equality and inclusion. The goal of this paper is to feature the statutes and regulations that implement civil rights norms in this way and understand how their goals and function differ from those that emphasize individual enforcement or redress of private claims. These regulatory regimes, which I call equality directives, warrant greater attention of those interested in equity because they provide a powerful source of incentives to move beyond traditional antidiscrimination adjudication to promote substantive inclusion. Through use of spending, policymaking and oversight, a regime of equality directives has capacity to counter the limitations of civil rights regimes centering on adjudication. Implementing these directives, states and localities are taking proactive, affirmative measures to redesign transit, housing and other services in ways that allow greater participation of previously excluded groups, and reshape the structural landscape that sustains inequality.

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<sup>7</sup> See Julie Chi-hye Suk, *Antidiscrimination Law in the Administrative State*, 2006 U. ILL. L. REV. 405 (contrasting duties imposed under UK law to U.S. law “which imposes no such [affirmative] duty on public authorities”); Leland Ware, *A Comparative Analysis of Unconscious and Institutional Discrimination in the United States and Britain*, 36 GA. J. INT’L & COMPL. L. 89, 140, 148-149 (2007) (describing positive duties imposed on public authorities under UK law and contrasting these with American emphasis on antidiscrimination, and remedying harm). These comparisons arise from examinations of the United Kingdom’s 2000 Amendments to the Race Relations Act of 1976. See Race Relations (Amendment) Act 2000 c. 34 §2 (Eng.). These Amendments impose a “general duty” on public authorities to eliminate unlawful discrimination, promote equality of opportunity and promote good relations between different racial groups. See Race Relations (Amendment) Act, 2000 c. 34, § 2 (Eng.); see also Suk, *supra* at 436-37 (describing UK Amendments and similar European Union (EU) and North Ireland laws that rely on “mainstreaming”: “requiring equality to be ‘taken into account in every policy and executive decision’ ”).

<sup>8</sup> See ROBERT C. LIEBERMAN, *SHAPING RACE POLICY* 149 (2005) [hereafter “SHAPING RACE POLICY”] (comparing employment discrimination policy in the United States to France and Great Britain, and finding that “[i]n the United States, fragmented and decentralized politics produced a fragmented and individualistic enforcement regime”). Eskridge and Ferejohn similarly show how the process of statutory implementation engages courts, legislators, administrative agencies, and public actors ultimately allowing for statutory norms that are more robust and generous than the Constitution. See WILLIAM N. ESKRIDGE JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 29-34 (2010) (describing EEOC’s process of “administrative constitutionalism” in developing guidelines interpreting Title VII to prohibit pregnancy discrimination). For a discussion of American reliance on adversarial rather than bureaucratic methods of policy implementation in civil rights and other areas, see ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 14-15, 46-47 (2001) (describing rise of litigation and “private attorneys general” as responsive to the fragmented American state).

Part I of this Article shows that the typical account of American civil rights law understands two enforcement regimes: a private attorney general model and a public enforcement model understood as prosecution by public agencies in court or claim resolution through administrative adjudication.<sup>9</sup> This Part argues that a third civil rights regulatory regime exists: one centered on advancing civil rights norms through formal and informal forms of administrative power. The prime examples are Title VI of the 1964 Civil Rights Act<sup>10</sup> and provisions of the Fair Housing Act of 1968 which require federal agencies and grantees to take affirmative steps to further fair housing goals.<sup>11</sup> As Part I shows, these statutes and regulations unleash a range of administrative tools—including conditioned spending and formal and informal forms of regulatory oversight and guidance—to promote equity and inclusion in federal-state programs. Largely because of the institutional choice these statutes seem to present—a bureaucratic form of enforcement disfavored by most civil rights commentators<sup>12</sup>—these statutes and regulations are given scant attention in the civil rights literature and in the practice and development of civil rights law.<sup>13</sup> Yet, I show that these statutes, through recent regulatory actions, have become key locations for imposing positive and pervasive duties on state actors to promote equity.

Part II argues that equality directives unlock regulatory tools that are lacking in the classic individual enforcement, antidiscrimination regime. Much of what commentators find insufficient about the traditional antidiscrimination bent of the civil rights regime—its failure to reach actions with disparate impact,<sup>14</sup> its fixation on formalized aspects of discrimination and bias,<sup>15</sup> its impotence in the face of embedded, institutionalized forms

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<sup>9</sup> See, e.g., LITIGATION STATE, *supra* note 5, at 5-7, 22, 34 (2010) (discussing congressional mobilization of private litigants to enforce Title VII of the Civil Rights Act of 1964 and rejection of administrative adjudication models); Michael Selmi, *Public and Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA. REV. 1401 (1998) [hereafter “*Public and Private Enforcement*”] (opposing private enforcement by litigants in courts with government prosecution of claims).

<sup>10</sup> See Title VI, 42 U.S.C. §2000d.

<sup>11</sup> See 42 U.S.C. §3608(e)(5) (2010) (requiring HUD to administer its programs and activities “in a manner affirmatively to further the policies of [the Fair Housing Act]”); 42 U.S.C. §3608(d) (requiring the same of federal grantees).

<sup>12</sup> See *infra* text accompanying notes 108-117.

<sup>13</sup> For instance, when Congress in 1988 strengthened the severely flawed FHA it sought to do so by strengthening two pillars of its enforcement apparatus—the administrative enforcement apparatus (through agency prosecutions and adjudications) and the private enforcement apparatus. See *infra* text accompanying notes 93-97. But Congress failed to even discuss mechanisms for strengthening what I would suggest is another pillar of the Act—the duties it requires of federal, state and local governments.

<sup>14</sup> See Michael Selmi, *Was The Disparate Impact Theory A Mistake?*, 53 U.C.L.A. 701, 734-42 (2006) (discussing practical failures and limitations of Title VII’s conception of discrimination); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1135-37 (1997) (discussing limitations of the Constitution’s construction of discrimination).

<sup>15</sup> See R. A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 890 (2004); Glenn C. Loury, *Discrimination in the Post-Civil Rights Era: Beyond Market*

of racial exclusion<sup>16</sup>— can be addressed through equality directives. “Antidiscrimination” does not fully reflect the goals of these directives. I use the term “equality” to capture that the directives have goals beyond remedying bias: rather they seek to promote economic and other opportunities for previously excluded groups, full participation in government funded programs, and social inclusion.

Part III shows how federal, state and local governments are implementing equality directives in two key areas — housing and transportation. Effective implementation of these directives allows underserved groups to participate in planning and policymaking, leading to redesign of transit programs to better serve marginalized groups and spurring the adoption of practices and policies that promote economic and social opportunity.

In Part IV, I show how public and private enforcement mechanisms help strengthen the regime. Equality directives are embedded in a hard enforcement regime – federal administrative oversight, and the possibility for private adjudicative enforcement (in courts and agencies) at the back end. These enforcement mechanisms help elaborate the meaning of equality directives and incentivize front-end implementation. At the same time, a central feature of equality directives is that they provide opportunities for private engagement and advocacy that extends well-beyond adjudicative enforcement. Traditional civil rights groups as well as community-based organizations are key players in a regime of equality directives, acting not simply as “private attorney generals,” but using policy advocacy, and political mobilization to serve as what I call “private implementers” of these directives.

Finally, Part V discusses key challenges posed by equality directives and how this emergent regime might be strengthened.

## I. BEYOND ADJUDICATIVE ENFORCEMENT

In *Alexander v. Sandoval*,<sup>17</sup> the Supreme Court declined to imply a private right of action to enforce the disparate impact regulations of Title VI of the 1964 Civil Rights Act. From the perspective of civil rights advocates, the decision was nothing less than a tragedy, ending an emerging litigation strategy that had invoked Title VI’s disparate

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*Interactions*, J. ECON. PERSP., Spring 1998, at 117-118 (urging move away from discrimination towards a focus on social capital and other mechanisms that lead to economic disparities); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 470-71(2001).

<sup>16</sup> See Ralph Richard Banks & Richard Thompson Ford, (*How*) *Does Unconscious Bias Matter?*, 58 EMORY L. J. 1053, 1053 (2009) (doubting that racial bias explains “all or even most of the racial injustices that plague our society”); *id.* at 31 (arguing that “many decisions and practices that adversely affect racial minorities do not fit neatly within the conventional antidiscrimination framework”).

<sup>17</sup> 532 U.S. 275 (2001).

impact regulations to address contemporary racial disparities in the use of federal and state transportation resources, health care disparities, and environmental justice.<sup>18</sup>

Grouping *Sandoval* with a series of cases that made it difficult or impossible to bring private enforcement actions, Professor Pamela Karlan argued that the case was part of a trend in the Supreme Court of jurisprudence “disarming the private attorney general.”<sup>19</sup> Civil rights statutes depend on private enforcement in courts by individuals. Private enforcement includes granting private individuals the right to sue, as well as statutes that incentivize individual enforcement by granting for instance, attorney’s fees and damages.<sup>20</sup>

Yet, inclusion of Title VI as a “private attorney general statute” is awkward. Not because *Sandoval* was correct in its holding that no private remedy existed to enforce Title VI’s disparate impact regulations.<sup>21</sup> (*Sandoval* seems best explained by the Court’s increased aversion to implied private rights of action.<sup>22</sup>) Rather it is awkward because Title VI is not the classic private attorney general statute. Indeed, Title VI originates in conceptions of using bureaucratic power to promote racial equity goals and in cleansing federal funds of discrimination.<sup>23</sup> For that reason, Title VI is more accurately seen as both a source of individual rights in federally funded programs (“no person . . . shall be . . . subjected to discrimination under any program or activity” receiving federal funds)<sup>24</sup> and imposing a set of duties on federally funded recipients (at minimum nondiscrimination, and the broader duties to promote equity duties as I argue below<sup>25</sup>).

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<sup>18</sup> See Philip Tegeler, *Title VI Enforcement in the Post-Sandoval Era*, 19 POVERTY & RACE 5 (2010) (“The scope of what civil rights advocates and their clients lost in *Sandoval* is staggering”).

<sup>19</sup> Pamela Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183 (2003).

<sup>20</sup> See *infra* text accompanying notes 29-31.

<sup>21</sup> Section 601 of Title VI provides that “no person in the United States shall on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity.” 42 U.S.C. §2000d. Despite the lack of an explicit private right of action in the statute, Court decisions prior to *Sandoval* had endorsed the view that the statute created a private remedy for violations of section 601. See *Cannon v. Univ. of Chicago*, 441 U.S. 677, 694, 710-11 (1979).

<sup>22</sup> See, e.g., *Correctional Services Corp. v. Malesko*, 543 U.S. 61 (2001). See also the Court’s subsequent decision in *Gonzaga v. Doe*, 536 U.S. 273, 285 (2002).

<sup>23</sup> See *infra* text accompanying notes 131-137.

<sup>24</sup> See §601, 42 U.S.C. 2000d.

<sup>25</sup> See *infra* text accompanying notes 136-140. Karlan recognizes this when she notes the *Sandoval* Court should have asked whether §602 of the statute “contemplates allowing private parties to enforce the obligations that regulations impose on the recipients of federal funds.” Karlan, *supra* note 19, at 198-99. Under this conception, private attorney generals are not simply delegated to vindicate congressional policy, see *Newman v. Piggie Park*, they are more like “qui tam” bounty hunters enforcing a duty owed to the government and improperly enforced by the government. See Karlan, *supra* note 19, at 198-99. This latter analogy is perhaps more apt in describing the relationship between private parties and public authorities in Title VI and Title VIII.

Telling is that Title VI has come to be seen primarily as another statute in the private attorney general arsenal. This suggests the dominance of the private attorney model in our conception of civil rights law and the perceived lack of value of a public attorney general. Even more, it reveals a skepticism about an alternative that is not named but that Title VI would seem to allow: relying on the state to promote equity norms through its regulatory and programmatic apparatus.

As I recount below, the dominant account of civil rights statutes generally opposes private and public enforcement, and describes both models as centering on the resolution of claims through adjudicative or quasi-adjudicative processes. The first and most discussed in the academic commentary is the private attorney general model, which emphasizes enforcement by individuals (in individual or class action litigation) in courts. The second is a public enforcement model – which involves both prosecution of claims in courts and in administrative tribunals. Indeed, commentators have described American civil rights law as a struggle between the two, with private enforcement emerging as the dominant, favored model.<sup>26</sup> After presenting these models, this Part argues that these dominant narratives omit a third type of civil rights regulation: those statutes and regulations that operate by imposing a set of proactive duties on public actors in the administrative state. As I show in this Part, this form of regulation has been a facet of several civil rights statutes, but largely untapped. In recent years a set of regulatory actions to enforce these statutes have instituted an American version of “equality directives”<sup>27</sup> – a regime that differs in form and operation from the dominant forms of civil rights regulation.

#### A. *Private Attorney General: The Standard Account*

Commentators typically understand the implementation of civil rights statutes through the private attorney general model. Not only do virtually “all modern civil rights statutes rely heavily on the private attorney general,”<sup>28</sup> but the bulk of legal commentary on the implementation of civil rights statutes centers on implementation through private judicial actions. Congress enacts civil rights statutes to promote antidiscrimination and equity goals, and empowers private individuals to enforce those goals through private litigation. The prime example is Title VII of the 1964 Civil Rights Act -- the fair employment provision that often serves as our short hand for civil rights. It grants a private right of action to enforce its provisions forbidding employment discrimination, allowing individuals to bring litigation in court after exhausting administrative enforcement mechanisms.<sup>29</sup> In the wake of the Civil Rights Act of 1991 -- intended specifically to

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<sup>26</sup> See *infra* text accompanying notes 65-73.

<sup>27</sup> See *infra* text accompanying notes 139-140 (discussing equality directives in the United Kingdom).

<sup>28</sup> See Karlan, *supra* note 19, at 186.

<sup>29</sup> See 42 U.S.C. §2000e (2010) *et seq.*

increase incentives to private litigation -- individuals can seek compensatory and punitive damages.<sup>30</sup> Through litigation in individual and class action cases, courts interpret the meaning of the substantive prohibitions of the statute. With a sufficient number of cases brought and high enough damages, employers – faced with actual suits, or to avoid the expense and adverse publicity of litigation – alter their practices to comply with court-endorsed interpretations of the statute.<sup>31</sup>

This model becomes the “private” attorney general because its conception is rooted in delegating to the private the statute’s public goals. As Pamela Karlan states, the “idea behind the private attorney general” is simple: “Congress can vindicate important public policy goals by empowering private individuals to bring suit.”<sup>32</sup> The case for the private attorney general then is that it supplements or buttresses what would otherwise be inadequate public enforcement. Even an ideally, well-funded, vigorous public enforcement agency could only do so much. Private litigation engages a multitude of private actors to bring their resources to rooting out discrimination.<sup>33</sup> Beyond a more bodies account, private litigation may simply be more effective than public enforcement. Private litigators and their clients may bring greater passion and motivation to enforcement. Or even if motivated by attorney’s fees and damages, private litigators may be more effective in bringing and winning cases. Spirited and risk-taking, the private bar may prove more willing than public actors to advance innovative theories to advance antidiscrimination and equality.<sup>34</sup>

In doing their part to buttress private enforcement regimes, courts explicitly acknowledge the role private enforcement plays in supplementing inadequate public enforcement. In *Newman v. Piggie Park Enterprises*,<sup>35</sup> one of the first Supreme Court cases interpreting the Civil Rights Act of 1964’s provision prohibiting discrimination in public accommodations, the Court noted the limits of the public attorney general--the Department of Justice (DOJ) could bring only pattern and practice cases to enforce the

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<sup>30</sup> See *id.* at §2000e-5(c).

<sup>31</sup> See, e.g., Sean Farhang, *Congressional Mobilization of Private Litigants: Evidence from the Civil Rights Act of 1991*, 6 J. EMP. L. STUD. 1 (2009) [hereafter “*Congressional Mobilization*”].

<sup>32</sup> See Karlan, *supra* note 19, at 186.

<sup>33</sup> See Selmi, *Public vs Private Enforcement of Civil Rights*, *supra* note 9, at 1438-41; Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM L. REV. 1384, 1387 (2000); Margaret H. Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782, 788 (noting that private enforcement regimes can “supplement public efforts, picking up the slack where agency resources run out”); Catherine R. Albiston & Laura Beth Nielson, *The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General*, 54 UCLA. REV. 1087, 1094 (2006) (noting that private enforcement negates need for “large governmental apparatus”).

<sup>34</sup> See Gilles, *supra* note 33, at 1387; Selmi, *Public v. Private Enforcement of Civil Rights*, *supra* note 9, at 1403-05, 1445-47 (discussing reasons why government lawyers may drift towards noncontroversial more easily winnable cases).

<sup>35</sup> 390 U.S. 400 (1968).

statute--and endorsed strong private enforcement to further the statute's broader public policy goals.<sup>36</sup> As the Court put the point, a private civil rights plaintiff was no ordinary tort plaintiff: "[i]f he obtains an injunction, he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that congress considered of the highest priority."<sup>37</sup>

The Court was similarly explicit in several interpretations of the Fair Housing Act (FHA) of 1968 in the initial decades after its enactment, before the 1988 Amendments to the Act strengthened the FHA's enforcement provisions.<sup>38</sup> From its inception, the FHA provided a private right of action, but the Act's private enforcement provisions were weak, providing plaintiffs only a short statute of limitations and courts a limited ability to award damages and attorney's fees.<sup>39</sup> The Act's enforcement provisions would hamper enforcement at least until the 1988 Amendments.<sup>40</sup> The public enforcement mechanisms were similarly weak. The Department of Housing and Urban Development (HUD) though charged with enforcing the statute had no power to bring enforcement actions, or even to hold hearings, rather it had power only to conciliate claims it found meritorious.<sup>41</sup> HUD could seek civil penalties but the amounts set were by many accounts too low to deter landlords.<sup>42</sup> In addition, the original FHA allowed HUD to refer only a limited set of cases to the Department of Justice (DOJ) for litigation -- pattern or practice cases, or cases that raised an issue of "general public importance."<sup>43</sup> DOJ's civil rights division in turn brought few lawsuits, in part because the statute allowed it no damages, giving it power to seek only injunctive relief.

With weak public enforcement capacity, the private enforcement that did occur was in large part enabled by court announced rules expanding standing, many of which explicitly invoked the private attorney general. For instance, in the landmark *Trafficante*

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<sup>36</sup> See *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968); Karlan, *supra* note 20 at 187.

<sup>37</sup> See *Piggie Park*, 390 U.S. at 401-02.

<sup>38</sup> See *infra* text accompanying note 53.

<sup>39</sup> See 42 U.S.C. § 3610(b) (subjecting FHA claims to a 180 day statute of limitations); § 3613(c)(1) (capping punitive damages at \$1000).

<sup>40</sup> See GEORGE R. METCALF, FAIR HOUSING COMES OF AGE 5 (1988) (attorney's fees limitations in the original FHA reduced the number of private attorneys willing to take cases); Robert G. Schwemm, *Private Enforcement and the Fair Housing Act*, 6 YALE L. AND POL'Y REV., 375, 381 (1987).

<sup>41</sup> The FHA required HUD to investigate, pursue, or dismiss complaints of housing discrimination within thirty days of filing. If HUD found a complaint meritorious, it had no power to bring its own suits and could only conduct "a conference, conciliation, and persuasion." See 42 U.S.C §3610(b). Republican Senator Everett Dirksen of Illinois insisted on restrictive enforcement to gain his support. See METCALF, *supra* note 40, at 18 (describing history surrounding passage of the 1968 Fair Housing Act).

<sup>42</sup> See Mara Sidney, *National Fair Housing Policy And Its (Perverse) Effects on Local Advocacy in FRAGILE RIGHTS WITHIN CITIES* 205 (JOHN GOERING ED. 2008) (explaining limitations of the pre-1988 federal fair housing law).

<sup>43</sup> 42 U.S.C §3613(a).

*v. Metropolitan Life* case in 1972, the Supreme Court ruled that current residents of an apartment complex had standing to bring a claim for discrimination under the FHA against minority applicants on the theory that they were deprived of the benefits of “living in an integrated community.”<sup>44</sup> In 1979, the Supreme Court similarly held that a municipality and four of its residents had standing to bring a claim against realtors illegally steering blacks and whites seeking homes to different neighborhoods.<sup>45</sup> Again in the 1982 case of *Havens Realty Corp., v. Coleman*, the Court held that fair housing testers had standing to sue as “aggrieved persons” under the FHA.<sup>46</sup> HUD’s weak enforcement capacity provided an explicit rationale for the court’s decision. Since HUD lacked enforcement power and DOJ had limited incentive and capacity to litigate, the Court concluded that broad standing rules were needed to facilitate private suits, and provide a “federal forum for all victims of housing discrimination.”<sup>47</sup>

Private enforcement reflects deliberate congressional choices to enforce public norms through litigation, and perhaps less explicitly, to supplement state incapacity. Enhancing private enforcement occurs through explicit grants of private rights to sue,<sup>48</sup> but it is also manifest in congressional provisions granting attorney’s fees to prevailing civil rights plaintiffs,<sup>49</sup> waiving sovereign immunity for damages actions<sup>50</sup> and expanding damages for civil rights violations.<sup>51</sup> In the 1988 Amendments to the FHA, key proponents recognized a need to strengthen the previously weak private enforcement provisions.<sup>52</sup> In the end, the amendments lengthened the statute of limitations, and expanded plaintiffs’

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<sup>44</sup> See *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972).

<sup>45</sup> See *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979).

<sup>46</sup> See *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378 (1982).

<sup>47</sup> See *id.* at 378.

<sup>48</sup> See, e.g., Title VII, 42 U.S.C. §2000e-5(f)(i) (2009) (authorizing suit after exhaustion of claims with EEOC); Title VIII, Fair Housing Act, 42 U.S.C. §3613 (2010) (authorizing persons to bring suit in federal or state court without filing an administrative complaint); Americans with Disabilities Act, 42 U.S.C. §§ 12117(a), 12188(a)(1) (2006).

<sup>49</sup> See, e.g., Civil Rights Attorney’s Fees Award Act of 1976; School Aid Act. See also Lemos, *supra* note 34 at 788-790 (describing congressional statutes that incentivize private litigation through fee recovery).

<sup>50</sup> See, e.g., See, e.g., Pub. L. 99-506 (1986) (now codified at 42 U.S.C. § 2000d-7) (abrogating state’s sovereign immunity in damages actions to enforce Title VI).

<sup>51</sup> See 42 U.S.C. §1981a (allowing prevailing plaintiffs right to recover compensatory damages up to \$250,000 and punitive damages for malicious or reckless indifference claims, ranging from \$50,000 to \$300,000 depending on the employer size). The Act also lengthened the statute of limitations in employment discrimination cases. See *id.*

<sup>52</sup> See Fair Housing Amendments Act of 1987: Hearing on S. 558 Before the Subcomm. on the Constitution of the Senate. Comm. on the Judiciary Committee, 100th Cong. 72-3 (1987) (testimony of Benjamin L. Hooks, Executive Director, NAACP); METCALF, FAIR HOUSING, *supra* note 40, at 22 (detailing advocacy and legislative efforts beginning in the mid-1970s to strengthen the FHA).

ability to recover attorney's fees and punitive damages.<sup>53</sup> Similarly, the Civil Rights Act of 1991 allowed compensatory and punitive damages to enforce certain provisions of Title VII and the Americans with Disabilities Act (ADA).<sup>54</sup> Key drafters in committee reports recognized the damage provisions as necessary to "encourage . . . victims [of discrimination] to act as 'private attorneys general' by enforcing the statute for the benefit of all Americans."<sup>55</sup> The profound increase in the amount of private litigation brought to enforce Title VII is likely explained by the 1991 damage incentives.<sup>56</sup>

More recently, congressional invocation of the private attorney general is evident in the response by members of Congress to the Supreme Court's recent decisions in *Bell Atlantic v. Twombly*<sup>57</sup> and in *Ashcroft v. Iqbal*.<sup>58</sup> These decisions moved away from the liberal pleading regime of *Conley v. Gibson*<sup>59</sup> by requiring that plaintiffs in federal courts plead their claims with "plausibility." By many accounts, this standard has increased the pleading burden on plaintiffs, made it more difficult to survive a motion to dismiss and proceed to discovery, with grave effects for the survival of civil rights claims. Some judges and litigants argue that the cases' impact is vastly overstated.<sup>60</sup> But at the very least the decision increases the discretion judges have to dismiss civil rights claims, potentially operating as a kind of heightened pleading standard for often disfavored employment discrimination cases.<sup>61</sup>

My argument here is that the rules governing pleading, discovery and other rules governing access to courts --- rules created by Congress, administrative actors, and courts -- are important planks in the foundation that enables the private attorney general. In considering legislation to overturn *Twombly* and *Iqbal*, many members of Congress explicitly invoke private enforcement as a key to vindicating statutory and constitutional

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<sup>53</sup> See Fair Housing Amendments Act (FHAA), Pub. L. No. 100-430, 102 Stat. 1619 (1988). The FHAA lengthened the statute of limitations to two years for private suits and to one year for complaints to HUD. See 42 U.S.C. § 3613.

<sup>54</sup> See 42 U.S.C. §1981a.

<sup>55</sup> H.R. REP. NO. 101-644, at 42 (1990); see also *id.* at 39, 44-45, 45; S. REP. NO. 101-315, at 33 (1990).

<sup>56</sup> Studies show that in the six years following the passage of the 1991 Act, job discrimination lawsuits in federal court increased by 211 percent. See LITIGATION STATE, *supra* note 5, at 200. Some of this increase is due to increases in disability claims made possible by the newly enacted Title 1 of the ADA. But analyses of EEOC filings suggest that Title VII claims were responsible for much of this growth. See FARHANG, LITIGATION STATE, *id.* at 200-01.

<sup>57</sup> 550 U.S. 554 (2007).

<sup>58</sup> 556 U.S. 662 (2009).

<sup>59</sup> 355 U.S. 41 (1957).

<sup>60</sup> See Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1298-99 (2010).

<sup>61</sup> See, e.g., Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of Iqbal on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65 (2010).

goals of equality.<sup>62</sup> The implicit assumption is that public enforcement is inadequate. Indeed, expanding administrative capacity or mechanisms to prosecute civil rights claims has not featured in congressional responses to date.

The primacy of the private attorney general model was not inevitable, but it has become the central conception of civil rights enforcement for good reason: in the end it was the best deal that fair employment advocates could get from Congress. When Congress debated the fair employment provisions of the 1964 Civil Rights Act, civil rights supporters initially pursued a regime of bureaucratic enforcement of resolving complaints, modeled on the National Labor Relations Act and fair employment practices commissions at the state level. The administrative agency would investigate charges, determine if probable cause existed, conciliate claims, and if conciliation failed, prosecute claims before the agency's quasi-judicial board.<sup>63</sup> Indeed, this initial model made administrative enforcement exclusive with no private right to sue in court.<sup>64</sup> For civil rights proponents, the administrative process was superior to judicial process: cheaper, quicker, less complex, and more flexible than private litigation.<sup>65</sup> In his recent study of institutional choice in civil rights, political scientist Sean Farhang documents the faith advocates placed in administrative enforcement of individual claims. Advocates of this approach believed that courts were necessarily passive, that an administrative approach would "better leverage needed administrative expertise" and be "proactive," and, unlike courts, agencies could "create policy that was unified coherent and more predictable."<sup>66</sup>

Opponents and (some supporters) of civil rights resisted these proposals for a range of reasons, but most prominently because it would vest too much power in the federal government, and particularly in a "single-mission" federal agency like the EEOC.<sup>67</sup> Private enforcement – though always supported by civil rights groups – was in the end allowed by opponents in Title VII as a compromise for diminishing the EEOC's adjudicative authority and for striking proposals that would have given the EEOC the

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<sup>62</sup> See, e.g., *Has The Supreme Court Limited Americans' Access to Courts: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 1-4 (2009) (statement of Sen. Patrick Leahy, Chair, S. Comm. on the Judiciary).

<sup>63</sup> See LITIGATION STATE, *supra* note 5, at 98-99 (describing early visions of the EEOC). Under initial proposals, the EEOC would consist of an Office of the Administrator and a five member Board. Proponents envisioned the Board as a quasi judicial body appointed by the President, confirmed by the Senate, and serving staggered seven-year terms. *See id.*

<sup>64</sup> See H. R. REP. NO. 405, at § 10(c) (1963).

<sup>65</sup> See LITIGATION STATE, *supra* note 5, at 99.

<sup>66</sup> *Id.* at 100.

<sup>67</sup> See HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY* 146 (1990) (describing original vision of the EEOC).

right to sue.<sup>68</sup> Civil rights proponents strengthened initial versions of private enforcement by pushing Congress to enact a fee-shifting provision in Title VII.<sup>69</sup>

Congress similarly resisted strong agency enforcement in the Fair Housing Act (FHA). Initial proposals for fair housing legislation empowered HUD to investigate complaints, hold evidentiary hearings, and issue enforcement orders. To defeat attempts to kill the bill, proponents agreed to strip HUD of its authority to hear claims, allowing it only power to conciliate claims, and to refer pattern and practice cases to DOJ.<sup>70</sup> While eventually granting private enforcement rights for the FHA as well, these were even weaker than those in employment.<sup>71</sup>

While civil rights proponents might not have initially favored the private attorney general model, by the time of the Civil Rights Act of 1991 it emerged as the favored model for civil rights proponents. (The 1988 strengthening of the FHA's administrative enforcement apparatus complicates this narrative as I discuss below.) The Act provided new compensatory and punitive damages for Title VII claims and removed proof standards that had made private enforcement difficult.<sup>72</sup> The recent study by Sean Farhang allows us to rethink congressional moves to enhance private enforcement, not simply as abdication of strong state enforcement of civil rights, but as harnessing private litigation to enhance state capacity. The damages provision of the 1991 Act, attorney's fees provisions, as well as Congress's initial enactments of private enforcement regimes when seen in that light become congressional moves to harness courts to supplement the ability of the state to regulate.<sup>73</sup> The current congressional response to *Iqbal* and *Twombly* becomes part of the same phenomenon: congressional members supporting civil rights respond to the decision not by enhancing additional administrative enforcement of Title VII or other civil rights statutes, but by seeking to remove constraints on individualized, court enforcement.

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<sup>68</sup> See LITIGATION STATE, *supra* note 5, at 98-111. Private enforcement proposals emerged first in House Republican amendments to Title VII (though in a limited way). See *id.* at 105 (documenting initial amendment that would have granted private suit with Commission authorization but without attorney's fees).

<sup>69</sup> See BLUMROSEN, *supra* note 67, at 48 (arguing that advocates saw fees as necessary to ensure that claimants could obtain private counsel). Farhang relays the recollection of Jack Greenberg -- head of the NAACP LDF at the time -- that civil rights advocates "supported counsel fees for prevailing plaintiffs as the only way to make private enforcement feasible." LITIGATION STATE, *supra* note 5, at 111 (citing Jack Greenberg's correspondence with author, Aug. 22, 2007).

<sup>70</sup> See METCALF, *supra* note 40, at 18.

<sup>71</sup> See Olatunde Johnson, *The Last Plank: Rethinking Public and Private Power to Advance Fair Housing*, 13 PENN J. CONST. LAW 1191, 1205-06 (2011) (describing fair housing's initially weak private enforcement regime).

<sup>72</sup> See 42 U.S.C. §2000e-5(c).

<sup>73</sup> See LITIGATION STATE, *supra* note 5, at 190-192 (providing an account of congressional intent to shore up private enforcement of Title VII through creation of a damages remedy).

Given the potential power of private litigation and the longstanding and deep American attachment to courts as a forum for vindicating rights,<sup>74</sup> one risks obscuring the downsides of the private attorney general model. For one, success of private enforcement depends heavily on judicial embrace of a set of procedural and other rules that make private enforcement possible, such as rules governing pleading, summary judgment, standing and fee recovery.<sup>75</sup> As noted above, some of the Supreme Court's recent decisions have interpreted procedural and litigation-enabling rules in ways that challenge private enforcement.

One can add in this respect the Supreme Court's recent decision in *Wal-Mart Stores, Inc. v. Dukes* – a case involving claims of systemic gender discrimination in pay and promotion practices -- which tightened requirements on pursuing class actions in cases involving monetary damages<sup>76</sup> and claims of discrimination based on an employer's subjective practices.<sup>77</sup> Indeed, the *Wal-Mart* decision powerfully illustrates some of the tensions involved in the private attorney general model. Class actions potentially provide a way to surmount some of the problems of pursuing discrimination claims through individualized action – by allowing for aggregation of smaller claims, and providing an avenue for structural and injunctive relief often elusive or unsought in individual claims. And, the Supreme Court, in the past has recognized employment discrimination class actions as paradigmatic class actions, noting that “suits alleging racial or ethnic discrimination are often by their nature class suits, involving classwide wrongs.”<sup>78</sup>

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<sup>74</sup> See KAGAN, *ADVERSARIAL LEGALISM*, *supra* note 8, at 14-15 (describing America's historic reliance on private litigation as an alternative to bureaucratic regulation).

<sup>75</sup> See Lemos, *supra* note 33, at 824-31 (detailing how judges in response to perceptions of excessive litigation can narrow interpretations of fee-shifting, standing, pleading and other statutes that create litigation incentives).

<sup>76</sup> See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). In *Wal-Mart*, the Supreme Court unanimously ruled that the plaintiffs' backpay claims could not be certified under Rule 23(b)(2) holding that the monetary relief claims were not incidental to the injunctive or declaratory relief sought as they required individualized calculation of monetary damages. *See id.* at 2557. In doing so, the Court departed from lower court cases holding that cases seeking backpay awards (considered equitable relief) as opposed to compensatory damages might be properly certified pursuant to Rule 23(b)(2). For instance, prior to the 1991 Act most circuits allowed backpay claims in 23(b)(2) classes. *See, e.g., Williams v. Owens-Illinois, Inc.*, 665 F.2d 918, 929 (9th Cir. 1982) (allowing Title VII claims for back pay to be certified under Rule 23 because they are “equitable” in nature).

<sup>77</sup> The Court held 5-4 that the plaintiffs failed to satisfy Rule 23(a)'s commonality requirement because they lacked “significant proof” that Wal-Mart “operated under a general policy of discrimination.” *See Wal-Mart*, 131 S. Ct. at 255 (quoting *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 156 (1982)). In so holding, the majority discounted plaintiffs' expert, statistical and anecdotal evidence that Wal-Mart's corporate culture and systems for determining pay and advancement, pervasively discriminated against women throughout the company's stores. *See Wal-Mart*, 131 S. Ct. at 2553-54, 2555, 2556; ; *see also id.* at 2563-64 (Ginsburg, J., dissenting) (summarizing plaintiffs' evidence raising an inference of systemic and nationwide discrimination).

<sup>78</sup> *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 405 (1977). For a discussion of the pre-*Wal-Mart* approach to class actions, see Melissa Hart, *Will Employment Discrimination Class Actions*

While the damages provisions of the 1991 Civil Rights Act incentivize attorneys to bring employment discrimination cases –including class actions – the *Wal-Mart* decision creates significant barriers to pursuing monetary damages cases as class actions.<sup>79</sup>

In addition to recent judicially-created barriers to private enforcement, reliance on litigation has longstanding, well-documented costs and challenges. Litigation can be time-consuming, protracted, and inefficient, exacting great financial and emotional costs on litigants.<sup>80</sup> When Congress incentivizes litigation, it requires increased resources to federal (and often state) courts. Fair employment litigation has proved the particular focal point for debates about the costs and value of litigation. Judicial rules tightening pleading and summary judgment are often framed by courts and commentators as a response largely to the volume of employment litigation.<sup>81</sup> And whatever one’s normative view about the value of these cases, when employment cases are perceived by judges as flooding courts and dismissed as frivolous,<sup>82</sup> it may be that no player benefits: be it the judicial system, plaintiffs seeking to vindicate civil rights, or defendants. Indeed as Professor Margaret Lemos has recently argued, efforts to enhance litigation through fee-shifts and damage enhancements may have the perverse effect of leading to increased hostility to plaintiffs’ claims whether they increase litigation or not.<sup>83</sup>

Even if one rejects accounts of too much litigation relative to the number of actual civil rights injuries, a reliance on litigation may skew the nature of civil rights enforcement. Attorneys may have incentives to pursue primarily high damages cases, or those with the most easily identifiable injuries. For instance, researchers have documented the shift that has taken place in Title VII employment cases – away from hiring cases towards those focused on firing and promotion.<sup>84</sup> This may, of course,

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*Survive*, 37 AKRON L. REV. 813, 813 (2004) (noting that “employment discrimination cases have typified the sort of civil rights action that courts and commentators describe as uniquely suited to resolution by class action litigation”).

<sup>79</sup> The Court leaves open the possibility that some claims for monetary relief may still be certified under 23(b)(2). See *Wal-Mart*, 131 S. Ct. at 2557 (declining to reach the “broader” question that 23(b)(2) “applies *only* to requests for such injunctive or declaratory relief and does not authorize the class certification of monetary claims at all”).

<sup>80</sup> See Lemos, *supra* note 34, at 789 (noting that expense of litigation is often not worth the cost); see also KAGAN, *supra*, note 8, at 107-111 (detailing some of the pitfalls of America’s civil justice system including high costs and inefficiencies and injustice generated by redundancy, complexity, and adversarialism).

<sup>81</sup> See, e.g., Elizabeth Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517 (2010).

<sup>82</sup> See Lemos, *supra* note 34, at 826-27 (documenting judicial concern about “frivolous” litigation); Lauren K. Robel, *Private Justice and the Federal Bench*, 68 IND. L.J. 891, 896-97 (1993); Toby J. Stern, *Comment, Federal Judges and Fearing the “Floodgates of Litigation,”* 6 U. PA. J. CONST. L. 377 (2003).

<sup>83</sup> See Lemos, *supra* note 34, at 784-85.

<sup>84</sup> See John Donohue & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983 (1991).

reflect a decrease in actual incidents of hiring discrimination, but more likely suggests that hiring discrimination is harder to identify in the absence of explicit forms of discrimination, and that these cases generate fewer damages.<sup>85</sup> Moreover, by placing the burden on the individual to complain, entire areas of civil rights may go underenforced. This has been a problem in fair housing. Despite the pervasiveness of housing discrimination, and the incentives created by the FHA, relatively few cases are brought particularly when compared to the documented incidents of discrimination.<sup>86</sup> The 1988 Amendments to the FHA make private enforcement easier, but led to only a modest upswing in litigation.<sup>87</sup> In part, this is because--like discrimination in hiring --many aspects of housing discrimination are hard to identify. In failure to rent and steering cases in particular, victims, unaware, fail to come forward.<sup>88</sup>

The point here is not to downplay the importance of the private attorney general – as noted above its centrality to conceptions of civil rights enforcement is well-earned, and such litigation has powerful capacity to prompt real change<sup>89</sup>-- but to understand the value as well as the limitations of the regime.

### B. *The Usual Meaning of Public Enforcement*

Any limitations of the private enforcement model are typically measured against what has become the less desirable alternative: public enforcement. In the civil rights context, public enforcement generally means one of two things. The first is public enforcement of claims through litigation in court, such as for instance claims of discrimination brought by the DOJ or federal agencies with litigating power such as the EEOC. Simply put, this is the Attorney General. The second is the administrative adjudication of federal civil rights claims. (As in the case of HUD, these two functions might operate as a hybrid).

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<sup>85</sup> See *id.* at 1017 & n.107.

<sup>86</sup> See Johnson, *The Last Plank*, *supra* note 71, at 1201-04 (describing challenges of individual enforcement in housing); MARGERY AUSTIN TURNER ET AL., U.S. DEP'T OF HOUS. & URBAN DEV., DISCRIMINATION IN METROPOLITAN HOUSING MARKETS: NATIONAL RESULTS FROM PHASE I HDS 2000 i-iv (2002) (showing prevalence of contemporary discrimination in housing).

<sup>87</sup> See Robert S. Schwemm, *Why Do Landlords Still Discriminate (And What Can Be Done About It)?*, 40 J. MARSH L. REV. 455, 506-07 (2007).

<sup>88</sup> See John Goering, *An Overview of Key Issues in the Field of Fair Housing Research*, in FRAGILE RIGHTS WITHIN CITIES, *supra* note 42, at 28 (only a fraction of actual victims of housing discrimination make use of the enforcement system).

<sup>89</sup> See, e.g., Sean Farhang, *Private Lawsuits, General Deterrence and State Capacity* 29 (Oct. 2010) (unpublished manuscript) (on file with author) (providing empirical evidence that the threat of private enforcement litigation led employers to adopt equal opportunity practices that had efficacy in improving employment outcomes for women and minorities, but noting that data failed to establish that private enforcement regimes were more effective than administrative implementation).

In the context of employment, for instance, the EEOC has investigative and prosecutorial authority to enforce a range of federal employment laws, including Title VII, the ADA, and the Age Discrimination in Employment Act (ADEA).<sup>90</sup> Individuals must first file a charge of discrimination with the EEOC, and the EEOC then has 180 days after filing to investigate the claim.<sup>91</sup> After 180 days an individual may request that the EEOC issue a right to sue notice, which allows the claimant to proceed with a complaint in federal or state court.<sup>92</sup> If the EEOC finds merit in a charge of discrimination, the agency lacks power to adjudicate the claim, but the parties may enter into conciliation procedures with the EEOC to resolve the claim. If the conciliation is unsuccessful, the EEOC may file suit on behalf of the claimant in court, or on its own behalf.<sup>93</sup> The Attorney General can also bring “pattern or practice” cases to enforce employment laws when he or she “has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by t[he] subchapter.”<sup>94</sup>

The FHA grants HUD authority to investigate claims of discrimination, while simultaneously seeking to conciliate the claim.<sup>95</sup> (If the complaint comes from a state or locality with “substantially equivalent” fair housing laws, the complaint is referred to that state’s civil rights agency).<sup>96</sup> The 1988 Amendments to the FHA created a new administrative enforcement scheme that allows victims to pursue claims before administrative law judges (ALJ).<sup>97</sup> If HUD determines that reasonable cause exists for the discrimination claim, HUD files a charge with the ALJ. At that point either party can elect to proceed in federal district court. If neither party elects for court, the case is heard

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<sup>90</sup> Congress amended Title VII in 1972, vesting the EEOC with authority to bring suits in Court. *See* Equal Employment Opportunity Act (EEOA) of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972); 42 U.S.C. § 2000e-5(f)(2) (2006) (“[T]he Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge”).

<sup>91</sup> *See, e.g.*, Title VII, 42 U.S.C. § 3613; Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 626; Americans With Disabilities Act, 42 U.S.C. § 12117. Administrative exhaustion is not required for employment discrimination claims filed pursuant to 42 U.S.C. § 1981 or under the Equal Pay Act, 29 U.S.C. § 206(d). Individuals have 180 days from the date of discrimination to file a charge with the EEOC, and 300 days in states with their own Fair Employment Agencies. *See* 42 U.S.C. § 2000e-5(e)(1). Past studies have found that the EEOC processes about 85% of federal employment discrimination cases. *See* John J. Donohue III & Peter Siegelman, *Law and Macroeconomics: Employment Litigation Over the Business Cycle*, 66 S. CAL. L. REV. 709, 735 (1993).

<sup>92</sup> *See, e.g.*, 42 U.S.C. §§ 2000e-5(b), (f)(1).

<sup>93</sup> *See* 42 U.S.C. § 2000e-5(f)(1). The defendant is entitled to *de novo* review in federal court. If the EEOC finds no discrimination, the agency issues a determination of “no-cause” to the claimant, and provides plaintiff a “right-to-sue” notice. *See id.*

<sup>94</sup> 42 U.S.C. § 2000e-6(a).

<sup>95</sup> *See* 42 U.S.C. § 3610 (authorizing aggrieved persons to file complaint with HUD).

<sup>96</sup> *See* 42 U.S.C. § 3610.

<sup>97</sup> *See* Pub. L. No. 100-430, 102 Stat.-1619 (1988) (codified at 42 U.S.C. § 3612).

by an ALJ who has power to issue a ruling and grant compensatory damages, injunctive relief and civil penalties up to \$50,000. Either HUD's Office of the General Counsel or a private attorney can represent the claimant in proceedings before HUD ALJs.<sup>98</sup>

The benefits of attorney general attention can be significant. Public agencies bring litigation and investigative resources to tackle civil rights problems. DOJ may have greater capacity to bring systemic claims in particular. The fear of unleashing the state's investigative and enforcement apparatus may prompt defendants to settle their claims, and curb discriminatory behavior by others. When an issue captures the attention of federal agencies like DOJ, it may garner greater press and public attention, and serve as a powerful mechanism for promoting antidiscrimination enforcement. In some areas, the federal government has practical tools for enforcement unavailable to private litigants. For instance, HUD has the power to conduct testing, and can bring claims based on testing and other investigations, even without the presence of an actual victim.<sup>99</sup>

In the second conception of public enforcement, agencies provide a location for resolving antidiscrimination claims. EEOC lacks adjudicative capacity, but does have the ability to investigate claims, and seek conciliation agreements between parties. The strongest civil rights administrative enforcement scheme, at least on paper, now belongs to HUD.<sup>100</sup> The potential advantages of the system in the particular context of fair housing are great. Reformers found that court litigation was a deterrent to victims: litigation in court is time consuming, expensive, and perceived by victims and lawyers as too costly given the low damages generally available in individual cases. Thus administrative enforcement was designed to serve as a cheaper, less burdensome way of securing compliance with the FHA.<sup>101</sup>

As noted above, strong administrative enforcement was initially desired by civil rights proponents at the time of the creation of federal civil rights laws. The reality -- at least based on the assessments of those seeking to advance civil rights enforcement -- has always been somewhat less palatable. A range of empirical analyses of agency enforcement in terms of prosecutorial and adjudicative function are sobering. EEOC is consistently plagued with backlogs and long delays in investigating and processing claims.<sup>102</sup> As for HUD, staffing and other administrative problems have historically

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<sup>98</sup> *See id.*

<sup>99</sup> *See* 42 U.S.C. §3614 (allowing HUD to initiate complaints).

<sup>100</sup> *See* Johnson, *The Last Plank*, *supra* note 71, at 1191 (describing fair housing's formal enforcement regime as the "strongest of any civil rights statute").

<sup>101</sup> *See* H.R. REP. NO. 100-71, at 16 (1988) (describing 1988 amendments as intended to strengthen private and administrative enforcement).

<sup>102</sup> *See, e.g.*, OFFICE OF PROGRAM OPERATIONS, EQUAL EMP'T OPP. COMM'N, ANNUAL REPORT (2009).

hampered the agency's ability to investigate discrimination claims.<sup>103</sup> With regard to HUD's adjudicative function, empirical studies show low rates of usage of the ALJ process by claimants.<sup>104</sup> When ALJs adjudicate cases, they tend to award much lower penalties than those gained for similar cases in court proceedings.<sup>105</sup>

Next are the structural and political realities of relying on administrative enforcement. Presidents carry different levels of commitment to civil rights enforcement, leading to tremendous variation in the amount of enforcement activity.<sup>106</sup> Some administrations appear to wholly abandon civil rights enforcement;<sup>107</sup> others change or alter priorities lessening enforcement in particular areas.<sup>108</sup> Congressional oversight of agency action might be weak, or non-existent depending on members' interests, politics and competing priorities. In addition government's dual role as enforcer of civil rights and defendant in civil rights cases may lead the government to adopt positions less favorable to civil rights claimants.<sup>109</sup>

What generally emerges in civil rights commentary is skepticism about the potential for enforcement through administrative adjudication or through public attorney generals. Professor Michael Selmi in comparing EEOC and HUD's enforcement record with those of private litigants, locates the fundamental problem in government lawyering. Government lawyers are simply less vigorous, innovative and passionate than private

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<sup>103</sup> See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-463, FAIR HOUSING: OPPORTUNITIES TO IMPROVE GAO'S OVERSIGHT AND MANAGEMENT OF THE ENFORCEMENT PROCESS (2004) (finding significant increase in completed investigations, but that staffing and training problems hampered HUD's ability to conduct investigations); U.S. COMM'N ON CIVIL RIGHTS, THE FAIR HOUSING AMENDMENTS OF 1988: THE ENFORCEMENT PROCESS (1994) (analyzing four years of enforcement after the FHAA and finding HUD procedures "deficient").

<sup>104</sup> See Michael H. Schill, *Implementing the Federal Housing Act: The Adjudication of Complaints*, in FRAGILE RIGHTS WITHIN CITIES *supra* note 42, at 169-71 (showing low rates of usage of HUD ALJ process).

<sup>105</sup> See *id.*

<sup>106</sup> See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-463, FAIR HOUSING: OPPORTUNITIES TO IMPROVE GAO'S OVERSIGHT AND MANAGEMENT OF THE ENFORCEMENT PROCESS (2004) (finding significant increase in completed investigations, but that staffing and training problems hampered HUD's ability to conduct investigations); U.S. COMM'N ON CIVIL RIGHTS, THE FAIR HOUSING AMENDMENTS OF 1988: THE ENFORCEMENT PROCESS (1994) (analyzing four years of enforcement after the FHAA and finding HUD procedures "deficient").

<sup>107</sup> See Senate 2002, 2003 oversight hearings on George W. Bush's Department of Justice, Civil Rights Division.

<sup>108</sup> See, e.g., DOJ rejection of disparate impact theory cases; HUD shift towards family status cases.

<sup>109</sup> See Neal Devins, *Unitariness & Independence: Solicitor General Control over Independent Agency Litigation*, 82 CAL. L. REV. 255, 266-67 (1994) (describing the George H.W. Bush Administration's advancement of arguments at "odds with pro-plaintiff" EEOC positions at the appellate level in order to defend employment discrimination suits against the government); Selmi, *supra* note 9, at 1450 (arguing that the government's dual role as plaintiff and defendant creates conflicts).

attorneys, Selmi argues.<sup>110</sup> Moreover the statutory role given to civil rights agencies can operate as an obstacle. The paradigm picture of how the civil rights statutory scheme frustrates civil rights enforcement becomes the EEOC. Title VII requires individuals to first exhaust their claims with the federal agency. But in several accounts, the agency is crippled under the weight of processing individual claims, has capacity to investigate few, and in the end is reduced simply to determining that the vast majority of claims have no merit.<sup>111</sup> From the perspective of private plaintiffs with strong, potentially meritorious suits, the agency presents itself primarily as a hindrance to quick judicial resolution of their claims.<sup>112</sup> In this view, the administrative process in the end is “strange and vacuous,”<sup>113</sup> and the shift to the emphasis on private enforcement of Title VII and other federal employment discrimination claims in the 1991 Civil Rights Act represented the gradual culmination of a loss of faith in the use of executive power to implement Title VII.<sup>114</sup>

HUD presents another type of problem, but one equally daunting. Big, lumbering, serving multiple roles, and controlled by interests actively hostile to civil rights, it seems a “weak institutional home” for civil rights enforcement.<sup>115</sup> Calls are now for the movement of civil rights enforcement authority outside of HUD to a separate dedicated enforcement agency akin to EEOC or combined with EEOC.<sup>116</sup>

In the end, researchers and civil rights commentators have little favorable to say about the enforcement efficacy of administrative agencies or, in the case of the EEOC, its formal statutory role.<sup>117</sup> To be sure, civil rights advocates continue to appeal for strengthening federal agency capacity, recognizing its potential value.<sup>118</sup> Academic commentators seem less hopeful: any attention in legal commentary to public

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<sup>110</sup> Selmi, *Public & Private Enforcement*, *supra* note 9, at 1407.

<sup>111</sup> See Michael Selmi, *The Value of the EEOC; Reexamining the Agency's Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 22 (1996) [Hereafter “*The Value of the EEOC*”]; see also U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-712, EQUAL EMPLOYMENT OPPORTUNITY: PILOT PROJECTS COULD HELP TEST SOLUTIONS TO LONG-STANDING CONCERNS WITH THE EEO COMPLAINT PROCESS 1-2 (2009); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-589, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: SHARING PROMISING PRACTICES AND FULLY IMPLEMENTING STRATEGIC HUMAN CAPITAL PLANNING CAN IMPROVE MANAGEMENT OF GROWING WORKLOAD 3 (2008).]

<sup>112</sup> See Selmi, *The Value of the EEOC*, *supra* note 111 at 8-9.

<sup>113</sup> See *id.* at 22.

<sup>114</sup> See LITIGATION STATE, *supra* note 9, at 33.

<sup>115</sup> CHRISTOPHER BONASTIA, *KNOCKING ON THE DOOR: THE FEDERAL GOVERNMENT'S ATTEMPT TO DESEGREGATE THE SUBURBS* (2008).

<sup>116</sup> See Leadership Conference, *National Housing Task Force Report* (2009).

<sup>117</sup> See, e.g., Michael Z. Green, *Proposing a New Paradigm for EEOC Enforcement After 35 Years: Outsourcing Charge Processing by Mandatory Mediation*, 105 DICK. L. REV. 305, 309-10 (2001) (“[B]y starting the EEOC as a charge-handling agency, rather than an enforcement agency, the EEOC has been forced to focus on handling charges instead of pursuing enforcement initiatives.

<sup>118</sup> See, e.g., Leadership Conference, *supra* note 116, at 3.

enforcement often ends with a call for strengthening mechanisms for *private* enforcement.<sup>119</sup>

### C. *A Third Model: American Equality Directives*

These standard conceptions of how civil rights statutes are implemented and enforced are united in that they advance judicial and quasi-judicial models of resolving the claims of individuals or groups of individuals. In telling the story of institutional choice for civil rights enforcement, the current account centers on choices between who should prosecute (public or private actors) and the best place for adjudication (court or agency).<sup>120</sup> Literally omitted from this compelling binary is the fact that the Civil Rights Act of 1964, which by these accounts ushered in an emphasis on private enforcement, also contained Title VI which appears directed at bureaucratic enforcement. In effect, these narratives fail to account for another strand in the civil rights regulatory regime: statutes and implementing regulations that operate as directives to the programs and public actors that constitute the administrative state. Nor do these narratives provide an account of how those statutes are then enforced in a regime that favors private court enforcement.

What I show below is that statutes like Title VI and Title VIII are structured to engage federal administrative power not just to promote compliance by public and private discriminators, but because the administrative state – the set of federal, state and local programs enabled by federal funding-- is the very object of the enforcement or rule-setting activity. Under these statutes, a set of regulatory requirements have emerged that place proactive and affirmative duties on federally-funded actors. These equality directives allow civil rights to mean more than court or agency resolution of claims of discrimination. Rather they address the broader question of how government decisions – in housing, transportation, land use and other areas – structure contemporary inequality.

My aim in this section is to describe the types of affirmative duties equality directives place on state actors to promote racial inclusion, and explain how they differ from the private and public enforcement models described above.

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<sup>119</sup>See, e.g., Selmi, *supra* note 9; David L. Rose, *Twenty-five Years Later: Where do We Stand on Equal Employment Opportunity Law Enforcement?*, 42 VAND. L. REV. 1121, 1132 (1989) (noting that “the problems of the EEOC have become so pervasive and endemic that some former high-ranking officials of the Commission have expressed their doubts as to whether the continued existence of the Commission is in the public interest” but ultimately arguing for strengthening government enforcement).

<sup>120</sup>See, e.g., LITIGATION STATE, *supra* note 5, at 98-105 (discussing congressional choice in enacting Title VII between an NLRB type model that focused on administrative adjudication with a “prosecutorial” model that in the end empowered private prosecutorial power); LIEBERMAN, *SHAPING RACE POLICY*, *supra* note 8, at 149; Selmi, *Public & Private Enforcement*, *supra* note 9 at 1410 (comparing agency and private enforcement of Title VII and Title VIII).

## 1. Examples

The regulatory regimes implementing Title VI of the 1964 Civil Rights Act and Title VIII of the Fair Housing Act are my prime examples.<sup>121</sup> Title VI prohibits racial and ethnic discrimination in federal spending thus covering all federal programs and activities, and state and local entities receiving federal funds.<sup>122</sup> A key provision in Title VIII requires that federal agencies and grant recipients affirmatively further fair housing. In placing positive duties on state actors, these regimes build on the base provided by these statutes.

While the essential statutory base are these core civil rights statutes, the strengthening and specifying of affirmative duties under these statutes are relatively recent. For instance by recent guidance implementing Title VI, the Department of Transportation (DOT) requires state and local actors receiving urban transit funds to assess whether their programs and activities have a deleterious impact on racial and ethnic groups, to include racial and ethnic minorities in their planning, and to consider less discriminatory alternatives. Similarly a 2003 guidance from the Department of Agriculture implementing Title VI requires federal agencies and their grantees to conduct a “civil rights impact analysis” that analyzes the proposed effect of their policies and actions on racial and ethnic minorities and persons with disabilities.<sup>123</sup> Regulations implementing Title VI require (DOT) and other federal agencies to assess whether any negative environmental and health impacts fall disproportionately on particular racial and ethnic groups and on low-income populations, and to take steps to mitigate these concerns.<sup>124</sup>

Title VIII is explicitly affirmative in its statutory mandate requiring that agencies and grantees take affirmative steps to promote fair housing goals.<sup>125</sup> A range of regulations,

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<sup>121</sup> Another example outside of Title VI and Title VIII is the more recently enacted statutory requirement that federal grantees address racial disparities in the juvenile justice system. Act of Nov. 4, 1992, Pub. L. No. 102-586 § 2(f)(3)(A)(ii), 106 Stat. 4982, 4993-94 (1992) (codified as amended at 42 U.S.C. § 5633 (2006)). For a discussion, see Olatunde C. A. Johnson, *Disparity Rules*, 107 COLUM. L. REV. 378 (2007).

<sup>122</sup> Section 601 of the statute provides that “no person. . . shall on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity” receiving federal funds. 42 U.S.C. §2000d.

<sup>123</sup> See OFFICE OF CIVIL RIGHTS, U.S. DEP’T OF AGRIC., CIVIL RIGHTS IMPACT ANALYSIS (2003), available at <http://www.ocio.usda.gov/directives/doc/DR4300-004.htm>.

<sup>124</sup> See OFFICE OF CIVIL RIGHTS, U.S. DEP’T OF AGRIC., CIVIL RIGHTS IMPACT ANALYSIS (2003), available at <http://www.ocio.usda.gov/directives/doc/DR4300-004.htm>.

<sup>125</sup> See 42 U.S.C. § 3608(e)(5) (requiring HUD to administer its programs and activities “in a manner affirmatively to further the policies of [the Fair Housing Act]”); 42 U.S.C. § 3608(d) (“All executive departments and agencies shall administer their programs and activities relating to housing and urban development . . . in a manner affirmatively to further the purposes of this title and shall cooperate with the Secretary [of Housing] to further such purposes.”).

executive orders, and agency guidance make this statutory mandate more specific. These rules require agencies and grantees to promote racial and economic integration in selecting sites for subsidized and public housing; to assess and remove barriers to integration and inclusion at the state and local levels; to collect data on the effects of federally-funded housing programs on segregation and integration; and to structure housing vouchers and homeless assistance programs to allow recipients to live in low-poverty neighborhoods.

As is evident from the above account, the texture of these requirements range. Some statutes and regulations place broad normative goals on state actors to promote equity—such as requiring federal agencies and grantees to take steps to “further fair housing” or to avoid “discrimination.”<sup>126</sup> Others require states and localities to self-assess as to whether their actions are causing harm to particular groups and to take steps to remove that harm.<sup>127</sup> Others require inclusion of affected communities (including underrepresented communities) in their planning.<sup>128</sup> Yet all are united in that they require front end planning with an equity and inclusionary lens. As a result, this regulatory framework has provided the impetus for changes in policies and programs that are altering the very landscape that structures inequality. For instance, this framework has led decisionmakers to change who benefits from public transit and housing programs, where public transit and subsidized housing are located, and lift zoning and other barriers to housing integration.<sup>129</sup> This regulatory approach does more than requiring governments to address formal bias – the disparate treatment of similarly situated groups.<sup>130</sup> It requires entities to rethink and redesign government-supported structures to proactively promote inclusion of groups that whether through discrimination, historic exclusion, or structural difference are excluded or disadvantaged socially and economically.

## 2. Essential Features

The examples I am presenting take a different approach to achieving racial and other forms of inclusion than in the standard public and private enforcement models. The

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<sup>126</sup> See, e.g., Title VI, 42 U.S.C. § 2000d; 28 C.F.R. § 42.104(b)(2) (2011) (DOJ regulations forbidding funding recipients from “utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color or national origin”); 49 C.F.R. § 21.5(b)(2) (providing the same for the DOT); Title VIII, 42 U.S.C. § 3608(e)(5) (imposing duty on federal agencies to “further” fair housing); 42 U.S.C. § 3608(d) (providing the same for federal grantees).

<sup>127</sup> See, e.g., FED. TRANSIT ADMIN., IMPLEMENTING CIRCULAR FTA C 4702.1A (2007); 24 C.F.R. § 570.487(b)(1)-(4) (analysis of impediments analysis required of community development grantees).

<sup>128</sup> See, e.g., DOT; U.S. DEP’T OF AGRIC., CIVIL RIGHTS IMPACT ANALYSIS (2003) (requiring as part of the civil rights impact analysis that agencies “consult with stakeholders, advisory committees, and customers, as appropriate, to obtain input prior to decision-making”).

<sup>129</sup> See discussion *infra*.

<sup>130</sup> See discussion *infra*.

essential attributes of these directives are that they are (1) regulatory in their approach – they engage administrative power in ways that go beyond adjudicative power; (2) affirmative and not just prohibitory – they require front-end planning with an equity lens, and (3) they impose a set of pervasive duties for federal-state programs.

*a. Regulatory Directives to the Administrative State.* A first way in which these statutes differ from the standard private attorney general or public enforcement model is that they are centered on regulatory, not adjudicative power. Title VI’s architecture engages the various levels of the administrative state – federal agencies, and state and local governments who receive federal funds—to adopt rules and policies to promote statutory goals of antidiscrimination, inclusion and equity. (Title VI also applies to private actors who receive federal funds but my focus here is on how it regulates public actors). Title VIII’s affirmatively furthering provision is similarly directed at federal agencies and grantees, and key drafters of the provision, announced it as a mechanism to engage the federal government in using its programmatic, enforcement, and spending leverage to promote integration and counter its past history of segregation.

If the central story of Title VII of the 1964 Civil Rights Act is the emergence of a private mechanism to enforce civil rights, Title VI, its other major provision engages bureaucratic power to promote equity. Title VI has two obvious strands. First is that it provides an individual right to be free of discrimination in federally funded programs.<sup>131</sup> The second strand is that Title VI provides a nonadjudicative bureaucratic mechanism which the federal government could use to enforce antidiscrimination norms on sub-national levels of government. Even more specifically, proponents of Title VI aimed to make *Brown* a reality in the face of noncompliant Southern school districts. As a White House Report stated shortly after Congress enacted Title VI, the statute aimed to “remove school desegregation efforts from the courts where they had been bogged down for more than a decade.”<sup>132</sup> This is the carrot-stick element of Title VI that commentators have acknowledged played such an instrumental role in the integration of Southern school districts.<sup>133</sup>

But another aspect of Title VI is what I will call its focus on the state itself. The statute announces an antidiscrimination norm for “federal funds.” And it is rooted in a conception of purging the state of complicity in discrimination and segregation. The predecessors can be said to be the New Deal Executive Orders forbidding employment

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<sup>131</sup> See 42 U.S.C. §2000d-1 (empowering agencies to enforce their regulations by terminating funding or “by any other means authorized by law”).

<sup>132</sup> See WHITE HOUSE TASK FORCE ON CIVIL RIGHTS, TO FULFILL THESE RIGHTS 63 (1966).

<sup>133</sup> See GARY ORFIELD, THE RECONSTRUCTION OF SOUTHERN EDUCATION; THE SCHOOLS AND THE 1964 CIVIL RIGHTS ACT 31-32 (1969); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991).

discrimination by federal agencies, and by government contractors.<sup>134</sup> With the expansion of federal grant-in-aid programs, federal funds became the new extension of the state. Purging these federal funds of discrimination was a key theme of proponents. Even President Eisenhower – not always a friend to civil rights – stated as early as 1953 that “wherever federal funds are expended for anything, I do not see how any American can justify, legally, or logically or morally discrimination in expenditure of those funds as among our citizens.”<sup>135</sup> And when President Kennedy celebrated the enactment of Title VI--after his early resistance to its funding cut off remedy<sup>136</sup> he spoke of an equity responsibility that inhered in federal funding and programs. “Simple justice,” Kennedy said “requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination.”<sup>137</sup>

Title VIII’s affirmatively furthering provision is even more explicitly directed at the administrative state, and directed not only at purging the federal government of past complicity in promoting segregation and subverting fair housing, but placing on it the affirmative duties to reverse course. Key proponents pushed for the provision, building on executive orders abolishing discrimination in government run and subsidized housing programs. Indeed, proponents sought the provision because they saw Title VI (which applied to housing programs) as insufficient in failing to place an affirmative duty on government.<sup>138</sup>

The tools of implementing these statutes then become directions to the federal, state and local programs enabled by federal administrative power. More specifically, these broad statutory directives are realized through the placing of conditions on federal

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<sup>134</sup> The roots of conditioning federal spending to advance civil rights stem from efforts in the New Deal and postwar period. See HAVARD S. SITKOFF, *A NEW DEAL FOR BLACKS: THE EMERGENCE OF CIVIL RIGHTS AS A NATIONAL ISSUE* 321(1978) (discussing Executive Order 8802 which also establishes a Committee on Fair Employment Practices (FEPC) in the Office of Personnel Management to administer the order). President Eisenhower in 1951 extended prohibitions on employment discrimination to recipients of federal contracts. See Exec. Ord. No. 10479, 18 C.F.R. § 4899 (1953) (banning discrimination by contractors on federally financed construction sites). See RISA GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* 42 (2007) (“In 1953, even Eisenhower, a reluctant supporter of African American civil rights, followed the by then decade-long precedent of taking executive action to eliminate discrimination in government contracting.”).

<sup>135</sup> See STEVEN C. HALPERN: *ON THE LIMITS OF THE LAW: THE IRONIC LEGACY OF TITLE VI OF THE 1964 CIVIL RIGHTS ACT* 23 (1995) (citing *The Public Papers of the Presidents of the United States: Dwight D. Eisenhower* (1953)).

<sup>136</sup> President Kennedy and other members of Congress initially opposed the idea of withholding federal aid, as an affront to localism in education, and as a potentially dangerous accumulation of federal power. ORFIELD, *supra* note 133, at 31-32.

<sup>137</sup> H.R. MISC. DOC. NO. 88-124, 3, 12 (1963).

<sup>138</sup> For an account, see Olatunde C.A. Johnson, *Stimulus and Civil Rights*, 111 COLUM. L. REV. 154, 193-94 (2011).

spending, issuing rules and guidance, providing technical assistance, and requiring reporting and self-evaluation by government grantees. Courts and administrative adjudication are indeed part of the regime. As discussed below, courts help enable the regime catalyzing regulatory implementation at times, and providing a location for enforcement of regulations. But what distinguishes these statutory and regulatory provisions from the standard models are the breadth of administrative tools they employ to promote nondiscrimination, equity and inclusion. This may be unremarkable to note for many administrative regimes, but my suggestion here is that this has not been a part of standard accounts of American civil rights statutes.

*b. Positive Directives.* Second, and relatedly, these statutes have provided a location for requiring state actors to take affirmative steps to promote equity or inclusion. By this, I mean that the implementation of these statutes requires that grantees do more than refrain from discrimination or avoid disparate impacts as required by the central provisions in federal fair employment and housing law. Rather, these statutes and implementing measures are “directive” in that they require state actors to take a series of proactive measures to achieve inclusionary goals. The unleashing of these statutes to create a set of more specific, affirmative directives is quite recent. Under the regulations that I term “equality directives” state and local actors are now required to engage in front-end planning to promote equality and inclusion. They must collect racial and ethnic data; conduct impact assessments; publicize information to minorities, the limited-English-proficient, low-income groups and persons with disabilities; perform outreach to these populations; propose, design and evaluate more inclusive alternatives; and alter their funding, programs, and policies to advance integration, nondiscrimination and inclusion.

In requiring states and localities to take initiative to assess how their programs might better further goals of inclusion and equality, they bear some similarity to measures adopted in the international context that place positive duties on state actors. Most prominently in the UK, equality law places a set of proactive duties on government to achieve equality by having “due regard” to eliminate discrimination, promote equality of opportunity, and further “good relations” between racial and ethnic groups.<sup>139</sup> From this general “due regard” duty, public authorities engage in a set of more specific duties,

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<sup>139</sup> See RACE RELATIONS (AMENDMENT) ACT OF 2000: SUMMARY OF THE 2000 ACT, <http://www.legislation.gov.uk/ukpga/2000/34/notes/division/3?type=en> (last visited Oct. 29, 2011) (describing the law as placing a “duty on specified public authorities to work towards the elimination of unlawful discrimination and promote equality of opportunity and good relations between persons of different racial groups”).

including assessing the equality impact of their activities, and considering how these impacts might be reduced.<sup>140</sup>

An account of housing and transportation in Part III provides examples of states and localities actually engaging in this front-end planning for inclusion, and how this planning leads them to alter their programs and practices in concrete ways.

c. *Pervasive and Embedded.* A final noteworthy aspect of these equality directives is that they embed a set of equity-promoting requirements in the daily operation of state-funded and operated programs. To be sure these directives do not operate in full force in all federal programs, but where they operate they impose ongoing requirements of self-evaluation, monitoring and reporting to avoid discrimination and promote inclusion. For instance, all recipients of federal mass transit funds must conduct impact assessments, outreach, as well as practices to include minority groups, persons with disabilities, and groups with limited-english proficiency. These requirements are not just admonishments to remedy bias, but a requirement that the ongoing operation of multibillion dollar federal programs operate in ways that ensure robust participation of varied groups.

In addition, the requirements, as part of conditioned spending, are embedded in existing grant programs unrelated to civil rights. They require the consideration of civil rights or equity concerns as part of the ongoing task of receiving and spending federal funds in particular programs. Implementation is in a large sense self-executing in that it does not depend on the filing of an administrative or legal complaint. When a transit agency or locality takes federal funds, they must assess the impacts of existing and proposed programs and policies, conduct outreach to include groups in planning and design, and adopt practices that promote goals of housing integration and access to transit. These duties do not depend on the filing of a complaint by groups, but rather are triggered by the receipt of federal funds. In short, the architecture of these directives draws on the spending and oversight relationship that exists between the federal government and its subnational grantees and are implemented primarily through that regulatory architecture.

## II. BEYOND ANTIDISCRIMINATION

These features of what I am calling America's equality directives – that they engage broader forms of administrative power, are positive and pervasive --- give these

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<sup>140</sup> See Race Relations – The Race Relations Act 1976 (Statutory Duties) Order 2003 (amending 2001 order), 2003, S.I. 2003/3006, available at [http://www.legislation.gov.uk/uksi/2003/3006/pdfs/uksi\\_20033006\\_en.pdf](http://www.legislation.gov.uk/uksi/2003/3006/pdfs/uksi_20033006_en.pdf); Northern Ireland Act 1998, c. 47, § 75.

directives a power beyond the standard antidiscrimination model. Equality directives engage state power not just to eradicate bias, but towards robust goals of inclusion. This can occur because equality directives draw on a broader set of regulatory tools than traditional antidiscrimination law, harnessing the state's power to create new programs, oversee existing programs, make rules to govern programs and spending, and centralize and dispense information and research. Equality directives thus supplement state adjudicative and prosecutorial power, and enlist the regulatory capacity of the administrative state in service of these ends. Second, and relatedly, these statutory and regulatory provisions provide a location for moving beyond the question of remedying bias to address the institutional and structural dimensions of inequality.

### A. *Regulating the State Itself*

Equality directives harness different aspects of state power than the paradigm Title VII model which centrally employs state power to further prosecution and resolution of discrimination claims. Under Title VII, Congress prohibits discrimination and delegates enforcement to public and private actors.<sup>141</sup> Federal agencies have power to investigate and prosecute claims. This is of course a stylized account of Title VII. An underemphasized aspect of Title VII is that federal agencies have promoted equal employment goals by employing other tools such as informal guidance, publicity, data collection, and conditioning grants to contractors.<sup>142</sup> My point here is to emphasize that the directives that I am describing are centrally about these less celebrated administrative tools of advancing civil rights – the powers of spending, rulemaking and oversight.

This framework's power depends on believing that federal administrative power remains a fruitful location for leveraging change. Even at a time of greatly diminishing federal resources, great potential still remains in this approach. For one, these statutory and regulatory regimes operate by building civil rights and equity requirements into existing spending and programmatic infrastructures, and do not depend on the creation of new ones. Federal agencies dispense funds to states and localities to run mass transit systems, develop highways, fund community development programs, provide grants for housing subsidy programs, fund health care and financing programs. These programs exist apart from civil rights concerns.

Second, in many programs, federal resources are not declining in relative importance. Practically speaking, federal spending remains crucial to the sustenance of state and local

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<sup>141</sup> See 42 U.S.C. §2000e-2(k) (2006).

<sup>142</sup> See LIEBERMAN, PRIVATE POWER, *supra* note 5, at 27 (describing EEOC's cooperation with civil rights groups in the 1970s to gather data, conduct investigations, and hold hearings to reform the hiring practices of particular industries); JOHN DAVID SKRENTNY, THE IRONIES OF AFFIRMATIVE ACTION: POLITICS, CULTURE AND JUSTICE IN AMERICA 127-33 (1996) (describing the emergence of racial reporting and affirmative action at the EEOC).

level programs in a broad range of programmatic areas of concern to social welfare, particularly housing, transportation, health, and education.<sup>143</sup> In many areas federal spending is increasing as a percentage of state spending, and thus federal influence is rising.<sup>144</sup>

Finally, even if these resources are declining, they still represent billions of dollars -- a vast set of programs and spending with power to structure equality. For instance, federal spending on transportation stands at about ninety-one billion dollars annually making it one of the largest domestic, discretionary spending programs.<sup>145</sup> Simply put, even in an era of tightening budgets, federal grant-in-aid programs remain extensive, and thus attaching equity rules to these programs has great potential to enlist these programs in promoting inclusion.

### B. *An Emphasis on Structure*

A second and related aspect of why equality directives warrant greater attention of those concerned about civil rights and equity: the state has ongoing power to structure a complex set of racial, ethnic and socioeconomic arrangements. While the public and private attorney general models of civil rights are fundamentally about enhancing the antidiscrimination apparatus, equality directives have power to intervene to reverse the structural and persistent forms of inequity. Here, the object of regulation is the state itself: the choices made by state actors about how to structure the programs they operate and fund to better advance racial and other forms of equality and inclusion.

This argument depends on understanding the state's continuing contribution to inequality as well as its potential (regardless of complicity or contribution) to redistribute or otherwise advance equality. The state's contribution might seem less paramount when Title VII operates as our paradigm. While some commentators have argued that changes

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<sup>143</sup> See generally Johnson, *Stimulus and Civil Rights*, *supra* note 138, at 161 (detailing rise in federal spending as a proportion of state spending); Daniel Klaff & Adam Lawton, *Conditional Spending and Other Forms of Cost Sharing* 32 (Harvard Law Sch. Fed. Budget Policy Seminar, Briefing Paper No. 18, 2008), available at [www.law.harvard.edu/faculty/hjcakson/ConditionalSpending\\_18\(rev\).pdf](http://www.law.harvard.edu/faculty/hjcakson/ConditionalSpending_18(rev).pdf).

<sup>144</sup> See Johnson, *Stimulus and Civil Rights*, *supra* note 138, at 161; *see also id.* at 172-79 (describing critical role of federal spending from the 2008 stimulus in supporting states' housing, education, and transportation programs).

<sup>145</sup> See Office of Mgmt. & Budget, Policy Budget Authority and Outlays by Function, Category and Program, Table 32-1, available at [http://www.whitehouse.gov/omb/budget/Analytical\\_Perspectives](http://www.whitehouse.gov/omb/budget/Analytical_Perspectives) (education, employment and social service spending is about \$ 127 billion). By way of context, \$706 billion is spent each year on Social Security, and \$ 690 billion on Defense (with an additional \$ 102 billion spent on Veteran's benefits and programs). *See id.*

in private sphere behavior are most salient for promoting equity,<sup>146</sup> in my view one should not underemphasize the ongoing role of the state. The risk is that as formalized discrimination by government actors has disappeared that the government recedes as an important arena for addressing inequality.

In fact, much evidence reveals that while the causes of continued racial and ethnic inequality are complex, government decisions play an ongoing role. In the housing context, residentially segregated communities of concentrated poverty limit or deny residents access to high quality schooling, quality jobs, opportunity networks, and basic elements of public safety.<sup>147</sup> Funding and programmatic decisions made at the federal, state and local levels influence the transit resources provided to high-minority, poor communities and whether these will provide not just low-cost transportation for dependent populations, but also connection to employment which is often located outside of low-income communities.<sup>148</sup> Decisions made on where to locate affordable housing, have consequence for whether poor families will have access to the range of education, tax, social capital and other benefits that accompany location in low-poverty, integrated (or majority white) neighborhoods.<sup>149</sup> The dimension of space and geography, structured in large part by state decisions, helps explain why racial inequality in particular has been enduring.<sup>150</sup> Even macrolevel changes in determinants of racial inequality that are

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<sup>146</sup> See, e.g., ESKRIDGE & FERREJOHN, *supra* note 8 at 4 (“While norms applicable only to the state may have an educational force, their ability to saturate the public culture is much greater when the norms are applicable to all of us”).

<sup>147</sup> See Xavier de Souza Briggs, *More Pluribus, Less Unum?* 29-32 in *THE GEOGRAPHY OF OPPORTUNITY* (Xavier de Souza Briggs ed., 2005) (detailing geographic concentration of school failure); James H. Carr & Nandinee K. Kutty, *The New Imperative for Equality*, in *SEGREGATION: THE RISING COSTS FOR AMERICA* 17-20 (James H. Carr & Nandinee K. Kutty eds., 2008) [hereinafter *SEGREGATION*]; Joleen Kirschenman & Kathryn M. Neckerman, *We’d Love to Hire Them, But . . . : The Meaning of Race for Employers*, in *THE URBAN UNDERCLASS 203* (Christopher Jencks & Paul E. Peterson eds., 1991) (detailing how residence and race interact to restrict job opportunities for African-Americans); Deborah L. Mckoy & Jeffrey M. Vincent, *Housing & Education: The Inextricable Link* in *SEGREGATION supra*, at 125-26; Margery Austin Turner, *Residential Segregation and Employment Inequality* in *SEGREGATION supra* at 151, 170-71 (discussing residential segregation as a contributing factor to less effective job networks for minorities). Data from the 2010 census shows modest but important improvement in the rate of black-white segregation. See John R. Logan & Brian J. Stults, *The Persistence of Segregation in the Metropolis: New Findings from the 2010 Census*, at 1, 4 available at <http://www.s4.brown.edu/us2010/Data/Report/report2.pdf> (last visited February 27, 2012). At the same time black white segregation levels remain “high,” particularly for African-Americans, *id.* at 4.

<sup>148</sup> See, e.g., THOMAS W. SANCHEZ & MARC BRENNAN, *THE RIGHT TO TRANSPORTATION: MOVING TO EQUITY* 1-2 (2007) (introducing importance of transportation to racial equity); *id.* at 53-57 (detailing contribution of transportation to spatial mismatch—the mismatch between where low-income urban (often) minority households live and the location of jobs).

<sup>149</sup> See Carr & Kutty, *The New Imperative for Equality*, in *SEGREGATION supra* note 147, at 23.

<sup>150</sup> See DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 148-85 (1993) (describing the contribution of housing segregation to contemporary poverty).

prompted by seemingly race neutral influences, such as the decline of the industrial or blue collar economy, have racially disparate effects, given spatial forms of inequity.<sup>151</sup>

Public decisions also influence private forms of discrimination. Public structuring of opportunity interacts with microlevel private forms of discrimination as well as macrolevel structural economic changes.<sup>152</sup> Modern day employment discrimination can be understood not just as individualized or firm-level racial discrimination, but involves how employers perceive applicants based on the confluence of race and the neighborhoods in which they live.<sup>153</sup> Housing discrimination through racial steering is legitimated based on the racialized landscape of our neighborhoods, as well as the often explicit desires of customers and realtors to avoid low-poverty, high minority neighborhoods.<sup>154</sup> In short, ensuring that public decisions and policies operate to promote equity provides a mechanism to address enduring problems at the intersection of racial, ethnic and class inequality.

This account of why the state matters as an object of civil rights regulation is most obviously true for race and ethnicity, where the social science literature has documented the state's contribution to persistent forms of inequity in housing, transportation, and wealth. It also matters in other areas of civil rights and equity regulation such as disability, perhaps less because of government complicity, than in government's power to leverage change going forward.<sup>155</sup>

### C. *Beyond Bias*

Engaging the state as an equity-promoting actor goes beyond the goal of remedying bias, and thus responds to some of the limitations of antidiscrimination law in addressing contemporary forms of inequality. By bias here I mean how it is typically understood in

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<sup>151</sup> See MASSEY & DENTON, *supra* note 150, at 12-13, 183-184 (describing mutual reinforcing nature of segregation and economic decline in inner-cities).

<sup>152</sup> For an account of the literature that supports this proposition in housing see Johnson, *Last Plank*, *supra* note 71, at 1211-14.

<sup>153</sup> See Kirschenman & Neckerman, *supra* note 147, at 20; Devah Pager, *The Stickiness of Racial Inequality* (2010) (unpublished manuscript on file with author);

<sup>154</sup> See George C. Galster & W. Mark Keeney, *Race, Residence, Discrimination, and Economic Opportunity: Modeling the Nexus of Urban Racial Phenomena*, 24 URB. AFF. Q. 87, 103 (1988).

<sup>155</sup> See, e.g., SANCHEZ & BRENNAN, *supra* note 148, at 114 (discussing importance of transportation in securing mobility for persons with disabilities); *id.* at 116 -17 (detailing principles of transportation equity for persons with disabilities, including assuring access and inclusiveness); see also Elizabeth Emens, *Intimate Discrimination: The State's Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1381 (2009) (arguing that the state should take affirmative steps to address "intimate discrimination" in the area of disability (as well as race)).

law and policy domains: disparate treatment of similarly situated individuals.<sup>156</sup> In the constitutional context, commentators long argued that antidiscrimination law as constructed by courts has proved too focused on questions of fault and malice.<sup>157</sup> The doctrinal solutions proposed under equal protection— such as requiring public actors to evaluate the extent to which their actions promote harm and to consider less harmful alternatives<sup>158</sup> are precisely the goals of a regime that places positive duties on state actors. The disparate impact component of statutory antidiscrimination law is a potential avenue for asking these questions too.<sup>159</sup> But in reality the way in which it is doctrinally constructed by courts has narrowed its efficacy and scope. For instance, in asking whether disparate impacts are justified by institutional necessity, courts often grant much deference to institutional decisionmakers.<sup>160</sup> Such deference likely reflects courts’

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<sup>156</sup> See, e.g., Glenn C. Loury, *Discrimination in the Post-Civil Rights Era: Beyond Market Interactions*, 12 J. ECON. PERSP. 117, 121 (1998) [hereinafter “*Post-Civil Rights*”]. Bias could be defined more broadly at the institutional level, to include the failure of officials to remedy racial disparate impacts. For instance, Professor Glenn Loury has described racial inequality as maintained by “a disregard for the effects of a policy choice on the welfare of persons in different racial groups.” GLENN C. LOURY, *THE ANATOMY OF RACIAL INEQUALITY* 166 (2002) [hereinafter “*ANATOMY*”]. While Loury describes this phenomenon as reflecting the “stigma,” associated with race, one could plausibly term it a form of institutional-level “bias.” Cf. Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 7 (1976) (arguing that intentional discrimination violating the equal protection clause might also be extended to include “racially selective sympathy and indifference”); Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L. J. 1278, 1317 (2011) [hereinafter “*Antibalkanization*”] (defining “bias” as including “structural discrimination”). I am using the term more narrowly to reflect not institutional or policy level decisions, but the type of individual level bias that Loury would call “reward bias” [–] unequal returns to equally productive contributions.” LOURY, *ANATOMY* *supra*, at 160 (contrasting “reward bias” with “development bias [–] unequal chances to realize one’s productive potential”).

<sup>157</sup> See, e.g., R.A. Lenhardt, *Understanding the Mark: Race, Stigma and Equality In Context*, 79 N.Y.U. L. REV. 803 (2004); Siegel, *Why Equal Protection No Longer Protects*, *supra* note 14, at 1136-37; Charles R. Lawrence, III, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN L. REV. 317, 321-22 (1987).

<sup>158</sup> See Lawrence, *supra* note 157, at (proposing that courts “analyze governmental behavior much like a cultural anthropologist might: by considering evidence regarding the historical and social context in which the decision was made and effectuated”). Lenhardt, *supra* note 157, at 892 (proposing that courts consider whether government action causes stigmatic harm by “preparing what would effectively be a racial impact statement”). Of course these approaches differ sharply from the equality directive approach in that they would require such analysis retrospectively by courts rather than the primary government decisionmaker.

<sup>159</sup> See Siegel, *Antibalkanization*, *supra* note 156 at 1317 (describing Title VII’s disparate impact standard as designed in part to “challeng[e] structural discrimination—discrimination that arises from the interaction of workplace criteria with other race-salient social practices.”).

<sup>160</sup> See Charles F. Abernathy, *Legal Realism and the Failure of the “Effects” Test for Discrimination*, 94 GEO. L.J. 267 (2006) (finding few successful Title VI disparate impact cases); Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 13-14 (2006) (noting difficulty of prevailing in Title VII disparate impact cases because they require that often complex employment decisions be broken down into discrete elements); Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 734-42 (2006) (reviewing appellate and district court decisions

reluctance to find public institutions liable for decisions that reflect a set of complex tradeoffs.<sup>161</sup> Take for instance Title VI disparate impact cases where courts were typically reluctant to find transit agencies liable for funding and service decisions that harmed minorities.<sup>162</sup>

Equality directives implement the goals of disparate impact law, but do so affirmatively and proactively in the planning stage of decisionmaking. They require grant recipients to conduct front-end assessment of impacts, evaluate alternatives, and include groups not normally at the table. This approach thus avoids the back end problems of court enforcement of disparate impact, by incorporating an equity and inclusionary lens before policies and programs are implemented. In requiring up front assessment, inclusion, and redesign, equality directives have features of a different strand of antidiscrimination law – the American Disabilities Act’s requirement of “reasonable accommodation.”<sup>163</sup> Yet as is shown by the specific examples presented in Part III, equality directives do more than set up broad goals akin to “reasonable accommodation,” they require grantees to take a set of specific steps of self-assessment, mitigation, and inclusion to meet those goals.

In moving beyond the prohibitory focus of antidiscrimination law and instead encouraging affirmative steps, equality directives provide a broader normative frame for civil rights goals than is captured by remedying bias. In this paper, I use “equality” or “equity” as a more expansive short hand than “antidiscrimination”, to signal that these

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and finding that “[d]isparate impact claims are more difficult to prove than standard intentional discrimination.”); Olatunde C. A. Johnson, *Disparity Rules*, 107 COLUM. L. REV. 374 (2007) (arguing that Title VI’s disparate impact test as employed by courts has proved ill-suited to addressing practices that caused disparate impact through the interaction with “structural and embedded racial inequalities”).

<sup>161</sup> Cf. ESKRIDGE & FERREJOHN, *supra* note 8, at 54 (discussing limits of adjudication in resolving problems that are polycentric, future oriented, and reallocational).

<sup>162</sup> A landmark case against the Los Angeles Transit system successfully relied on the Title VI disparate impact standard. *See infra* note 180 and accompanying text. Other similar litigation brought was unsuccessful. *See infra* note 181. However, as I note in Part III, even this unsuccessful litigation contributed to the development of the DOT’s regulatory equality directives. *See infra* notes 180 - 182 and accompanying text.

<sup>163</sup> *See* ADA s 102(b)(5)(A), 42 U.S.C. s 12,112(b)(5)(A) (including in the definition of discrimination “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual . . .”). Commentators have argued that features of Title VII including its disparate impact requirement of remedying unjustified disparate impacts, forbidding of stereotyping, disallowing employers to cater to employer preferences are similar to ADA’s requirement of accommodation. *See, e.g.*, Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642 (2001); Samuel R. Bagenstos, “Rational Discrimination,” *Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 859-60, 866-67 (2003) [hereinafter “Rational Discrimination”] (arguing that the distinctions are overdrawn because the normative aims of traditional antidiscrimination law and the ADA are similar -- dismantling “group-based subordination” – and they employ similar means --prohibiting “rational discrimination”).

directives do not simply seek to remedy or avoid bias, but to share federal resources, dismantle long-standing barriers in the distribution of federal funds, promote integration, and further inclusion in policymaking, planning and services.<sup>164</sup>

Finally, this normative shift away from bias has instrumental benefits – it responds to the reality that bias at the individual or firm level is at most one contributor to contemporary racial inequality. The hard account of this understands bias or discrimination as no longer pervasive and argues that it should be demoted as an explanation for contemporary racial inequality.<sup>165</sup> Even short of this claim,<sup>166</sup> too much emphasis on bias and antidiscrimination risks privileging the problems of those well-positioned to benefit from the removal of formalized barriers to equality, while leaving untouched more enduring and embedded problems of poverty, such as access to jobs, incarceration, and poor social capital, which affect low-income persons of color.<sup>167</sup> While the private and public attorney general model centers on eradicating discrimination and bias primarily in private markets, the regulatory directives I am describing focus on the state’s contribution to building a landscape that structures access and opportunity.

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<sup>164</sup> This point can be overstated. As Sam Bagenstos has noted, Title VII’s ultimate goal is not just lifting formal bias but preventing subordination and promoting full-inclusion. See Bagenstos, *Rational Discrimination*, *supra* note 163, at 859-60. Title VIII’s goals as articulated by key supporters included both promoting integration as well as combating bias. See, e.g., 114 CONG. REC. 3422 (1968) (statement of Senator Mondale that the goal of the FHA was to promote “an integrated society, a stable society free of the conditions which spawn riots, free of riots themselves”).

<sup>165</sup> See Banks & Ford, *supra* note 16, at 1114 (arguing that “many decisions and practices that adversely affect racial minorities do not fit neatly within the conventional antidiscrimination framework”); LOURY, ANATOMY, *supra* note 156, at 79-84 (arguing that discrimination should be “demoted, dislodged from its current prominent place in the conceptual discourse on racial inequality in American life”); Loury, *Post-Civil Rights Era*, *supra* note 156, at 121 (arguing that “market discrimination” is likely “not the primary source of race disparities” and that current tools for combating market discrimination are inadequate to the task of reducing economic disparities between racial groups).

<sup>166</sup> Accounts of pervasive bias in job markets (both low and higher wage), see Devah Pager et al, *Discrimination in a Low-Wage Job Market: A Field Experiment* (2009), and all levels of housing. See Johnson, *Last Plank*, *supra* note 71, 1197-1200, point to the risk of overstating this point.

<sup>167</sup> Recent legal scholarship has begun to look closely at the structural aspects of inequality including the contribution of government policies, the effects of cumulative and historic inequities on contemporary discrimination, and the institutional and inter-institutional practices that operate to exclude or disadvantage particular groups. See, e.g., Johnson, *Disparity Rules*, *supra* note at 167 (encouraging legal scholarship to move beyond discussions of bias to address how “[d]ecades of discrimination have created a social structure that shapes in distinctly racial terms” residential segregation, access to wealth, educational resources, and social capital); R.A. Lenhardt, *Race Audits*, 62 HASTINGS L.J. 1527, 1540-43 (2011) (describing theoretical underpinnings of “structuralism” which “emphasizes the cumulative effect of institutional structures and systems on outcomes for institutions, groups, and individuals”); Susan Sturm, *Second Generation Discrimination A Structural Approach*, 101 COLUM. L. REV. 458, 470-71 (2001) (showing how “ongoing patterns of interaction shaped by organization. . . influence workplace conditions, access, and opportunities for advancement over time”).

In short, these equality directives go beyond an emphasis on prohibitory bias, by requiring governments to take affirmative steps to prevent harm, and promote inclusion. In their focus on government actors, they harness resources beyond the private realm to leverage government's regulatory and funding apparatus to promote inclusion and opportunity.

### III. DIRECTIVES FOR HOUSING AND TRANSPORTATION EQUITY

In this Part, I begin by providing an account of how equality directives have emerged using the areas of transportation and housing as examples. This account shows how Title VI and Title VIII provided the framework for the recent development of explicit, proactive equality directives. These directives were prompted by a confluence of public and private actions including litigation and advocacy by civil rights groups, trends in the use of Presidential directives to spur agency action and create policy, and Supreme Court jurisprudence weakening private enforcement. This Part shows how these directives are implemented at the state and local levels to further equity goals.

#### A. *Transportation Impact Assessments*

##### 1. Overview

Transportation policy raises enduring questions of inclusion and equality. Decisions on where to locate transit, its physical and language accessibility, and its cost all determine how individuals and communities will be connected to opportunity-enhancing resources such as employment, schools, social services and parks -- and has vast consequences on the economic development of communities, the environment, and on human health. Mobility through public transit serves to promote independence and access to resources for persons with disabilities.<sup>168</sup> For minorities, the distribution and accessibility of transportation resources contributes to poverty and joblessness. High-minority, poor communities are often disconnected from emerging job centers,<sup>169</sup> and transportation policies have had profound influence in shaping segregation in metropolitan areas -- encouraging white flight from central cities, and contributing to concentrated, racialized poverty in urban areas.<sup>170</sup>

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<sup>168</sup> See THOMAS W. SANCHEZ ET AL., *THE RIGHT TO TRANSPORTATION* 113-14 (2008) (framing transportation accessibility as a civil right).

<sup>169</sup> See Harry Holzer et al., *Work, Search and Travel Among White And Black Youth*, 35 J. URB. ECON. 320 (1994); Harry Holzer, *The Spatial Mismatch Hypothesis: What Has the Evidence Shown?*, 28 URB. STUD. 105 (1991); Thomas W. Sanchez, *The Impact of Public Transportation on U.S. Metropolitan Wage Inequality*, 39 URB. STUD. 423 (2002).

<sup>170</sup> See K.T. JACKSON, *CRAGBRASS FRONTIER* (1985) (detailing the contribution of highway development to suburbanization, sprawl, and segregation).

DOT's Federal Transit Administration provides billions of formula and discretionary funds for buses, subways, railways and other mass transit systems. Administered by the FTA, this money is used to build, modernize and extend transit systems, and subsidize transit fares.<sup>171</sup> In recent years, the FTA has issued what I am terming equality directives. (The Federal Highway Administration – which administers an even larger store of funds for surface transit – has similar directives.<sup>172</sup>) Regulations and guidance of the FTA now require grant recipients to assess how their programs and activities impact minority communities and to take steps to avert adverse impacts. Specifically, funding recipients must integrate into their programs an environmental justice analysis, that is, an analysis of whether their programs and activities have adverse health and environmental impacts on minority communities; comparisons between effects on minority communities and nonminority communities; and documentation of actions taken to mitigate those concerns.<sup>173</sup> DOT grant recipients must also conduct community outreach to ensure participation of minority, and LEP communities.<sup>174</sup> For mass transit programs and activities in larger regions, DOT requires funding recipients to: gather and analyze data to evaluate whether minority groups are fairly benefiting from federally funded programs and services;<sup>175</sup> develop quantitative measures to evaluate that services are being provided in similar ways to racial and ethnic groups;<sup>176</sup> evaluate significant system-wide service and fare changes to determine whether they have a discriminatory impact;<sup>177</sup> monitor services every three years to ensure that prior decisions have not resulted in

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<sup>171</sup> See FED. TRANSIT ADMIN., U.S. DEP'T OF TRANSP., Highlights of the Federal Transit Administration's Impact on Public Transit in the United States, *available at* [http://www.fta.dot.gov/documents/FtaImpactBook\\_Web.pdf](http://www.fta.dot.gov/documents/FtaImpactBook_Web.pdf) (last visited Oct. 28, 2011).

<sup>172</sup> See FED. HIGHWAY ADMIN., U.S. DEP'T OF TRANSP., ORDER NO. 6640.23, FHWA ACTIONS TO ADDRESS ENVIRONMENTAL JUSTICE IN MINORITY POPULATIONS AND LOW-INCOME POPULATIONS (1998), *available at* [http://www.fhwa.dot.gov/legregs/directives/orders/6640\\_23.htm](http://www.fhwa.dot.gov/legregs/directives/orders/6640_23.htm); FED. HIGHWAY ADMIN., U.S. DEP'T OF TRANSP., COMMUNITY IMPACT ASSESSMENTS: A QUICK REFERENCE FOR TRANSIT, *available at* [http://www.ciatrans.net/CIA\\_Quick\\_Reference/Purpose.html](http://www.ciatrans.net/CIA_Quick_Reference/Purpose.html) (last visited Oct. 29, 2011).

<sup>173</sup> For FTA construction projects covered by the National Environmental Policy Act (NEPA), recipients should complete an environmental justice analysis. See FTA C 4702.1A, IV-4.

<sup>174</sup> See FTA C 4702.1A, IV-4. (grantees “should seek out and consider the viewpoints of minority, low-income, and LEP populations in the course of conducting public outreach and involvement activities. An agency’s public participation strategy shall offer early and continuous opportunities for the public to be involved in the identification of social, economic and environmental impacts of proposed transportation decisions.”)

<sup>175</sup> See FTA C 4702.1A, Chapter V, V-1 (“Requirement to Collect Demographic Data.”). DOT suggests a number of options for satisfying this requirement including GIA mapping, collection of survey information, or a “locally developed alternative” that meets the regulatory obligations of 49 C.F.R. 21.9(b)).

<sup>176</sup> See FTA C 4702.1A, Chapter V, V-3 (“Requirement to Set Systemwide Service Standards”). This standard is to comply with 49 C.F.R. §§ 21.5(b)(2), 7, Appendix C to 49 C.F.R. part 21. The circular goes on to list effective practices for developing system wide standards, such as on-time performance of the system, frequency of service, distribution of comfort and amenities (such as benches, shelters, route maps etc.), and service availability. *Id.* at V-3, V-4.

<sup>177</sup> See FTA C 4702.1A, Chapter V, V-5-V-7 (“Requirement to Evaluate Service and Fare Changes”).

disparate impact and to take corrective action to remedy any disparities.”<sup>178</sup> While “informal,” this guidance is an implementation of the DOT’s Title VI regulations, and there are possible sanctions for failures to comply.<sup>179</sup>

In effect, these requirements transform Title VI’s statutory prohibition on “discrimination” into a set of affirmative requirements to analyze impacts, consider alternatives, and promote full participation.

## 2. Emergence

These requirements emerged recently culminating from a set of regulatory actions and litigation that moved Title VI towards the more robust goal of using federal funds to promote full inclusion. First, these regulations are made possible by Title VI litigation and complaints brought in the mid-1990s against transit departments before *Sandoval*, most prominently *Labor/Community Strategy Center et al. v. Los Angeles Metropolitan Transportation Authority* which successfully sought redress for claims that the transit system’s funding and policies disfavored predominantly minority bus riders.<sup>180</sup> Though apart from the Los Angeles case much of this litigation was unsuccessful,<sup>181</sup> these efforts highlighted demands for full inclusion of racial and ethnic minorities in the planning and the distribution of transit resources and framed transportation equity as a Title VI concern.<sup>182</sup>

Second, these equality directives, finalized in 2007, were enabled by a set of Presidential directives promulgated in the late 1990s that require federal agencies to integrate into federal programs goals related to environmental justice and to open access to federal programs to communities with limited English proficiency.

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<sup>178</sup> See FTA C 4702.1A, V-7 (“Requirement to Monitor Transit Service.”).

<sup>179</sup> See FTA C-4702.1

<sup>180</sup> In the case, minority bus riders brought a claim that the transit authority was expanding rail services while disfavoring funding for buses primarily ridden by minorities, resulting in intentional and disparate impact discrimination in violation of Title VI and its regulations. The suit resulted in an eventual consent decree against the transit authority. See *Bus Riders Union v. Metro. Transp. Auth.*, 263 F.3d 1041 (9th Cir. 2001); *cert denied*, 535 U.S. 951 (2002) (upholding district court’s consent decree). (As a student intern at the NAACP LDF, I assisted in this litigation in its initial stages).

<sup>181</sup> See, e.g., *N.Y. Urban League, Inc. v. Metro. Transp. Auth.*, 71 F.3d 1031 (2d Cir. 1995) (vacating district court order enjoining MTA from raising fares 20 percent for urban transit, while only raising them 9 percent for commuter rail service); *Committee for A Better Northern Philadelphia v. Southeastern Pennsylvania Transp. Authority [SEPTA]*, 935 F.3d. 1280 (3d Cir. 1991) (rejecting plaintiffs’ claim that the allocation of federal subsidies for SEPTA’s commuter rail division at the expense of SEPTA’s city transit division had a disparate impact on minorities in violation of Title VI).

<sup>182</sup> In adopting equality directives, DOT referenced specifically these Title VI complaints, presenting the guidance as in part a response to a set of systemic complaints filed against transit systems. See Notice of Proposed Title VI Circular, 71 Fed. Reg. 40178, 40180 (July 14, 2006) (providing examples of Title VI litigation and administrative complaints).

Grantees under key DOT programs have since 1972 had a duty to certify that they are complying with Title VI's antidiscrimination and disparate impact regulations.<sup>183</sup> These rules include the standard disparate impact provision, which prohibits recipients from "utilizing criteria or methods of administration which have the effect of subjecting people to discrimination on the basis of their race, color, or national origin."<sup>184</sup> And, they also require recipients "even in the absence of prior discriminatory practice or usage" to "take affirmative action to assure that no person is excluded from participation nor denied the benefits" of programs based on race or ethnicity.

The 2007 revision of the DOT guidelines aims to provide clearer guidance and procedures on the meaning of disparate impact and to implement two executive orders.<sup>185</sup> The first was a 1994 Clinton administration Executive Order directing all federal agencies to integrate environmental justice concerns into federal programs by evaluating the environmental and human health effects of their programs and policies on minority and low-income communities.<sup>186</sup> In addition to affirming existing prohibitions on discriminatory actions and those with unjustified discriminatory effects,<sup>187</sup> the Executive Order requires each agency to: develop an environmental justice strategy identifying environmental effects;<sup>188</sup> gather and disseminate specific data and research<sup>189</sup>; and promote public participation in decision-making and research.<sup>190</sup>

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<sup>183</sup> See 49 C.F.R. § 21 (1970). Grant recipients have to annually certify to the FTA that they are complying with Title VI. See 49 C.F.R. § 21.9(b) (2011); FTA C 4702.1A, IV-1. Every three years, grant recipients have to do a more extensive written submission documenting their compliance with Title VI which includes summaries of public outreach and involvement, their written plans for inclusion of people with limited-English proficiency, a record of Title VI complaints, investigations and lawsuits, and a documentation of its procedures for tracking and investigating Title VI complaints. See FTA C 4702.1A, IV-3.

<sup>184</sup> DOT Title VI Regulations, 49 C.F.R. § 21.5(b)(2).

<sup>185</sup> See Notice of Proposed Title VI Circular, 71 Fed. Reg. 40178, 40179 (July 14, 2006) (stating that rule revisions was prompted by desire to provide grantees greater specificity on the "types of actions" that meet the expectations of 49 C.F.R. § 21.5(b)(7) requirement that grantees take affirmative steps to promote inclusion).

<sup>186</sup> See Exec. Ord. 12898 (1994) ("Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations").

<sup>187</sup> See Exec. Ord. 12898, at § 2-2 (requiring each federal agency to "conduct its programs, policies and activities that substantially affect human health or the environment, in a manner that ensures that such programs, policies, and activities do not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under, such programs, policies, and activities because of their race, color or national origin").

<sup>188</sup> The environmental justice strategy must identify "programs, policies, planning and public participation processes, enforcement, and or rulemakings related to human health or the environment." See Exec. Ord. 12898, § 1-103.

<sup>189</sup> The order requires that agencies conducting environmental health research should include where possible minority, low-income persons, and other at-risk populations. See *id.* at §3-301. All agencies

DOT's equality directives arise also from a second Clinton-administration Executive Order issued in 2000, implemented by federal agencies under George W. Bush, which requires federal agencies to take affirmative steps to provide "meaningful access" to persons with Limited English Proficiency (LEP).<sup>191</sup> As the Executive Order makes clear, the "meaningful access" requirement had long been part of Title VI's regulations,<sup>192</sup> but the order requires agencies to develop more specific rules and guidelines to ensure that funding recipients and federal agencies meet this requirement.<sup>193</sup>

The final factor in the creation of equality directives in transportation was *Sandoval* itself which ended private enforcement of the agency's disparate impact regulations, and created the possibility of additional administrative complaints against recipients. In its 2007 guidance requiring impact assessments and greater inclusion of minorities and other disadvantaged groups, the agency noted that *Sandoval* was likely to lead to an increase in administrative complaints against the DOT, and thus revision of the guidance would assist grantees in preventing disparate impacts.<sup>194</sup>

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should regularly collect and analyze information regarding whether their programs, policies or activities have a disproportionate effect on minority and low-income populations. *Id.*

<sup>190</sup> The Executive Order directs agencies to promote public participation decisionmaking related to the environment by requiring public hearings and notice, and ensuring that documents are understandable to the general public and translated for limited English-proficient populations. *See id.* at §5-5; *see also* Memorandum for the Heads of All Departments and Agencies (Feb. 11, 1994), at §3-301, *available at* [http://www.epa.gov/compliance/ej/resources/policy/clinton\\_memo\\_12898.pdf](http://www.epa.gov/compliance/ej/resources/policy/clinton_memo_12898.pdf).

<sup>191</sup> *See* Exec. Ord. 13166 ("Improving Access to Services for Persons With Limited English Proficiency" (2000)). Federal Transit Administration (FTA), DOT, Notice of Proposed Title VI Circular, FA-2005-23227 (Jul. 14, 2006).

<sup>192</sup> *See* CIVIL RIGHTS DIVISION, U.S. DEP'T OF JUSTICE, ENFORCEMENT OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964, NATIONAL ORIGIN DISCRIMINATION AGAINST PERSONS WITH LIMITED ENGLISH PROFICIENCY; Policy Guidance, 65 Fed. Reg. 50123 (Aug. 11, 2000) ("This policy guidance does not create new obligations, but rather, clarifies existing Title VI responsibilities."). The DOJ issued policy guidance for Clinton's Executive Order, and DOJ's role in coordinating and implementing the Order continued during the Bush Administration with a set of regulatory guidance on inclusion of LEP communities. *See* Policy Guidance Concerning Recipients' Responsibilities to Limited English Proficient (LEP) Persons, 70 Fed. Reg. 74087 (Dec. 14, 2005); *see also* FTA C 4702.1A, IV-1, IV-2; Ralph F. Boyd, Jr., Asst. Attorney General, Civil Rights Division, U.S. Dep't of Just., Memorandum For Heads of Departments and Agencies, General Counsels and Civil Rights Directors, Executive Order 13166.

<sup>193</sup> *See* Exec. Ord. 13166, Improving Access to Services for Persons with Limited English Proficiency. The DOT also incorporated its goals for inclusion of Limited English Proficient populations in the 2000 circular's requirement that recipients translate relevant information for LEP populations, and include such communities in impact assessments and community outreach. *See* Policy Guidance Concerning Recipients' Responsibilities to Limited English Proficient (LEP) Persons, 70 Fed. Reg. 74087 (Dec. 14, 2005); *see also* FTA C 4702.1A, IV-1, IV-2.

<sup>194</sup> *See* Notice of Proposed Title VI Circular, 71 Fed. Reg. 40178, 40179 (July 14, 2006) (noting that *Sandoval* would likely lead to an increase in disparate impact complaints and thus "recipients of FTA funds and the general public would benefit from guidance clarifying what steps they should take to demonstrate

### 3. Implementation

The FTA now implements its equality directives by: requiring grantees to conduct impact assessments, outreach, and mitigation;<sup>195</sup> providing technical assistance on how to conduct impact assessments;<sup>196</sup> supplying information on best practices for ensuring outreach and public participation;<sup>197</sup> and withholding federal funds pending compliance with impact assessments and other measures.<sup>198</sup>

Complying with DOT's equality directives, state and local transit agencies collect demographic data; conduct outreach to include minorities, LEP communities, and persons with disabilities; incorporate equity assessments of service, fare and other changes into their transit decisions, and adopt measures to mitigate harm to minority and transit-dependent populations.<sup>199</sup>

Equality directives prompt transit agencies to include equity concerns in the upfront design of their transit system. Enforcing equality directives, Chicago researchers, community groups, and the public transit authority collaborated to design transit system extensions that more effectively meet the needs of minority, transit-dependent and low-income populations.<sup>200</sup> The Minneapolis transit agency included an equity analysis in the

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that their programs, policies, and activities do not result in a disparate impact on the basis of race, color, or national origin”).

<sup>195</sup> See Letter from Peter Rogoff, Federal Transit Administration, to Grantees (Mar. 8, 2011) (reminding grantees of importance of complying with Title VI and FTA's implementing guidance).

<sup>196</sup> See FED. TRANSIT ADMIN., U.S. DEP'T OF TRANSP., FARE ANALYSIS & SERVICE EQUITY WEBINAR (2010) (explaining how to perform fare analysis, and which kinds of changes warrant them).

<sup>197</sup> See, e.g., GLENN ROBINSON, U.S. DEPARTMENT OF TRANSPORTATION, FILLING THE GAP: ENVIRONMENTAL JUSTICE IN TRANSPORTATION TOOLKIT PREPARED FOR FEDERAL TRANSIT ADMINISTRATION 3-7 (2007) (providing examples from the field on effective outreach, inclusion of public in planning and decision-making).

<sup>198</sup> See SRTA FIXED ROUTE SYSTEM FARE STUDY FOR THE CITIES OF FALL RIVER AND NEW BEDFORD 3 (2008) (fare equity study conducted in response to letter from FTA's Office of Civil Rights); S. MYERS, LEE CNTY. TRANSIT DEP'T, TITLE VI PLAN, 2009 PROGRAM UPDATE 7 (2009) (FTA requiring improvement in state and local transit authorities' compliance with Title VI).

<sup>199</sup> See Transit Coop. Research Program, *Reductions in Transit Service or Increases in Fares: Civil Rights, ADA, Regulatory, and Environmental Justice Implications*, 35 LEGAL RESEARCH DIGEST, March 2011, at 1 [hereinafter *Reductions in Transit Service*] (reporting survey describing integration of impact assessments with relation to service cuts and fare increases); Transit Coop. Research Program, *Transit Agency Compliance with Title VI: Limited English Proficiency Requirements*, 97 RESEARCH RESULTS DIGEST, Jan. 2011, at 1 (describing integration of LEP requirements).

<sup>200</sup> See NATHALIE P. VOORHEES CENTER FOR NEIGHBORHOOD & COMMUNITY IMPROVEMENT, UNIV. OF ILLINOIS AT CHICAGO, TRANSIT EQUITY MATTERS: AN EQUITY INDEX & REGIONAL ANALYSIS OF THE RED LINE & TWO OTHER PROPOSED CTA TRANSIT EXTENSION 16-17 (2009) (building on FTA's Title VI and environmental justice guidance to develop an “equity index”—indicators of the extent to which transit enhances mobility, economic and housing development, and environmental and human health).

initial design of a new light rail system, structuring the proposed routes to enhance benefits and avoid harm to minority communities.<sup>201</sup>

Equality directives have led agencies to mitigate harm to minority groups when making transit reductions.<sup>202</sup> The Washington Metropolitan Area Transit Authority recently conducted a fare and service analysis when budget shortfalls forced increases in fares and changes in service. After public hearings, outreach and language assistance to LEP populations, the transit system increased fares but structured them to mitigate harms to transit dependent minority and low-income riders.<sup>203</sup> Similarly the New Jersey Transit Authority – under pressure from local advocates to reveal their impact assessments -- adopted a plan to minimize the effects of fare increases on minority, low-income and transit dependent populations.<sup>204</sup>

As discussed in Part V, governments and civil society groups could do more to strengthen implementation.<sup>205</sup> Yet this account of federal oversight of transit agencies and integration of the directives by transit agencies shows the promise of this new regime.

## B. *Furthering Housing Integration*

### 1. Overview

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<sup>201</sup> See CENTRAL CORRIDOR LIGHT RAIL TRANSIT PROJECT, CENTRAL CORRIDOR TITLE VI ANALYSIS: APPENDIX I (2009), available at [www.metrocouncil.org/transportation/ccorridor/FEIS/AppendixI.pdf](http://www.metrocouncil.org/transportation/ccorridor/FEIS/AppendixI.pdf).

<sup>202</sup> Much of the data that researchers have begun to collect in this area involves agency equity analysis when reducing services or making fare increases. See *Reductions in Transit Service*, *supra* note, at 38-39. For additional examples of efforts to assess equity impacts and include underrepresented groups, see SRTA FIXED ROUTE SYSTEM FARE STUDY FOR THE CITIES OF FALL RIVER AND NEW BEDFORD, *supra* note 198, at 8 (recommending alternatives to mitigate potential harm of fare and service changes); ROBERT J. HICKEY, USING QUANTITATIVE METHODS IN EQUITY AND DEMOGRAPHIC ANALYSIS 3-5 (Sept. 2010) (describing fare equity analysis conducted by New York's transit system); LEE CNTY. TRANSIT DEP'T, TITLE VI PLAN, *supra* note 198, at 10-13 (detailing analyses of service and fare changes and distribution of transit services and amenities); MADISON CNTY. COUNCIL OF GOVERNMENTS, PUBLIC PARTICIPATION PLAN FOR THE ANDERSON/MADISON COUNTY METROPOLITAN PLANNING AREA (March 2007) (describing public outreach strategies and designs in response to the FTA's guidance); DES MOINES TRANSIT AUTH., COMMISSION MEETING MINUTES MARCH 29, 2011 (detailing outreach to LEP community and proposed fare and equity analysis).

<sup>203</sup> See WASH. METRO. AREA TRANSIT AUTH., TITLE VI EQUITY EVALUATION: PROPOSED ADJUSTMENTS TO PASSENGER FARES, ROUTES, HOURS OF SERVICE & OTHER CHANGES 3-5 (2010) (summarizing potential impact and actions taken to mitigate harm to particular populations).

<sup>204</sup> See Kyle Wiswall, *NJ Transit Equity Analysis in Nick of Time, Admits Some Impact*, MOBILIZING THE REGION (April 23, 2010), <http://blog.tstc.org/2010/04/23/nj-transit-releases-equity-analysis-in-nick-of-time-admits-some-impacts>.

<sup>205</sup> See Part V, *infra*.

A second example of equality directives is in the area of fair housing. State and local governments that receive federal community development funds must evaluate both public and private obstacles to achieving fair housing in their communities and take steps to reduce those obstacles. These regulatory requirements adopted in 1995 are known as the “analysis of impediments” and apply to Community Development Block Grants – one of the largest sources of federal funding for the revitalization of low-income communities.<sup>206</sup> A HUD manual implementing these regulations provides guidance on the range of ways that grantees can meet these obligations, specifying how to collect and analyze data and how to structure programs to better promote integration and nondiscrimination.<sup>207</sup> These regulations and informal guidance proved central in the recent case holding Westchester County liable for failing to comply with its statutory duty to affirmatively further fair housing under Title VIII.<sup>208</sup>

## 2. Emergence

The statutory backdrop here is Title VIII’s requirement that HUD, federal agencies and federal grantees “affirmatively further” fair housing.<sup>209</sup> These provisions represent a congressional response to past federal complicity in creating segregation and –while the legislative history is thin – evidence shows that key drafters of the provision sought greater engagement by federal actors to combat private market discrimination, and to use federal programs to promote integration.<sup>210</sup> Yet the federal government did little to enforce the provision until spurred by litigation in the 1970s. Advocates relied on the provision to challenge HUD’s past history of creating racial segregation in public housing, as well as ongoing siting practices by HUD and local grantees that operated to further racial segregation. The result was a set of important lower court cases holding that HUD’s duty to further fair housing required HUD to promote integration in locating public and subsidized housing.<sup>211</sup> HUD complied by promulgating the first set of

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<sup>206</sup> The Housing Community Development Act of 1974 requires that grantees certify their compliance with the Fair Housing Act and that they will affirmatively further fair housing. See 42 U.S.C. § 5304(b)(2) (2006); *id.* at § 5306(d)(5). HUD regulations again require this certification, see 24 C.F.R. § 570.601(a)(2) (2011), and more specifically that grantees conduct a fair housing analysis. See 24 C.F.R. § 570.601(a)(2).

<sup>207</sup> See U.S. Department of Housing & Urban Development, Office of Fair Housing, An Equal Opportunity Fair Housing Planning Guide, Vol. 1. (1996), available at <http://www.nls.gov/offices/fheo/images/fhpg.pdf> (last visited Aug. 2 2011) [hereafter “Fair Housing Planning Guide”].

<sup>208</sup> See *United States ex rel. Anti-Discrimination Center of Metro New York v. Westchester County*, 668 F. Supp. 2d 548 (S.D.N.Y. 2009).

<sup>209</sup> See 42 U.S.C. 3608(d) (2010).

<sup>210</sup> See Florence Wagman Roisman, *Affirmatively Furthering Fair Housing in Regional Housing Markets: The Baltimore Public Housing Desegregation Litigation*, 42 WAKE FOREST L. REV. 333, 389 (2007).

<sup>211</sup> See, e.g., *Shannon v. HUD*, 436 F.2d 809, 821-22(3<sup>d</sup> Cir. 1970) (holding that the Fair Housing Act and Title VI require HUD to consider the racial and socioeconomic effects of its site selection decisions).

regulations on site selection, which prohibited federally-funded projects from furthering segregation (or “minority concentration”) unless necessary to meet an “overriding need” for housing in the target community.<sup>212</sup>

More than twenty years later, the Clinton Administration issued an executive order giving further life to the statutory directive. The 1994 Executive Order directed federal agencies to “affirmatively further fair housing in the design of their policies and administration of their programs.”<sup>213</sup> More specifically, the order directs HUD to require grantees to analyze “impediments” to fair housing.<sup>214</sup>

The analysis of impediments (AI) directive for federally funded community development programs is a concrete result of this Order, as well a set of congressional directives requiring community development grantees to further fair housing.<sup>215</sup> HUD now requires that communities seeking to receive grants under major housing affordability and community development programs<sup>216</sup> submit an AFFH certification,<sup>217</sup>

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<sup>212</sup> 37 Fed. Reg. 203, 204(1972). Prior to *Shannon*, HUD had begun an effort to establish site selection criteria. See Steven Lev, *HUD Site and Neighborhood Selection Standards: An Easing for Placement Restrictions*, 22 URB. L. J. 199, 207 (describing efforts undertaken by Secretary George Romney in the Nixon Administration). The Third Circuit’s actions in *Shannon* in a sense catalyzed this action. See CHRISTOPHER BONASTIA, *KNOCKING ON THE DOOR: THE FEDERAL GOVERNMENT’S ATTEMPT TO DESEGREGATE THE SUBURBS* 128 (2006).

<sup>213</sup> This order required agencies to promote fair housing in the design and operation of their programs, to publish regulations to implement fair housing directives, and to establish a process for promoting compliance including procedures for investigation, informal resolution, and sanctions. See Exec. Ord. 12,892, § 3-301, § 3-302; § 4-401- § 4-404, § 5-501-§ 5-505 (Jan. 20, 1994); Memorandum, *Federal Leadership of Fair Housing*, 59 Fed. Reg. 8513 (Jan. 17, 1994). In addition, Executive Order 12,892 established the President’s “Fair Housing Council,” consisting of nine cabinet secretaries and the heads of all federal financial regulatory agencies and chaired by the Secretary of HUD. See Exec. Ord. No. 12,892, § 3-302.

<sup>214</sup> The EO requires that HUD “describe a method to identify impediments in programs or activities that restrict fair housing choice and implement incentives that will maximize the achievement of practices that affirmatively further fair housing.” *Id.* at §4-401(a)(5).

<sup>215</sup> Congress, in 1983, required that all grantees receiving community development block grant funds certify that they would affirmatively further fair housing. See Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633 (1974). Congress required certification in another HUD affordable housing program in 1990. See National Affordable Housing Act of 1990 (NAHA), Pub. L. No. 101-625, § 105(b)(13), 104 Stat. 4079 (1990) (requiring certification); *id.* at § 104(21) (defining certification).

<sup>216</sup> HUD in 1995 consolidated the Community Development Block Grant Program (CDBG) with other housing affordability and community development programs, requiring specifically that communities submit what is known as the Consolidated Plan. See Consolidated Submission for Community Planning and Development Programs, 60 Fed. Reg. 1896 (Jan. 5, 1995).

<sup>217</sup> Certification requires a written assertion, “based on supporting evidence” “available for inspection” by HUD, the Inspector General and the public, and “deemed accurate” unless the Secretary determines otherwise. See FAIR HOUSING PLANNING GUIDE, *supra* note 207, at 1-4; National Affordable Housing Act of 1990 § 105(b)(13).

analyze “impediments to fair housing choice within the jurisdiction,” “take appropriate action to overcome the effects of any impediments identified through that analysis” and “maintain relevant records.”<sup>218</sup>

### 3. Implementation

HUD implements the fair housing equality directive by providing guidance on how communities can proactively promote fair housing. HUD’s “Fair Housing Planning Guide” requires that entities conduct an AI by assessing how relevant laws and policies affect the availability, location and accessibility of housing and reviewing “all conditions” affecting fair housing choice on the basis of race, ethnicity, disability and other categories.<sup>219</sup> The Planning Guide requires that jurisdictions take a regional approach to fair housing planning (which is intended to further integration within metropolitan areas), establish procedures for public input, and provides a list of sources for data analysis.<sup>220</sup> The Planning Guide then requires jurisdictions to take actions to address these impediments, though – as I discuss in greater detail below – the Guide’s language is less directive on the questions of what specific actions must be taken.

The Planning Guide also provides examples of best practices and model interventions to address impediments to fair housing, including creating local fair housing commissions,<sup>221</sup> enacting legislation mandating pro-integrative site selection for affordable housing in localities,<sup>222</sup> increasing funding for local fair housing and human rights agencies,<sup>223</sup> adopting laws prohibiting source-of-income discrimination, creating housing accessibility and inclusionary zoning ordinances,<sup>224</sup> working with local groups to establish fair housing testing programs,<sup>225</sup> and providing mobility assistance for housing voucher recipients<sup>226</sup>.

HUD’s most recent guidance to grantees expands on the Planning Guide by requiring grant recipients to adopt a comprehensive regional approach to dismantling

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<sup>218</sup> 24 C.F.R. § 91.225(a)(1) (2011).

<sup>219</sup> See Fair Housing Planning Guide, *supra* note 207, at 2-3. “Impediments” to fair housing choice include more than just violations of the Fair Housing act, but actions or omissions that have the effect of restricting housing opportunities on the basis of race, disability and other areas, and that are “counterproductive to fair housing choice such as community resistance” to “minorities, persons with disabilities” and others. *See id.* at 2-17.

<sup>220</sup> *See id.* at 2-8, 2-13, 2-22.

<sup>221</sup> *See id.* at 3-13.

<sup>222</sup> *See id.* at 3-14.

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

<sup>224</sup> *See id.* at 4-9.

<sup>225</sup> *See id.* at 4-11, 4-12.

<sup>226</sup> *See id.*

racial and economic segregation, and promoting housing integration.<sup>227</sup> Research and practice shows that the problem of racialized concentration of poverty requires solutions at the regional level. Segregation is manifest not only in terms of racial and economic differences between neighborhoods, but in the spatial divide between suburbs and cities.<sup>228</sup> Indeed, political and geographical boundaries are often shaped and defined by economic and racial segregation.<sup>229</sup> In that vein, HUD requires federal grantees to work not just within geographically defined barriers but in conjunction with other localities to remove barriers to segregation. Specifically, grantees must conduct a regional equity assessment to identify areas of racial and ethnic segregation and racially concentrated areas of poverty;<sup>230</sup> understand the demographic trends and the forces driving segregation; identify disparities in access to opportunities such as quality schools, jobs, and stable housing;<sup>231</sup> and take steps at the regional level to address segregation and disparities in opportunity.<sup>232</sup>

Notably, this recent guidance articulates goals beyond antidiscrimination, specifying that “grantees do more than just combat discrimination” – they must work towards equity and opportunity.<sup>233</sup> The aim is to create “geographies of opportunity,” – locations that “effectively connect people to jobs, quality public schools” and other resources necessary for social and economic advancement.<sup>234</sup> This guidance provides a good illustration of the frame and approach of equality directives --- providing a location for proactive planning and policymaking towards goals of substantive inclusion and equality.

At the state and local levels, many grantees engage in a thick set of programs and policies to affirmatively further fair housing goals. For instance, states and localities give priority funding to projects and communities that create affordable housing that is racially and ethnically inclusive and inclusive of persons with disabilities;<sup>235</sup> use federal funds to provide housing search assistance to help link families receiving vouchers to housing

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<sup>227</sup> See U.S. DEP’T OF HOUS. & URB. DEV., ADDRESSING EQUITY & OPPORTUNITY: THE REGIONAL FAIR HOUSING EQUITY ASSESSMENT (FHEA) GRANT OBLIGATION (2011) [hereinafter ADDRESSING EQUITY], available at [http://www.prrac.org/pdf/Regional\\_FH\\_Equity\\_Assessment\\_HUD\\_Aug\\_2011.pdf](http://www.prrac.org/pdf/Regional_FH_Equity_Assessment_HUD_Aug_2011.pdf). This regional approach is consistent with the goals of the FHA.

<sup>228</sup> See BRIGGS, *supra* note 147, at 18, 23.

<sup>229</sup> See *id.* at 23; Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1850-51 (1994)

<sup>230</sup> See Addressing Equity, *supra* note 227, at 3. Racially Identified Areas of Poverty “(RCAP)” are defined as census tracts that are a majority nonwhite and have family poverty rates of more than 40%. *Id.*

<sup>231</sup> See *id.* HUD has created five indices for identifying access to opportunity: “school proficiency index, poverty index, labor market index, housing stability index, [and] job access index.” *Id.*

<sup>232</sup> See *id.*

<sup>233</sup> Addressing Equity, *supra* note 227, at 3

<sup>234</sup> See Addressing Equity, *supra* note 227, at 3.

<sup>235</sup> See, e.g., MASS. DEP’T OF HOUS. & COMM. DEV., AFFIRMATIVE FAIR HOUSING & CIVIL RIGHTS POLICY 22, 24-25 (2010).

opportunities in low-poverty, integrated neighborhoods;<sup>236</sup> and creatively link federally funded low-income housing programs to quality transportation, education, and job centers. States have required localities seeking federal housing funding to develop an affirmative fair housing program with particular elements including strengthening their fair housing compliance infrastructure; developing site selection and land use policies that promote affordable housing; conducting outreach to underrepresented groups; eliminating local residency preferences; and reforming exclusionary zoning practices.<sup>237</sup>

In short, the fair housing equality directives require states and localities receiving community development funds to further fair housing by identifying public and private barriers to achieving fair housing and by using their leverage and expertise. This leverage includes the government's control over programs, funding, and legislation, its ability to gather and analyze data, their role as conveners, and its potential access to funding and other resources. Under this model, fair housing becomes a pervasive goal of government-funded community development programs, rather than enforced simply through antidiscrimination litigation.

#### IV. MULTIMODAL ELABORATION AND IMPLEMENTATION

The implementation of equality directives by federal, state and local governments described in Part III serves to elaborate the meaning of equality directives (that is, specify what directives require of grantees) and to fulfill their substantive goals. The central appeal of the equality directives regime is that implementation is proactive and pervasive rather than dependent on adjudicative enforcement. As this Part shows, however, equality directives also derive their force from outside compliance pressure placed on grantees. These efforts include agency-initiated enforcement as well enforcement efforts initiated by private groups. The prime virtue of this hard enforcement is not the resolution of the specific disputes at hand, but the elaboration and strengthening of the overall equality directive regulatory regime. Significantly, outside pressure is not limited to traditional adjudicative enforcement. Emerging efforts, which I term private implementation, allow a broad range of private groups to participate in the elaboration and implementation of directives. This Part draws again on the examples of housing and transportation to show how this multimodal enforcement expands the meaning and capacity of equality directives.

##### A. Agency-Driven Oversight

First, the equality directives described above are backed by a system of federal agency review, with possible sanctions for failure to comply. Transportation funding recipients

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<sup>236</sup> See, e.g., *id.* at 37.

<sup>237</sup> See, e.g., *id.* at 24.

are required to annually certify their compliance with Title VI and every three years are required to submit a detailed report to the federal agency documenting disparate impact assessments, mitigation efforts taken in response to found impacts, and the record of Title VI complaints and litigation.<sup>238</sup> Failure to adhere to regulatory requirements can lead to a finding that a funding recipient is “deficient”<sup>239</sup> and returned to the state and local grantee for improvements. Grantees that engage in practices that have the “purpose or effect of denying persons the benefits of” or of discriminatorily “excluding” individuals or groups are deemed “noncompliant,” allowing the agency to withhold federal funds pending resolution of the matter, or begin a process to terminate federal funding.<sup>240</sup> Similarly, HUD requires an annual certification from grantees that they are “affirmatively furthering fair housing.” If an entity fails to complete an adequate certification, HUD also has power to withhold or terminate funds.

At least on a formal level, then, most entities comply. State and local grantees complete their annual certifications, and reports. Generally, skepticism about administrative enforcement through conditional spending programs assumes that termination in federal funds is an empty remedy.<sup>241</sup> But it is not clear that termination or other remedies needs to be invoked to secure compliance. State and local governments are repeat players with federal agencies. Their longstanding funding and programmatic relationships give them strong incentives to comply with the federal regulatory program.

And federal agencies do initiate civil rights review of state and local grantees even apart from prompting through private complaints or legal action.<sup>242</sup> As an example, HUD recently found that Marin County, California had failed to meet its obligation to affirmatively further fair housing. In particular, the County had received community development funds but a review by HUD showed that the County had failed to promote fair housing and inclusion, ensure meaningful citizen participation, or provide adequate accessibility for persons with disabilities.<sup>243</sup> In the end, the County signed a voluntary agreement with HUD that required it to affirmatively market affordable housing to minorities and persons with disabilities; complete an analysis of impediments to fair

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<sup>238</sup> See Circular FTA C 4702.1A, II-2 (FTA review of recipient and subrecipients).

<sup>239</sup> *Id.* If the FTA reviews the reporting and finds it satisfactory it approves it as having “no deficiency.”  
*Id.*

<sup>240</sup> See FTA C 4702.1A, VIII-1 et seq., chapter X (“Effecting Compliance”); *Id.* at II-3.

<sup>241</sup> See *supra* text accompanying notes 32-34.

<sup>242</sup> The National Low Income Housing Coalition, an advocacy group, noted that “legal action did not precipitate” the Marin County agreement --- “another indication that HUD is giving greater scrutiny and heightened enforcement to affirmatively furthering fair housing.” See National Low Income Housing Coalition, 16 Memo to Members 3 (Jan. 4, 2011).

<sup>243</sup> See Dep’t of Hous. Urb. Dev., Press Release, HUD and Marin County Agreement Will Promote Affordable Housing Opportunities For Minorities and Persons with Disabilities (January 4, 2011), available at [http://portal.hud.gov/hudportal/HUD?src=/press/press\\_releases\\_media\\_advisories/2011/HUDNo.11-002HUD & Marin County](http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2011/HUDNo.11-002HUD%20&Marin%20County) (last visited Aug. 4, 2011).

housing, and increase outreach and services to racial and ethnic minorities, those with limited English speaking proficiency, and to persons with disabilities.<sup>244</sup>

## B. *Private Elaboration and Implementation*

Agency-driven oversight is only one way of ensuring that these directives are brought to life. Beyond the well-rehearsed reasons that one can be skeptical of the capacity of civil rights agencies,<sup>245</sup> much of what could count as “compliance” with Title VI or Title VIII might exist *only* on paper. Agency review might then consist of ensuring that certifications are complete. And lacking either resources or incentive, agencies might fail to take further steps to evaluate whether substantive goals have been met.

In addition, relying on administrative review is likely to generate little enthusiasm from civil society groups traditionally interested in rights enforcement. Even with the benefits I have articulated, such a system compares poorly to systems of adjudication if it operates without engagement of private civil society groups. From this vantage point, an administrative “enforcement” regime that leaves little room for private engagement will seem necessarily thin.

What a closer look reveals, however, is emerging private group activity to monitor compliance with existing equality directives, push for the adoption of broader and more specific directives, and employ these directives to spur government actors to promote inclusion. In what follows, I provide an account of these efforts.

### 1. Private Litigation: The Westchester Example.

*a. The Litigation.* As discussed above, litigation helped transform the statutory duty to “affirmatively further fair housing” – establishing that federally-funded housing programs should avoid replicating segregation and should act to further racial integration in the regional metropolitan area. Litigation plays a role again in enforcing the regulatory equality directives that emerge from the statute. The example I draw on is from a recent case enforcing equality directives against Westchester County. The plaintiffs effectively surmounted the doctrinal challenge of privately enforcing the AFFH equality directives, ultimately revealing how litigation might be used to further elaborate the scope of an equality directive, prod more effective federal agency oversight of states and localities, and create greater incentives for states and localities to pursue equality goals.

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<sup>244</sup> *See id.*

<sup>245</sup> *See* Agreement for Voluntary Compliance Between the U.S. Dep’t of HUD, Off. of Fair Hous. & Equ. Oppy. and the County of Marin, Comm. Dev. Block Grant Program (Dec. 2010).

The Westchester case surmounted the doctrinal barriers to private enforcement of the AFFH regulations by relying on a novel argument under the False Claims Act.<sup>246</sup> A New York-based civil rights group initiated the litigation arguing that Westchester's annual certification to the federal government that it had complied with the AFFH equality directive was false. The County's response was effectively that the equality directive – the analysis of impediments directive that required the County to evaluate fair housing barriers and take corrective action --- lacked substantive content. Specifically, the County claimed that it had satisfied the regulatory scheme requiring certification of compliance by evaluating economically-based impediments to housing access. Nothing in the regulatory or statutory scheme, the County argued, required a further analysis of the *racial* impediments to fair housing. The district court rejected this argument holding that the analysis of impediments regulation required a racial analysis, and granted the plaintiffs partial summary judgment. In the end the parties agreed to settle the case. With the prodding of HUD, the parties negotiated a consent decree that continues to be subject to monitoring by the district court.<sup>247</sup>

b. *Radiating Effects*. The case alerted other regulated entities – specifically, state and local grantees – as to the meaning of compliance with the equality directive. Specifically, the Westchester case suggested that certification of the AFFH equality directive had to be performed in good faith. Through the case, the equality directives transformed from a thin set of procedural requirements – checking boxes of compliance with a statutory or regulatory requirement – into a more substantive set of duties to further the goals of housing integration and nondiscrimination.

Litigation's external effects are likely to operate differently in the context of equality directive enforcement, which involves a conditioned spending program, than in standard civil rights adjudicative context. A single action, like Westchester has power to radiate through the administrative state which contains tightly networked repeat players. All the more than 1000 state and local grantees under the community development block grant

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<sup>246</sup> *Sandoval and Gonzaga v. Doe*, 536 U.S. 273 (2002) raise formidable challenges to private enforcement of provisions in Title VI and Title VIII that lack explicit private rights of action. Private enforcement could conceivably occur through 42 U.S.C. Section 1983, an avenue that the *Sandoval* court appeared to leave open. See *Sandoval*, 532 U.S. at 299-300 (Stevens J., dissenting) (suggesting that Title VI's disparate impact regulation could be enforced using § 1983). To this point, however, courts are divided on using section 1983 to enforce Title VIII's AFFH provision. See, e.g., *Asylum Hill Problem Solving Revitalization Ass'n v. King*, 36 CONN. L. RPTR. 422 (Super Ct. 2004) (declining enforcement of Title VIII's AFFH provisions using §1983).

<sup>247</sup> The reliance on the False Claims Act illustrates the directive's complex relation to federal power and private engagement. As *Piggie Park* suggests, the qui tam notion allows private parties to act as bounty hunters, gaining private damages in service of vindicating the public good. Equality directives exist as duties to the federal government conditioned by federal spending, yet enacted for the greater public interest.

program must certify that they are furthering fair housing.<sup>248</sup> All now must comprehend a more robust meaning of that certification, and the potential consequences – adverse litigation, administrative action – for failing to further those goals.<sup>249</sup> A tight set of repeat players means that actors have institutional incentives to further the equality directive’s goals. Grantees receive state and local CDBG funding regularly, interact with federal administrators about the funding proposals,<sup>250</sup> and engage in learning and strong networks with each other.<sup>251</sup>

The Westchester case also prodded the regulatory capacity of the federal government which not only helped broker the settlement, but subsequently vowed to begin a new era of more vigorous enforcement of the AFFH requirement and its implementing regulatory directives.<sup>252</sup>

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<sup>248</sup> See *Community Development Block Grant Program – CDBG*, The U.S. Department of Housing and Urban Development, Office of Community Planning and Development, [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/comm\\_planning/communitydevelopment/programs](http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/communitydevelopment/programs).

<sup>249</sup> Most CDBG grantees are known as “entitlement jurisdictions,” urban counties and metropolitan areas that receive annual grants on a formula basis. See Dep’t of Hous. & Urb. Dev., *Community Development Block Grants Entitlement Communities Grant*, at [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/comm\\_planning/communitydevelopment/programs/entitlement](http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/communitydevelopment/programs/entitlement) (last visited Aug. 6, 2011).

<sup>250</sup> To receive its annual CDBG entitlement grant, a grantee must prepare and submit to HUD its Consolidated Plan. See 24 CFR Part 91. The Consolidated Plan is a jurisdiction’s comprehensive planning document and application for funding under the following Community Planning and Development formula grant programs: CDBG, HOME Investment Partnerships, Housing Opportunities for Persons with AIDS (HOPWA), and Emergency Shelter Grants (ESG). [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/comm\\_planning/communitydevelopment/programs/entitlement](http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/communitydevelopment/programs/entitlement). HUD provides on-going technical assistance and training for grantees. See, e.g., *Basically CDBG Course Training Manual*, [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/comm\\_planning/communitydevelopment/training/basicallycdbg](http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/communitydevelopment/training/basicallycdbg).

<sup>251</sup> This occurs through nonprofit umbrella associations of local governments that provide technical assistance and serve as a clearinghouse for information about CDBG and other HUD programs. See, e.g., National Community Development Association, <http://www.ncdaonline.org/overview.asp> (last visited Aug. 8, 2011) (describing association as comprised of 550 local governments and designed to provide information on federally funded community and economic development programs). Information sharing also occurs through HUD’s trainings, and dissemination of research and best practices. See, e.g., Dep’t of Hous. & Urb. Dev., *Community Development Training*, [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/comm\\_planning/communitydevelopment/training](http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/communitydevelopment/training); [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/comm\\_planning/communitydevelopment/training](http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/communitydevelopment/training); Dep’t of Hous. & Urb. Dev., *Publications, Community and Economic Development*, <http://www.huduser.org/portal/taxonomy/term/34>, as well as through foundations.

<sup>252</sup> See Sam Roberts, *Westchester Adds Housing to Desegregation Pact*, N.Y. TIMES, Aug. 11, 2009, <http://www.nytimes.com/2009/08/11/nyregion/11settle.html> (quoting HUD official as saying, “Until now

Finally, the case mobilized private actors – prompting advocacy by fair housing groups that have primarily focused on private litigation in individual cases.<sup>253</sup> One effect of the case was to reveal to fair housing groups the potential gains of increased attention to these equality directives. Dozens of groups across the nation pressed the federal government to intervene to negotiate a settlement in the case. In addition, national, state, and local housing groups have banded together to press for a broader revision of the AFFH rules that would extend beyond the CDBG program, and that would place a more specific set of goals and requirements on housing grant recipients.<sup>254</sup>

The Westchester case thus reveals how private groups use litigation to achieve enforcement of the fair housing equality directive, with potentially broader effects of enforcement through the administrative state. The litigation has capacity to spur innovation in the actions that states and localities undertake to achieve fair housing; strengthen federal government oversight; expand the meaning of AFFH; and increase state and local compliance with equality directives.

## 2. Administrative Enforcement: The BART Case

Filing an administrative complaint with the agency also provides a method of private enforcement. A recent administrative complaint shows agency willingness to enforce equality directives against noncompliant grantees and, as importantly, provides a powerful example of how administrative complaints are used to strengthen the overall regulatory regime.

*a. The Complaint.* The case involved a Title VI complaint filed by San Francisco Bay Area groups to actions undertaken by the Bay Area Regional Transit Authority (BART) which operates the public rail system that connects San Francisco, California with the surrounding East Bay and Northern San Mateo counties. BART sought to extend their

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we tended to lay dormant. This is historic, because we are going to hold people's feet to the fire"). See also Michael Allen, *No Certification, No Money: The Revival of Civil Rights Obligations in HUD Funding Programs*, 78 PLAN. COMMISSIONERS J. 16, 16 (2010).

<sup>253</sup> See Johnson, *Last Plank*, *supra* note 71, at 1222-24.

<sup>254</sup> See Notice of Informal Meeting, Affirmatively Furthering Fair Housing and Fair Housing Plans, 74 Fed. Reg. 33,456 (Jul. 13, 2009) (announcing informal meeting to collect public views on proposed rule to implement AFFH); Testimony of John D. Trasvina, Assistant Secretary for Fair Housing and Equal Opportunity Before the U.S. House of Representatives, Committee on Financial Services (Jan. 20, 2010), at 1-2 available at [http://portal.hud.gov/hudportal/documents/huddoc?id=DOC\\_7752.pdf](http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_7752.pdf) (describing rulemaking process); Craig Gurian & Michael Allen, *Making Real the Desegregating Promise of the Fair Housing Act: "Affirmatively Furthering Fair Housing" Comes of Age*, 43 CLEARINGHOUSE REV. 560, 569 (2010) (noting that the Westchester case helped spur current rulemaking).

transit system using regional revenue, \$70 million in stimulus funds,<sup>255</sup> and loans from the Department of Transportation.<sup>256</sup>

The groups were concerned that the system extension would not adequately service public transit dependent low-income and minority populations of East Oakland, and about the environmental impacts on communities of color.<sup>257</sup> As the project proceeded, the groups filed an administrative complaint with the Federal Transit Agency claiming that BART had failed to comply with Title VI of the Civil Rights Act and the Executive Order 12898 on environmental justice. In particular, the groups argued that BART had failed to prepare the required service and fare equity analyses as required by DOT's equality directive,<sup>258</sup> and failed to conduct a proper analysis of disparate impact as required by the environmental impact statement.<sup>259</sup> They also alleged that BART had failed to take steps to mitigate impacts or consider less discriminatory alternatives.

Five months after the groups filed the administrative complaint, DOT found BART's impact analyses lacking and reallocated \$70 million from the airport connection project to the Bay Area transit lines.<sup>260</sup>

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<sup>255</sup> The region's Metropolitan Transportation Commission (MTC) is charged with overseeing funding for the system. The OAC cost \$459 million overall, *see* <http://mtc.ca.gov/planning/rtep/pdf/RES-3434.pdf>, and in 2009, the MTC agreed to allocate \$70 million in stimulus funds to help fund the project. [See Complaint at 21, 22].

<sup>256</sup> This loan was anticipated to be up to \$150 million through the Transportation Infrastructure Finance and Innovation Act. In addition to receiving funding for this specific project, BART received federal financial assistance through Section 5307 of the Urbanized Area Formula grants program. *See* BART, FY 2009 Operating Budget, <http://bart.gov/about/financials/index.aspx> and BART, FY 2008 Audited Financial Report, available at <http://bart.gov/about/financials/index.aspx>.

<sup>257</sup> The groups are Urban Habitat, a nonprofit environmental justice organization based in Oakland; TransForm, an Oakland-based group that seeks to strengthen public transportation infrastructure in the Bay Area; and Genesis, a regional faith-based organization whose members and constituents include low-income people and people of color. They were represented by the public interest firm Public Advocates. *See* Complaint Under Title VI of the Civil Rights Act of 1964 and Executive Order 12898.

<sup>258</sup> *See* FTA Cir. 4702.1A at V-5.

<sup>259</sup> The complaint contended that BART failed to base its analysis on current demographic data; to conduct a comparative analyses of the impact of alternative proposals on service, affordability, speed, and cost-efficiency; or to analyze the effect of replacing existing transit service and removing certain existing transit stops. *See* Complaint at 22.

<sup>260</sup> Initially, the FTA administrator contacted relevant BART and MTC officials expressing serious concerns regarding the failure to conduct an equity analysis, and threatening withdrawal of federal stimulus funds. *See* FTA Letter to MTC and BART (Jan. 15, 2010). BART responded by submitting a document purporting to conduct a Title VI analysis of the project's impact on environmental justice, and on racial and ethnic minorities and persons with limited english proficiency. The FTA however, found that BART had failed to: provide a coherent policy for evaluating changes and "major changes" in system services; conduct a proper analysis of impacts of major service changes; assess alternative methods of transportation; or properly include affected minority and low-income communities.

b. *Radiating Effects*. The BART case shows the possibility of appealing to the administrative complaint process to require funding recipients to fulfill the ambitions of the equality directive. Much like the example in the Westchester case, it renders a seemingly procedural requirement – that grantees conduct impact assessments -- into something more ample - that is: submit an equity analysis that incorporates appropriate data, effective methodology and adequately considers alternatives. Second, in withholding funds from the project, the agency showed its willingness to impose sanctions for failing to comply with the equality directive.

For this reason, the significance of the enforcement action will likely extend well beyond BART. The case garnered publicity, forcing transit authorities across the nation to take immediate notice of the fund withholding. A potential result is more robust compliance with the equality directives, and pursuit of the goals that they represent.

Civil society groups, too, have built from the case in important ways using it to promote improvements in DOT's impact assessment process and to argue that DOT revise its guidance to grantees.<sup>261</sup> While the FTA has so far declined to revise its rules, the FTA issued a written notice to all FTA funding recipients affirming the need to follow the Circular's specific directive to assess the impacts of service and fare changes.<sup>262</sup>

In short, administrative enforcement has power beyond a single action to strengthen the meaning and scope of equality directives and provide incentives for grantees to meet its goals.

### 3. The Private Implementer

Finally, a third arena of enforcement and elaboration of equality directives exists that is neither traditional litigation nor administrative enforcement. Civil society groups undertake efforts to implement existing equality directives, expand their meaning and efficacy, and oversee state and federal implementation of these objectives. This advocacy, monitoring and information sharing reveals an emerging practice at the intersection of civil rights law – with its traditional focus on court-enforced rights – and policy advocacy, and political organizing.

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<sup>261</sup> See Public Advocates & Urban Habitat, *Civil Rights and Environmental Justice in Public Transportation; Proposed FTA Actions to Build on Its Strong Record of Enforcement* (December 2010) [Hereafter "December 2010 White Paper"]. For instance, transit equity and public interest groups have recommended that DOT adopt specific guidance to grantees on how to analyze whether an action has an impact on a protected population. See December 2010 White Paper at 4.

<sup>262</sup> See US DOT, FTA Letter to Colleagues (March 8, 2011).

One component of this work is the sharing of model interventions with state and local governments and other advocacy groups. For instance, groups -- most of whom consider themselves civil rights organizations but which do not engage in traditional litigation -- publish reports showing how state and localities effectively promote fair housing in federally-funded programs, gathering concrete examples of innovative interventions.<sup>263</sup> Similarly, transportation advocates and researchers publicize effective interventions in transportation equity, such as efforts to include minority groups in public participation and planning, and model impact assessments.<sup>264</sup> These efforts have capacity to serve as a road map to stakeholders interested in innovatively using federal fair housing funds, and advocates can use information about best practices to pressure less willing states and localities.

Another aspect of this work involves entreating federal-level actors to issue more specific equality rules, strengthen oversight of state and local grantees, and sanction noncompliant states and localities.<sup>265</sup> Relatedly, civil society groups engage in advocacy to show how state and local governments are falling short of the requirements and goals of the equality directives. In the area of transportation, groups highlight lack of public participation, the failure to include minorities and women in transportation planning,<sup>266</sup> and advocate for improvements in federally-subsidized public transit.<sup>267</sup> In housing, they evaluate whether states and localities have completed AIs,

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<sup>263</sup> For examples of this work see, Poverty Race Research Action Council & Lawyers Committee for Civil Rights, *Civil Rights Best Practices in the Low Income Housing Tax Credit Program*; Institute on Race and Poverty, University of Minnesota, *Twin Cities Low Income Housing* (showing siting and levels of segregation in federally-funded low-income housing programs), available at [http://www.irpumn.org/website/projects/index.php?strWebAction=project\\_detail&intProjectID=28](http://www.irpumn.org/website/projects/index.php?strWebAction=project_detail&intProjectID=28) (last visited Aug. 9, 2011), Kirwan Institute, *Wisconsin Low-Income Housing Criteria* (describing work in Wisconsin to link affordable housing siting to job rich opportunity networks), available at <http://www.kirwaninstitute.org/research/opportunity-communities/page/4/> (last visited Aug. 9, 2011).

<sup>264</sup> See, e.g., Thomas W. Sanchez et al, *Moving to Equity: Addressing Inequitable Effects of Transportation Policy on Minorities*, A Joint Report of the Center For Community Change and the Harvard Civil Rights Project (2003).

<sup>265</sup> See, e.g., Opportunity Agenda, *Reforming HUD's Regulations to Affirmatively Further Fair Housing* (2010); <http://www.prrac.org/pdf/AffirmativelyFurtheringFairHousing7-29-09comments.pdf>.

<sup>266</sup> See, e.g., Thomas W. Sanchez, *An Equity Analysis of Transportation Funding, Race, Poverty and the Environment*; A Project of Urban Habitat, available at <http://urbanhabitat.org/node/2812> (last visited Aug. 9, 2011) (providing data showing underrepresentation of women and minorities on transportation planning boards and advocating for increased representation).

<sup>267</sup> An example is the work of the Minnesota Urban League and the University of Minnesota's Institute of Race and Poverty to document the effect of transit cuts on communities of color, and successfully advocate for restoration of crucial services. See Institute on Race and Poverty, University of Minnesota, *Transit Equity on the Northside*, [http://www.irpumn.org/website/projects/index.php?strWebAction=project\\_detail&intProjectID=21](http://www.irpumn.org/website/projects/index.php?strWebAction=project_detail&intProjectID=21) (last visited Aug. 8, 2011).

comprehensively analyzed barriers to fair housing, and whether they are taking steps to overcome identified impediments.<sup>268</sup>

Much of this advocacy is as recent as the equality directives. Accordingly, most telling is the activity by national-level organizations instructing their state and local partners on how to make use of equality directives. In the area of fair housing, for instance the National Low Income Housing Coalition – a coalition of low-income housing advocates and providers – recently launched a program to help guide its members on enforcement of the analysis of impediments requirement in their jurisdictions.<sup>269</sup> The guide helps explain the regulatory requirements and the process for devising AIs and provides examples of how advocates can use HUD’s Fair Housing Planning Guide in their work.<sup>270</sup> This includes showing advocates how to participate in the development of the AI, how to monitor compliance on actions to address impediments,<sup>271</sup> and how to seek remedies from HUD. Similarly, the Transportation Equity Network, a coalition of state and locally based non-governmental organizations, instructs its members on the requirements of Title VI, and the DOT circulars and provides examples of effective litigation, administrative advocacy, and organizing strategies.<sup>272</sup>

This emerging advocacy builds on instances of “hard” enforcement of equality directives by administrative agencies and courts. The National Low Income Housing Coalition encourages state and local groups to take the *Westchester* case to their jurisdictions reminding them of the court’s holding that the “ ‘AFFH certification was not a mere boilerplate formality, but rather was a substantive requirement.’ ”<sup>273</sup> Similarly transportation advocates highlight the successes of litigation and administrative complaints such as the BART case.<sup>274</sup> At the same time, these emerging efforts recognize where the equality directives fail to place hard constraints on government

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<sup>268</sup> For examples of such work, see The Inclusive Communities Project, <http://www.inclusivecommunities.net/build.php>; and The Antidiscrimination Center, <http://www.antibiaslaw.com/affordable-housing>.

<sup>269</sup> See National Low Income Housing Coalition (NLIHC), Analysis of Impediments to Fair Housing Choice (May 6, 2009), available at [http://www.nlihc.org/detail/article.cfm?article\\_id=6099](http://www.nlihc.org/detail/article.cfm?article_id=6099) (last visited Aug. 9, 2011).

<sup>270</sup> See *id.*

<sup>271</sup> See *id.*

<sup>272</sup> See Transportation Equity Network, Civil Rights Webinar: Tools for Equity, available at [http://www.transportationequity.org/index.php?option=com\\_content&view=article&id=285:civil-rights-act-webinar-tools-for-equity&catid=63:feature](http://www.transportationequity.org/index.php?option=com_content&view=article&id=285:civil-rights-act-webinar-tools-for-equity&catid=63:feature) (last visited Aug. 9, 2011).

<sup>273</sup> See NLIHC, *supra* note 269, (quoting *U.S. ex rel. Anti-Discrimination Center v. Westchester County, New York*, 668 F. Supp.2d 548, 569 (S.D.N.Y. 2009)).

<sup>274</sup> See, e.g., Transportation Equity Network, Civil Rights Training Webinar, *supra* note 272 (presentation of Guillermo Mayer, Public Advocates).

actors, nevertheless entreating advocates to use even the softer language of equality directives as tools in their advocacy.<sup>275</sup>

One might call this work – providing technical assistance, shaming noncompliant states and localities, prodding and advocacy, and participating in the impact assessments and other tools of equality directives – private implementation of equality directives. The private implementer builds on the gains of the private attorney general, but is not constrained by adjudicative advocacy.

This work to implement equality directives engages a broader set of groups than in traditional adjudicative civil rights enforcement. As the examples in the areas of housing and transportation show, this advocacy connects groups that have traditionally focused on rights enforcement, with those who engage in non-litigation advocacy and community organizing. These efforts also bring “rights” groups who operate in an antidiscrimination frame together with groups concerned with poverty alleviation, community revitalization, and environmental reform. In that vein, private implementation efforts of equality directives respond to a constant critique of civil rights lawyering that it is too centered on formal rights that benefit the middle-class and insufficiently focused on the structural problems of poverty and exclusion.<sup>276</sup>

## V. STRENGTHENING EQUALITY DIRECTIVES

In what follows, I discuss challenges raised by equality directives, and how the existing regime might be made stronger.

### A. *Strengthening Oversight*

Equality directives depend in large part on the capacity and will for enforcement by federal, state, and local actors. The examples provided in Parts III and IV show the critical role federal actors play in overseeing grantees, issuing regulatory guidance, providing technical assistance, and administering sanctions. And private groups too are critical -- engaging in broad forms of advocacy to prod such federal action.

The embeddedness of these directives in federal agencies that distribute funding and have regulatory power like DOT and HUD, rather than a separate civil rights agency

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<sup>275</sup> See NLIHC, *supra* note 269 (noting that AIs are not reviewed by HUD, and that public participation in the CDBG is not tied directly to AI, but relying on the language of HUD Fair Housing Planning Guide stating that a jurisdiction should update their AI to reflect current problems, and that HUD can disapprove an AFFH certification if there is no analysis of impediments or no actions taken to overcome the impediments).

<sup>276</sup> See, e.g., Banks & Ford, *supra* note 16, at 1120 (arguing that “the goal of eliminating discrimination is too modest, not ambitious enough” given the state of structural inequity).

provides a source of power and leverage over grantees, integrating civil rights goals into the ongoing programmatic and regulatory apparatus of the agency.

Depending on federal agencies and executive power can also present challenges. The level of civil rights enforcement will vary by Presidential administration. This constraint is potentially significant but should not be overstated. For instance, the Bush administration – perceived as less supportive of civil rights – expanded DOT’s equality directives.<sup>277</sup> The Bush Administration also reissued the analysis of impediments guidance and the Fair Housing Planning Guide “remind[ing]” jurisdictions of the need to update their AIs and of the relevant fair housing regulations.<sup>278</sup> Moreover, once established equality directives can be sustained by their own political economy, making wholesale abandonment of their goals unlikely. This includes buy-in by willing state and local stakeholders, and pressure from interest groups to continue to implement their goals.

A related challenge is that federal agencies vary in their capacity to further inclusionary norms, and, indeed some have regulatory interests that run counter to civil rights and equity concerns.<sup>279</sup> Addressing this requires supporting the civil rights capacity of the agencies by, for instance, expanding staff and other resources to conduct oversight and provide technical assistance. Revising particular equality directives to incorporate increased oversight and reporting might also be necessary. For instance, the Government Accounting Office recently recommended a set of changes to improve the efficacy of the analysis of impediments process, advising that HUD should not only increase oversight, but promulgate regulations requiring periodic updating of the AI and submission for reviews of the AI by HUD.<sup>280</sup>

Effective oversight cannot simply be the function of government alone. Strengthening equality directives means an increased role for private civil society groups at the state and local levels seeking to make equality directives more robust. Much of current private group engagement with equality directives occurs at the national level – prodding changes by federal actors. Yet, to the extent that equality directives devolve responsibility for implementation to state and local actors, the advocacy, oversight, and

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<sup>277</sup> See notes 183- 194 and accompanying text *supra* (detailing the 2007 post-*Sandoval* revision of the DOT environmental justice and limited English proficiency guidelines).

<sup>278</sup> See September 2, 2004 Memorandum from HUD’s Community Planning & Development Office (CPD), [www.hud.gov/offices/fheo/library/finaljointletter.pdf](http://www.hud.gov/offices/fheo/library/finaljointletter.pdf) (last visited Aug. 10, 2011). The Bush Administration again reminded community development grantees of their fair housing duties in 2007, see [www.hud.gov/offices/fheo/promotingfh/fairhousing-cdbg.pdf](http://www.hud.gov/offices/fheo/promotingfh/fairhousing-cdbg.pdf) (last visited Aug. 10, 2011).

<sup>279</sup> See, e.g., SANCHEZ & BRENMAN, *supra* note 148, at 76 (noting limitations of DOT in enforcing civil rights); BONASTIA (arguing that HUD is a weak “institutional home” for civil rights enforcement).

<sup>280</sup> See U.S. Govt’ Account. Office, Housing and Community Grants: HUD Needs to Enhance Its Requirements and Oversight of Jurisdictions’ Fair Housing Plans (Sep. 14, 2010), available at [www.gao.gov/products/GAO-10-905](http://www.gao.gov/products/GAO-10-905).

monitoring of civil society groups needs to similarly devolve. Promising efforts are emerging upon which civil society groups might expand.<sup>281</sup>

### B. *Balancing Procedural and Substantive Goals*

Equality directives emphasize a set of procedural planning mechanisms (impact assessment, evaluation of alternatives, participation) as a means of furthering substantive equity goals. This emphasis on self-assessment and participation is a key strength of the approach. Indeed the procedural “means” are intertwined with the substantive ends -- inclusion. For instance the harm repeatedly identified by transportation advocates is the failure to include people of color, people with disabilities and others in the planning, design and implementation of policy and program.<sup>282</sup>

In addition, integrating equity and inclusionary concerns during the front-end planning stage, before a decision is made, has advantages over the traditional method of civil rights regulation. In other contexts, commentators have found that regulation that intervenes at the planning stage allows the regulated actors who have the most information about the problem to devise standards and goals rather than imposing government standards through top down regulation.<sup>283</sup> Regimes that allow for innovations and experimentation can also promote development of effective solutions in cases of regulatory uncertainty – where the regulator, regulated party and private parties are unclear about the proper solution.<sup>284</sup> Beyond the advantage of expertise and innovation, front-end planning helps promote buy-in and compliance.<sup>285</sup> Similarly, here, front-end planning with an equity lens may yield better results than federal mandates or evaluation by courts and agencies after a decision has been made. Equality directives can

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<sup>281</sup> For instance in the area of transportation, two groups in Northern California --Policy Link and Public Advocates (a civil rights law firm) -- have sought not only to monitor transportation equity issues in their state and at the federal level, but also to more broadly increase the capacity of state and local groups to perform such monitoring. See, e.g., Policy Link, Making Equity Central to Federal Transportation Policy 6 (2007) available at [www.policylink.org/.../Transportation-Equity-Executive-Summary.pdf](http://www.policylink.org/.../Transportation-Equity-Executive-Summary.pdf) (announcing goal of building the capacity of local, state and regional transportation equity leaders). An LA group, known as the LA Transportation Equity Network has spearheaded advocacy in Southern California. See, e.g., Letter from LA TEN to Los Angeles County Metropolitan Transportation Authority, Public Comments on Draft 2001 Long Range Transportation Plan (Apr. 11, 2001).

<sup>282</sup> Thomas Sanchez and Marc Brenman begin their definition of transportation equity with the concept of ensuring “opportunities for meaningful involvement in the transportation planning process.” SANCHEZ & BRENNAN, *supra* note 148, at 8. *Id.* at 115 (describing disability groups’ emphasis on inclusion in policy and planning).

<sup>283</sup> See Cary Coglianese & David Lazer, *Management-Based Regulation: Prescribing Private Management to Achieve Public Goals*, 37 LAW & SOC’Y REV. 691, 693-94 (2003)

<sup>284</sup> See Charles F. Sabel & William H. Simon, *Contextualizing Regimes: Institutionalization as a Response to the Limits of Interpretation and Policy Engineering*, 110 MICH. L. REV. \_\_\_\_ (forthcoming 2012).

<sup>285</sup> See Coglianese & Lazar, *supra* note 283, at 695-96.

help jurisdictions tailor solutions to local conditions, and the developed solutions may have more legitimacy with grantees.<sup>286</sup>

At the same time, equality directives will in some instances benefit from rules that help structure the planning process. These rules will differ in particular contexts and must be tailored to the needs of particular areas (transportation, housing, agriculture, criminal justice etc.).<sup>287</sup> For instance, as mentioned earlier, transportation advocates are seeking more specific guidance to grantees on the methodology for conducting impact assessments.<sup>288</sup> Similarly, fair housing advocates have asked HUD to revise its AFFH regulations to require more specific metrics for measuring progress towards fair housing goals.<sup>289</sup>

### C. *Suggesting and Directing*

Relatedly, equality directives must balance the benefits of flexibility and innovation with methods that ensure compliance by grantees. In part, this is achieved through the hard aspects of the regime, specifically the possibility of fund termination. Beyond imposing hard constraints and remedies, equality directives might also promote compliance by providing greater clarity in the requirements they place on grantees.

As an example, the FTA's equality directives mandate inclusion, but only recommend a set of "effective practices" making clear that "recipients and subrecipients have wide latitude to determine how, when and how often specific public involvement measures should take place, and what specific measures are most appropriate."<sup>290</sup> While the FTA mandates impact assessments, no guidance specifies the methodology for determining impacts. And, though "major" changes such as service changes require impact assessments, the agency lets grantees define what is "major."<sup>291</sup> HUD's Fair Planning

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<sup>286</sup> Cf. Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1069 (2004) (in the context of public law remedies discussing "rolling-rule regime" – provisional rules, that "incorporate a process of reassessment and revision with continuing stakeholder participation"); Sabel & Simon, *Contextualizing Regimes*, *supra* note 284, at \_\_ (describing regimes that allow contextualization).

<sup>287</sup> Cf. Sabel & Simon, *Contextualizing Regimes*, *supra* note 284, at \_\_\_\_.

<sup>288</sup> See discussion *supra* notes 261-262.

<sup>289</sup> See, e.g., Opportunity Agenda, *supra* note 265, at 3.

<sup>290</sup> See FTA Circular 4702.1A (providing that "recipient should make these determinations based on the composition of the population affected by the recipient's action, the type of public involvement process planned by the recipient, and the resources available to the agency").

<sup>291</sup> See FTA Circular 4702.1 (stating that "[o]ften, [major service change] is defined as a numerical standard, such as a change that affects 25 percent of service hours of a route").

Guide similarly leaves to grantees the determination of what constitutes a fair housing barrier, who to include in planning, data collection, and appropriate remedies.<sup>292</sup>

This latitude appropriately permits innovation, tailoring and flexibility. Yet equality directives should also incorporate learning about effective methodologies for conducting impact assessments or analyzing barriers to fair housing, and provide strong incentives for grantees to adopt such approaches. For communities seeking to remedy impediments to fair housing, for instance, equality directives might require jurisdictions to certify that they have eliminated the most common barriers to fair housing or adopted proven best practices. My point here is not to prescribe a specific set of revisions for any particular equality directive. Rather it is to argue that equality directives can allow experimentation by grantees, while also strengthening incentives for grantees to adopt effective methods for promoting equality and inclusion.

Finally, equality directives may spark a converse set of concerns -- that they are *too* directive. One potential concern is constitutional – whether in requiring affirmative consideration of race and ethnicity -- directives risk running afoul of the Constitution. The directives are authorized by Congress’s Spending Power which the Court has so far construed to be easily satisfied.<sup>293</sup> The more serious limitation might be the Equal Protection Clause, which serves as a constraint on Congress’s Spending Power and the administrative agency’s regulatory power.<sup>294</sup> On this score, the Supreme Court’s recent caselaw points to a tension between the disparate impact standard and the equal protection clause.<sup>295</sup> But given that equality directives do not require the adoption of an explicitly race-conscious action – they only require that racial and ethnic harms be taken

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<sup>292</sup> See Fair Housing Planning Guide, *supra* note 207, at 7-10.

<sup>293</sup> The directives I have highlighted emerge from statutes that are the proper exercise of Congress’s Spending Power: the underlying programs promote the general welfare in providing transportation, housing, and other services; the conditions imposed are related to the federal interest in ensuring that all groups fairly benefit from federal programs and funding; and the conditions are not unduly coercive for states and localities. See *South Carolina v. Dole*, 483 U.S. 203, 207, 211 (1987) (discussing direct limitations on Spending Power).

<sup>294</sup> See *Dole*, 483 U.S. at 210-11 (holding that exercises of Spending Power cannot run afoul of another constitutional provision).

<sup>295</sup> The Court’s decision in *Ricci v. DeStefano*, 129 S.Ct. 2658, 2664 (2009) suggests the tension between the disparate treatment norm embodied in statutes and the Constitution, and the statutory disparate impact framework. The Court has so far declined to take up Justice Scalia’s invitations to confront this tension directly. See *Ricci*, *supra* at \_\_ (Scalia, J., concurring) (“[The decision]...postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution’s guarantee of equal protection?”).

into consideration in the planning and design of program and policy—they should not run afoul of current understandings of the Equal Protection Clause.<sup>296</sup>

Another potential concern is that equality directives subject state and local grantees to too much federal-level regulation. One response to this objection is that equality directives represent implementations of regulatory and statutory disparate impact standards that already govern grantees. Moreover, the regulatory approach of equality directives – its emphasis on front-end assessments of impacts, and planning to promote civil rights goals -- has advantages for grantees over subjecting them to complaints after the grantee has completed a project or made a decision. DOT’s regulations make these advantages explicit: as *Sandoval* creates the likelihood of more administrative complaints, equality directives help grantees structure their decisions to avoid complaints.<sup>297</sup>

### CONCLUSION

This Article has drawn attention to equality directives, a form of regulation excluded from standard narratives of public and private enforcement in civil rights. Proactive requirements that state actors promote equality and inclusion have long been embedded in key civil rights statutes, but a more robust regulatory regime has emerged in recent years -- in some cases out of the ashes of *Sandoval*’s weakening of the private attorney general function.

Many of these equality directives are new, and future studies might examine how these directives continue to be internalized at the federal level – in the “permanent government”<sup>298</sup> of agencies – how they are implemented at the state and local levels, and their potential utility in areas outside of transportation and housing such as criminal justice and health. Subsequent examinations should also consider the relationship between equality directives and a broader trend of requiring racial impact assessments of government policies. Several states have recently adopted legislation requiring that state

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<sup>296</sup> Cf. Sheila Foster, *Environmental Justice & The Constitution*, 39 ENVIRON. JUST. LAW REPT. NEWS & ANALYSIS 10347, 10350 (2009) (arguing prior to *Ricci* that environmental justice provisions that forbid actions with an unjustified impact do not contain the type of “racial classification that federal courts have been willing to find justifies strict judicial scrutiny of such policies”);

<sup>297</sup> See Notice of Proposed Rulemaking, 71 Fed. Reg. 40178, 40179 (noting that *Sandoval* would likely increase the number of administrative complaints and thus “recipients of FTA funds and the general public would benefit from guidance clarifying what steps they should take to demonstrate that their programs, policies, and activities do not result in a disparate impact on the basis of race, color, or national origin”).

<sup>298</sup> GRAHAM, *supra* note 67, at 7.

legislatures and agencies evaluate the racial impact of pending legislation and regulations and consider race neutral alternatives.<sup>299</sup>

American equality directives also raise questions for future exploration by scholars of comparative antidiscrimination law and of American political development. One might now examine how the development and implementation of American equality directives compares to those in Europe and the United Kingdom, particularly given the traditional fragmentation of the American governance structure, the relative electoral and interest group power of minority groups in America, and America's long-standing emphasis on rights.

For the moment, this Article's paramount aim is to direct civil rights advocacy and commentary to this important area. An emphasis on individualized harm, antidiscrimination, and the private sphere is inadequate to the task of promoting equality and inclusion today. Equality directives supplement the antidiscrimination frame because they are better attuned to the structural dimensions of inequality. They extend beyond bias to address the state's contribution to contemporary inequality as well as the state's capacity to promote inclusion. To fully unleash the capacity of equality directives requires building on promising initiatives that are beginning to alter the nature of contemporary civil rights advocacy -- moving beyond the conception of the civil rights advocate as a private attorney general but rather using a range of advocacy tools to expand, implement, and leverage these directives at the federal, state and local levels.

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<sup>299</sup> See IOWA House File 2393 (requiring minority impact statements for state grant applications and changes to state criminal or sentencing law or procedures); Connecticut HB 5933, Racial and Ethnic Impact Statements (requiring racial impact assessment of proposed legislation affecting criminal justice and sentencing); see also Illinois; North Carolina & Wisconsin. At least eight states are considering similar legislation, see, e.g. Oregon, HB 2352 (proposed legislation requiring racial impact statements for criminal justice bills).