From Enlightened Administration to Adversarial Legalism:

The Creation and Development of the Civil Rights State

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Major policy change almost always has multiple causes and generates a variety of subtle, far-reaching consequences, some intended, many not. This was certainly true of the civil rights revolution of the 1960s that culminated in passage of two of the most important laws in American history, the Civil Rights Act (CRA) of 1964 and the Voting Rights Act (VRA) of 1965. The resulting destruction of the racial caste system in the South not only profoundly affected the position of African-Americans within American society, but created a new party system in which the solid Democratic South became the solid Republican South. Prohibitions against racial discrimination were quickly extended to ban discrimination based on gender, language, disability, and age. The civil rights revolution changed our understanding of federalism, the proper role of the courts, the powers of Congress, and the authority of administrative agencies. In short, this was a profound constitutional moment that rivaled that of the New Deal.

In this paper I cannot hope to describe the events that precipitated the civil rights revolution or to evaluate the extent to which these laws have reduced racial discrimination and inequality. For the latter I would direct the reader to succinct essays by Orlando Patterson and Jennifer Hochschild.[1] As for the former, I will simply say that the traditional view—namely, that civil rights protests stretching from the 1955-56 Montgomery bus boycott to the 1963 March on Washington briefly made civil rights the most salient political issue in the nation, forcing citizens and politicians to chose between fidelity to the Constitution and the American creed on the one hand and more decades of hypocrisy and unrest on the other—remains more convincing than the various revisionisms that have accumulated over the years. I do not mean to suggest that other factors (such as the growing political power of African-Americans in some northern cities

or the Supreme Court's role in protecting and legitimizing civil rights protestors or the legislative skill of Lyndon Johnson or the fact that decades of international conflict with Nazi racism and Soviet totalitarianism shone a spotlight on our failure to abide by our own principles) were not important. No change as significant as this one can be attributed to a single cause. But in the end it was the nobility of the protestors and their cause and the hideousness of the southern response to them that forced Americans outside the South to decide whose side they were on.

The question I will address here is this: After the Civil Rights Act and the Voting Rights Act were passed and public attention wandered, why did the federal government's efforts to attack racial discrimination and inequality become increasingly aggressive? To put the matter another way, why did the Second Reconstruction not go the way of the first? There are, after all, a number of reasons to have expected that federal enforcement of these laws would be weak-kneed and short lived. Consider the following:

1. After 1965 the salience of civil rights issues plummeted. We know that in many areas of regulation this produces a notable decline in the zeal of regulators. To make matters worse, the urban unrest off the second half of the decade contributed to racial "backlash" exploited by a number of politicians, most notably Richard Nixon.
2. Most of the enforcement mechanisms in the 1964 act were weak to begin with, largely as a result of the legislative compromises required to garner enough Republican support to overcome the Dixiecrat filibuster in the Senate. In its early years the Equal Employment Opportunity Commission (EEOC) was repeatedly described (by its friends, no less) as a "poor enfeebled thing."[2] The Office for

Civil Rights (OCR) within the Department of Health, Education, and Welfare was not only seriously understaffed, but run, according to the seasoned administrative veteran Wilbur Cohen, by young lawyers with "no political knowledge" and "no real administrative ability," "just a bunch of amateurs with real good ideas and very socially minded, wandering around in the desert of Sinai."[3] Most importantly, neither office had credible sanctions to impose against employers or subnational governments that violated the new laws.

3. School desegregation remained largely in the hands of federal courts, which had produced virtually no desegregation in the deep South in the decade following *Brown v. Board of Education*.
4. Opposition to school desegregation and to the enfranchisement of black voters remained strong in the South, and southern officials had proven adept at finding ways to circumvent previous civil rights laws.
5. While there was little chance that the Supreme Court would gut civil rights laws as they had done a century before, some features of the 1964 and 1965 acts—especially the preclearance provisions of the VRA—pushed the limits of what even the Warren Court would allow. Both Congress and the Supreme Court emphasized that some parts of the VRA could be justified only as *temporary* measures to deal with *extraordinary* circumstances. That is why key provisions of the act were set to expired after five years. At the time, few expected these "temporary" provisions to remain in effect until 2031, the date they are currently set to expire.

6. All the new laws prohibited racial "discrimination," but none explained with any precision what that pivotal term means or how it can be proven. These laws did specify what the term does *not* mean: efforts to achieve racial balance, whether in schools or in the workforce. With a directness that often frustrated civil rights administrators, these law adopted a "color-blind" understanding of civil rights that required a finding of intentional discrimination. Devising a way to give the laws teeth without too obviously demanding some form of racial balance has been a challenge for all civil rights agencies for decades.
7. Above all, we should not forget the monumental nature of the task at hand, changing the behavior of thousands upon thousands of school districts, employers, voting officials, labor unions, banks, realtors, policemen, and ordinary citizens. Not only was this among the most extensive regulatory efforts ever undertaken by the national government, but it challenged deeply rooted customs and mores. In most instances the federal government could not count on the states to carry out these policies, as it had so often done in other contexts. Here the states were the heart of the problem, not a potential administrative ally.

In retrospect, enforcement of at least two controversial parts of the civil rights legislation of the mid-1960s proved to be relatively easy. The public accommodations section of the 1964 act—at the time its most contentious l title—encountered little resistance. Title II freed commercial establishments from state laws demanding segregation. In most instances violations would have been highly visible. Once Ollie's Barbecue and the Heart of Atlanta Motel were told to shape up, resistance collapsed. Second, the prohibition of literacy tests in the seven state of the deep South had

remarkably swift and dramatic consequences of voter registration. Not only was the prohibition clear—thou shall not employ literacy tests—but states were prohibited from engaging in end-runs without first getting approval from federal officials. Clarity and prohibitory language—these were crucial.

One should add that the very passage of the 1964 and 1965 legislation contributed to an underlying cultural shift. Racial discrimination, segregation, and exclusion would no longer be considered acceptable behavior. Racial prejudice did not end—indeed, it may be impossible ever to banish it from the face of the earth—but increasingly it was something that could not be announced or defended in broad daylight. This is hard to quantify. But its importance is even harder to deny.

Other parts of the project announced in the years between 1964 and 1968 proved much harder to achieve. Desegregating southern schools required a monumental effort; the debate over the meaning of desegregation in the north was long and angry. Although the racial achievement gap narrowed significantly in the decade and a half after the civil rights revolution, it remained stubbornly resistant to change thereafter. Guaranteeing "equal employment opportunity" proved even more difficult, especially as good paying blue-collar jobs began to disappear. Years of "fair housing" regulation did depressingly little to change housing patterns. Housing segregation in turn produced single-race public schools in most large cities. These problems are well known. But it cannot be said that the federal government did not take aggressive action to address them.

Our Exceptional "Civil Rights State"

The central thesis of this paper is that in the years following enactment of landmark civil rights legislation, the federal government discovered novel ways to administer, interpret, and enforce those laws. Most important was the symbiotic relationship that developed between federal courts and civil rights agencies. While we are taught to believe that that the judiciary is the least powerful (and therefore the "least dangerous") branch because it exercises "no control over either the sword or the purse," it was in fact the federal courts that provided the enforcement muscle that drove the Second Reconstruction. The EEOC and the OCR provided administrative guidelines and monitored compliance by regulated entities, but federal judges provided both the most imposing sanctions and the most important enforcement mechanisms. For reasons that will be explained below, the resulting division of labor between courts and agencies produced regulatory policies more aggressive than those likely to have flowed from a purely administrative or purely court-based approach. Together the federal judges and civil rights agencies took a long series of incremental steps away from the 1964 and 1965 acts' focus on intentional discrimination and toward an implicit norm of racial proportionality. This put backbone in an otherwise flaccid regulatory framework. It also made it easier for each set of regulators to deny that they had deviated from the letter or spirit of those laws.

None of this had been anticipated by the original supporters of those statutes. On the eve of enactment of the Civil Rights Act and the Voting Rights Act, there was a pervasive sense that litigation had proven incapable of undermining the Jim Crow system in the South. As loyal New Dealers, the sponsors of this legislation believed that in civil

rights--as in economic policy three decades earlier—"the day of enlightened administration had come."[4] The legislation initially proposed by the Kennedy and Johnson Administrations and by civil rights supporters in the House offered standard New Deal solutions to a problem the original New Deal had recognized, but not dared to attack. The emphasis was on delegating extensive rulemaking and enforcement powers to federal agencies, particularly the Department of Justice's Civil Rights Division, the EEOC created by Title VII, the several Offices for Civil Rights located within the various departments and independent agencies. Their model for emulation was the National Labor Relations Board (NLRB), an agency that combined executive and judicial functions and wielded the power to issue unilateral "cease and desist" orders. Republican and Dixiecrat opposition to these administrative measures forced civil rights advocates to retreat. For the next several years civil rights organizations and their allies in Congress continued to promote a New Deal-style regulatory apparatus. Only gradually did they came to appreciate the advantages of the hybrid framework that was slowly emerging to interpret and enforce civil rights laws.[5]

In recent years, a number of important political science works have shown that the United States is no longer the "weak state" described in so many comparative studies and that we have seriously underestimated the size and power of the American "state" because we have failed to appreciate how it differs from the more centralized and unitary European "state." For example, Christopher Howard has shown that when one takes into account the many indirect ways in which American government distributes income supports—such as tax credits and loans—the U.S. sits close to the middle of advanced industrial democracies in terms of percentage of GDP devoted to social provision.

Susanne Mettler has described our "submerged state," a "conglomeration" of federal policies that "that incentivize and subsidize activities engaged in by private actors" rather than acting more directly and visibly to achieve public goals. Other policy studies have shown that especially during the 1970s and 1980s environmental protection in the United States was more stringent than in Europe. Historians have demonstrated that the American "state" was never quite the 100-pound weakling we have imagined.[6]

Several scholars have noted that when it comes to civil rights, the usual transatlantic pattern has been reversed: American government is more energetic and more efficacious than its European counterparts. In his comparison of race policy in the U.S., Britain, and France, Robert Lieberman points out that despite the "resolutely color-blind laws" that formed the legal foundation of the civil rights regime in the United States, "the 'weak' American state . . . not only produced more active and extensive enforcement of antidiscrimination law; it also managed to challenge the color-blind presumptions of its own law and to forge an extensive network of race-conscious policies and practices that have proven strikingly resilient in the face of political and legal challenges."[7] Lieberman shows how employment discrimination litigation helped to create a durable alliance among civil rights organizations, Democrats in Congress, and administrators in the EEOC. Others have confirmed Lieberman's comparative findings. For example, Abigail Saguy's 2003 book on sexual harassment shows both that American law deals much more harshly with sexual harassment than French law, and that much of the credit for this goes to federal judges. The US in effect has developed a federal common law of sexual harassment despite the fact that the Congress has never squarely addressed the issue.[8] Sociologists who study employment discrimination policy

seem to be particularly startled to find that our "weak" state has produced such robust regulation. Nicholas Pedriana and Robin Stryker have written an illuminating article on the EEOC explaining what they describe as "the strength of a weak agency." Frank Dobbin and John Sutton has similarly explored "the strength of a weak state" and the "paradox" of a "weak state" producing aggressive regulation. [9] Erik Bleich has shown how heavily—and consciously--Britain borrowed from the U.S. when it sought to strengthen its civil rights laws in the 1970s.[10]

Understanding how courts and litigation can strengthen the "the state" is particularly important in the contemporary U.S. because, as Robert Kagan has shown, "adversarial legalism" has replaced New Deal-style delegation of authority to administrative agencies as the dominant policymaking style in this country. "Adversarial legalism" combines an expansion of the responsibilities of the central government with a decentralized, party-driven form of decisionmaking. Kagan explains that it arises from a "fundamental tension" between a political culture "that expects and demands comprehensive governmental protection from serious harm, injustice, and environmental dangers—and hence a powerful, activist government," and "a set of governmental structures that reflects mistrust of concentrated power and hence that limits and fragments political and government authority."[11] Adversarial legalism is our home-grown alternative to bureaucratic centralization or rule by experts, an essential element of the contemporary American "state."

Those who study "state-building" have been frustratingly slow to recognize the extent to which "adversarial legalism" can increase the scope and power of government. In separate review essays both John Skrentny and Paul Frymer have noted that historians,

political scientists, and sociologists frequently underestimate the American state because they "miss the important ways that courts contribute to the development of state power." Those who study state-building tend to equate "state" with "centralized bureaucracy." They see courts either as irrelevant or, even more often, as obstacles to the creation of administrative capacity. Their images of courts comes from the *Lochner* era and the New Deal, when it was certainly reasonable to believe that strengthening the administrative capacity of both the federal government and the states required curbing the courts. Both before and after the New Deal, though, "judicial authority has been absolutely essential to the power and reach of the modern regulatory state."[12] "In the 1960s," Frymer writes, "the courts played a far more active and *affirmative* role in building the powers of the state and expanding its power to regulate civil society and the economy." Indeed the federal judiciary "became one of the leading engines of the regulatory state."[13]

Nowhere is this clearer or more important than in civil rights regulation. The new regulatory apparatus that emerged to tackle racial discrimination in the late 1960s and early 1970s was soon deployed to attack many other forms of discrimination. Republicans and Democrats, Congress and the White House all found it convenient to favor this form of policymaking over those that created new bureaucracies or required more government spending. The complex nature of this regulatory system—the fact that it was hard to see and hard to understand—was one of its greatest political advantages. The following account of Titles VI and VII of the Civil Rights Act is designed to describe part of our equally "submerged" civil rights state.

Title VII and the Rise of a Private Enforcement Regime

Much of the debate over civil rights legislation centered on the extent of authority delegated to courts and administrative agencies. Could federal agencies promulgate binding rules and issue "cease and desist" orders, or would they be limited to filing suit in federal court? Could the EEOC initiate litigation itself, or would it be required to rely on private plaintiffs or attorneys in the Department of Justice? Who would assume responsibility for "pre-clearing" election law changes in "covered" Southern states? The Department of Justice? Local federal judges? Federal judges in the District of Columbia? These institutional issues loomed particularly large because the laws' central substantive mandate--do not discriminate on the basis of race--remained so vague.

Many of the key participants understood how much hung on matters of institutional design, and they drew on their recent experience to make educated guesses about the likely consequences of various proposals. For example, Department of Justice attorneys who had handled voting rights issues in the South were exasperated both by the constant stream of obstacles erected by southern officials to prevent African-Americans from voting, and by the unwillingness of some federal district court judges to help eliminate them.[14] As a result, the 1965 act placed the burden on southern states to justify *any* new voting law, and required them to seek approval from administrators or judges in Washington, not local federal district court judges appointed, in effect, by the states' segregationist Senators.

During the "longest debate" of 1964, no section of the proposed legislation was subject to more scrutiny and legislative bargaining than Title VII, which prohibited racial and gender discrimination by private employers. Passage of the act was not secured until

the Johnson Administration and Senate Democratic leaders reached an agreement with Senate Minority Leader Everett Dirksen, who supplied enough Republican votes to end the southern Democrats' filibuster. The most important part of the compromise (usually known as the "Dirksen-Mansfield substitute") set a number of limits on the power of the EEOC. It denied the EEOC power to issue cease-and-desist orders or even to file suit in federal court. It also explicitly denied the EEOC any authority to disrupt "bona fide" seniority systems or to require an employer to achieve a racially balanced workforce.

In 1963-64 the battle lines over Title VII reflected three decades of bitter partisan disagreement over labor relations. Both Republicans and Democrats viewed the issue of the extent of the EEOC's authority through the lens of their experience with the National Labor Relations Board (NLRB). This was understandable since Title VII involved government regulation of business practices similar to that instituted by the NLRB. In fact, the NLRB had already waded into the ticklish issue of racial discrimination by unions.[15] New Dealers in the House, Senate, and the administration favored creating an enforcement agency analogous to the Board, with power to investigate complaints, promulgate legally binding rules, and above all issue enforcement orders on hiring practices, reinstatement, and back-pay. They also sought to keep the federal courts at arms length: their version of the legislation limited judicial review of the new agency to the Administrative Procedure Act's deferential "arbitrary and capricious" standard, and made no provision for private enforcement suits. Sean Farhang explains that the "administratively-centered enforcement framework" established by the House Judiciary Committee with the approval of the Johnson Administration "embodied the enforcement preferences" of Democratic civil rights advocates in Congress and leading civil rights

groups, including the NAACP and the Leadership Conference on Civil Rights. Civil rights leaders "had consistently advocated for this administrative enforcement framework with no private rights to litigate, in job discrimination bill since 1944 and . . . it was the overwhelmingly dominant model at the state level."[16] They considered private litigation a dead-end, and pinned their hope on systematic enforcement action by a powerful, expert agency insulated from judicial second-guessing.

To business-friendly Republicans—including many of the Senators whose support civil rights advocates so desperately needed to break the Dixiecrat filibuster--creating a new National Labor Relations Board was simply unacceptable. As the economist and Nixon advisor Arthur Burns once put it, "the words cease-and-desist and N.L.R.B. are inflammatory words to most businessmen. They find the N.L.R.B. in its activities among the worst in the federal government and in many instances, they are absolutely right in this evaluation."[17] The GOP's staunch opposition to granting administrative agencies cease-and-desist power, Hugh Davis Graham notes, "reflected the great battle over administrative reform of the 1940s, in which a coalition of Republicans and southern Democrats attacked the regulatory abuses they associated with the New Deal."[18] Republicans on the House Judiciary Committee warned in their minority report that it would be "a major mistake to model legislation in the field on the National Labor Relations Board, which has one of the sorriest records of all the Federal agencies for political involvement."[19] House leaders eventually removed the cease-and-desist power from the bill in order to craft legislation that could pass the Senate.

Even this weakened EEOC was too much for Senate Republicans. According to Graham, the amendments Dirksen insisted upon were "devised primarily to limit the

EEOC," which still "reminded Dirksen and his more conservative colleagues uncomfortably of its crusading earlier model: the NLRB."[20] They insisted upon removing the EEOC's authority to initiate court suits against employers. Under the Dirksen amendment, the Department of Justice was given power to pursue systematic "pattern and practice" suits, but the vast majority of cases would be left to private litigation. The NAACP and other civil rights advocates vigorously opposed this change, but were able to extract only one concession: in these private cases judges could waive filing fees, appoint attorneys for indigent plaintiffs, and award attorneys fees to the victorious party. The NAACP's Legal Defense and Education Fund's Jack Greenberg argued that this was "the only way to make private enforcement feasible."[21]

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

> While the key move of House Republicans on the fair employment provision had been to *judicialize* the enforcement forum, relying upon bureaucratic authority to execute the prosecutorial function, the key move of Republicans in the Senate, led by Dirksen, was to substantially *privatize* the prosecutorial function. They made private lawsuits the dominant mode of Title VII enforcement, creating an engine that would, in the years to come, produced levels of private enforcement litigation beyond there imagining.[22]

As Farhang suggests, the debate over the authority of the EEOC is instructive not only because it illustrates the New Deal political divide on administrative power, but above all because the participants were so *wrong* about the consequences of these arrangements for civil rights. In Hugh Davis Graham's words, in the 1960s "both sides seem to be betting on the wrong horse." Both parties "had fallen into ossified, knee-jerk patterns of commitment and rhetoric."[23]

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

> Based on a decade of experience, the civil rights movement should have welcomed the court enforcement, while those who wished to minimize the impact of the law should have preferred an administrative agency with seemingly broad powers which could be "captured" by the interest is set out to regulate. Neither group, however, saw events in this perspective.[24]

Farhang notes the irony that if Senate Republicans had accepted the House provisions on the powers of the EEOC, "the long run outcome would have been a far weakened enforcement regime."[25]

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

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

> Between 1965 and 1970, LDF brought the cases that clear away the procedural obstacles to using . . . Title VII effectively and later, for some years, brought virtually all the cases they gave the law its bite. We enlisted scholars, economists, and labor experts every step of the way to target industries where lawsuits would do the most good. They also informed courts of legal wrongs and how to remedy them.[26]

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

> Between 1971 and 1974, the staff did four to five class action trials and after that one or two each year. . . . In the first half of 1980, staff lawyers were lead counsel in eight cases in the Supreme Court, twenty-six in courts of appeal, and twenty-

> nine in district courts. By then, more than half the cases were against state and local governments and there were many against large corporations and unions. . . . We have more cases than the entire Equal Employment Opportunity Commission.[27]

Greenberg was not exaggerating when he bragged,

> Our Title VII operation was a major triumph in making legal doctrine and achieving social gain -- blacks, other minorities, and women won a dramatic increase in the number of jobs available to them and in the higher pay they received in those jobs. In terms of the impact of the change wrought, it was almost on par with the campaign that won *Brown*.[28]

To be sure, LDF did have significant assistance, not just from other civil rights organizations but from the EEOC itself. The EEOC worked closely with civil rights organizations, often filing amicus briefs to support their position and issuing guidelines to provide them with legal ammunition.[29]

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

Emphasizing the section's "broad purposes" in effect required judges and administrators to ignore uncomfortably clear provisions of the law.

The version of Title VII enacted in 1964 not only granted few powers to the EEOC, but it imposed a number of important substantive constraints on policymakers. One section of the law explicitly permits employers to use "professionally developed ability tests" as long as they are not "designed and intended or used to discriminate because of race, color, religion, sex, or national origin."[30] Another, added to appease labor unions, protected any "bona fide seniority or merit system." This meant that the significant advantages conferred upon white male employees by previous discriminatory actions could not be taken away, even if this "inevitably had the consequence of impeding the progress of minority employees and women into jobs from which they had previously been excluded."[31] Protecting seniority systems, one district court judge wrote in a frequently cited opinion, threatened "to freeze an entire generation of Negroes into discriminatory patterns that existed before the act."[32]

Even more important were Title VII's explicit endorsement of an "intent" standard and its concomitant rejection of any demands for racial balance in the workplace. The law provided that a court can impose sanctions on an employer only if it "finds that the respondent has *intentionally* engaged in or is *intentionally* engaging in an unlawful employment practice."[33] Anticipating the coming fight over affirmative action §703(j) announced,

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

The bill's Senate floor leaders emphasized over and over again that Title VII prohibited only intentional discrimination, not failure to create a racially balanced workforce. In Hubert Humphrey's words, Title VII "does not limit the employer's freedom to hire, fire, promote, or demote for any reason—or no reason—so long as his action is not based on race."[34] "Contrary to the allegations of some opponents of this title," Humphrey told the Senate,

> there is nothing in it that will give any power to the Commission or to any court to require hiring, firing, or promotion of employees in order to meet a racial 'quota' or to achieve a certain racial balance. That bugaboo has been brought up a dozen times; but it is nonexistent. In fact, the very opposite is true. Title VII prohibits discrimination. In effect, it says that race, religion, and national origin are not to be used as the basis for hiring and firing. Title VII is designed to encourage hiring on the basis of ability and qualifications, not race or religion.[35]

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

> There is no requirement in title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve a violation of title VII because maintaining such a balance would require an employer to hire or refuse to hire on the basis of race.[36]

The act's chief sponsors' eagerness to demonstrate that Title VII would not institute racial or gender quotas was not just a prudent legislative strategy. According to Hugh Davis Graham, "the evidence suggests that the traditional liberalism shared by most of the civil rights establishment was philosophically offended by the notion of racial preference."[37] As President Kennedy put it a few months before his death, "I think it would be a mistake to begin to assign quotas on the basis of religion, or race, or color, or nationality. I think we'd get into a good deal of trouble."[38]

Although EEOC staff members and civil rights advocates had initially shared this focus on eliminating intentional discrimination rather than mandating racial balance, they soon came to believe (probably correctly) that a law limited to attacking overt, intentional discrimination and committed to protecting existing seniority and merit hiring systems would do little to change long-term employment patterns and practices. According to Alfred Blumrosen, "All of the EEOC's early interpretations of Title VII emerged from a unified idea—that the statute should be read so as to maximize its impact on employer practices."[39] As violence and unrest spread through the urban north, the EEOC became obsessed with "finding something that *works,* that gets *results,* even if that included race consciousness."[40] Civil rights groups attacked the EEOC for shuffling paper while the cities burned. The EEOC, John Skrentny has noted, "had a limited audience for its performance, and that audience was already booing loudly." [41]

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

> Given the determination of the EEOC's professionals--and by 1967 of the chairman and a majority of the commissioners -- to mount a 'wholesale' attack on institutionalized racism, the agency was prepared to defy Title VII restrictions and attempt to build a body of case law that would justify its focus on effects and its disregard of intent. But *commission lawyers acknowledged that such a course would set it at odds with the compromise language that was the key to Title VII's passage.* [42]

Even the commission's official administrative history conceded that "eventually this will call for reconsideration of the amendment by Congress, or the reconsideration of its interpretation by the commission."[43]

Blumrosen later explained in detail why adhering to the restrictions embedded in Title VII "would have plunged Title VII investigations into an endless effort to identify an 'evil motive'" and prevented it from "changing industrial relations systems."[44] "Creative administration," he maintained, "converted a powerless agency operating under an apparently weak statute into a major force for the elimination of employment discrimination."[45] The Supreme Court openly embraced such "creativity" several years later when it issued its famous decision in *Steelworkers v. Weber*. Justice Brennan's majority opinion argued that while the explicit language of Title VII seemed to prohibit affirmative action programs developed by employers under pressure from the EEOC, judicial and administrative interpretation of Title VII should be guided by the "spirit" and overriding purpose of the law, which was to improve employment opportunities for racial minorities and thus to achieve "the integration of blacks into the mainstream of American society."[46] This strategy of ignoring the constraints contained in the statute in order to change employment practices was not invented by the Supreme Court; it had been the mantra of the EEOC for more than a decade prior to Brennan's decision.

The big story in the first fifteen years of litigation under Title VII was how willing the federal courts were to carry out the legislative revisions the EEOC expected would eventually need to come from Congress. Critics of these decisions have explained in detail how federal judges tortured the wording of the law.[47] Even the courts' defenders concede that judges played fast and loose with the statutory language. Paul Frymer, for example, writes that "courts significantly rewrote aspects of the law . . . and, in the process, got rid of very carefully placed loopholes that unions and other civil rights opponents had demanded in order to pass the act, turning it from one that emphasize

color-blindness to one that underscored affirmative action."[48] Some of this de facto revision of the statute was achieved in Supreme Court decisions such as *Griggs v. Duke Power*[49], *Albemarle Paper Co. v. Moody*[5051], *Franks v. Bowman Transportation Co.,*[52] *Weber*, and (somewhat later) *Johnson v. Transportation Agency.*[53] Almost as important were such seminal lower court decisions as *Quarles v. Phillip Morris*[54], *Contractors Association v. Secretary of Labor Association*[55], and a series of Fifth Circuit decisions on seniority systems.[56]

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

It is possible, of course, that if the EEOC had been given as much power as Democrats had originally hoped, it would have done much the same as the courts. After all, the courts often followed agency guidelines and advice. It is hard to believe, though, that such action by the EEOC would not have generated serious political opposition.

Republicans would have said, "We told you so," and launched an attack on the “runaway bureaucracy.” This almost certainly would have led Republican Presidents Nixon and Ford to appoint commissioners less committed to amending the statute through administrative action. Labor unions, too, were highly dissatisfied with the new enforcement policies, adding significantly to the political pressure for greater restraint. While Blumrosen’s claim of imminent agency “capture" by "the interests it set out to regulate" understates the extent to which the EEOC continued to push for aggressive action, the EEOC certainly was more susceptible to pressure from Congress and the president than were federal courts.

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

social legislation."[57] By the time the Supreme Court, the lower courts, and the EEOC had assembled the Title VII sandwich, Congress had changed sufficiently to enjoy the meal. Or at least this was true of the leaders of the key committees, who stood ready to block any legislative amendment of these judicial revisions.

John Skrentny points out that the judiciary was also skillful at *legitimating* this "new model of discrimination." A key part of the judicial art, he argues, is "asserting that what is new (the controversial case at hand) is *not* new."[58] The novelty of the policy established in the pivotal case of *Griggs v. Duke Power* was disguised not only by the Court's rhetorical effort to tie "disparate impact" analysis to the ultimate purposes of Title VII, but also by the fact that it was written by Chief Justice Burger for a unanimous Court. For all these reasons the division of labor established by Title VII proved to be a particularly good mechanism for slowly redesigning the government's attack on employment discrimination without revising the underlying statute.

By 1969 civil rights groups had come to appreciate the virtues of the institutional arrangement they had attacked only a few years before. Their faith in the courts was revived, and with the election of Richard Nixon their trust in the EEOC plummeted. The LDF's Jack Greenberg now told the Senate Judiciary committee that "the entire history of the development of civil rights law is that private suits have led the way and government enforcement has followed." Joseph Rauh agreed "without reservation."[59] Congress continued to debate expansion of the power of the EEOC. But, as Sean Farhang explains, the strategy of civil rights groups had changed significantly:

> Although they still supported cease-and-desist, their preferences regarding administrative implementation versus private litigation had been decisively transformed as compared to 1963-64. They now wanted both and were unwilling to give up private enforcement for cease-and-desist powers. . . . [P]ropelled to the

> center of the enforcement stage by the Dirksen compromise, civil rights groups carried out the prosecutorial role to great effect, providing African Americans material job opportunities previously denied to them, including in the South. . . . . Civil rights advocates could not, they had now decided, afford to rely solely upon the beneficence of bureaucrats, who in turn depended on elected officials for resources and power, to enforce fair employment practices.[60]

As Greenberg put it, "with private enforcement we were the captains of our own ship. We took initiatives that more cautious government agencies wouldn't."[61] In 1972 Congress gave the EEOC power to file employment discrimination suits but not to issue cease-and-desist orders. The institutional issues that had seemed so important in the eyes of New Dealers now seemed insignificant.

The role private enforcement cases came to play in employment discrimination policy is indicated by the volume of suits filed in federal court. Private enforcement cases averaged less than 100 per year in the late 1960s. This grew to about 5,000 cases per year by the late 1970s, reached almost 10,000 annually in the 1980s, and then skyrocketed to over 22,000 per years in the late 1990s. In fact, employment discrimination cases now constitute almost one-fifth of all non-prisoner lawsuits brought under federal statutes.[62] As these statistics indicate, strong incentives lead plaintiffs to file such cases and attorneys to help them do so.

The impressive growth of employment discrimination can be traced not just the new interpretations of Title VII announced by the courts, but to congressional enactments that lower the costs and raise the benefits of litigation for plaintiffs and their lawyers. The best example of the former is the Civil Rights Attorney's Fees Award Act (CRAFAA) of 1976, which extended fee shifting to all civil rights laws (including Titles VI and IX, the subject of the next section of this paper). The best example of the latter is the Civil

Rights Act of 1991. Both provide significant support for Thomas Burke's argument that Congress has become a leading proponent of adversarial legalism.[63]

The congressional debate over CRAFAA offers a good illustration of how policymaking through litigation served the political needs of Democrats and liberal Republicans (not yet an endangered species) in the 1970s.[64] While committed to improving the plight of racial minorities, women, the disabled, and other disadvantaged groups, they were growing increasingly wary of the emerging backlash against entitlement spending, social regulation, and the federal bureaucracy. They particularly feared being labeled supporters of "big government." Combining federal mandates on subnational governments and the private sector with enforcement through the courts provided a handy mechanism for squaring the political circle: this was an attractive way to provide more government protections without increasing government spending or expanding the federal bureaucracy.[65] The Senate Report on CRAFAA emphasized that the bill would strengthen enforcement of civil rights law "while at the same time limiting the growth of the enforcement bureaucracy." Senate Minority Leader Hugh Scott claimed that this legislation "would cost the government nothing" and "would make the civil rights laws almost self-enforcing."[66] What politician could object to that?

Ironically, while Congress has repeatedly demonstrated its support for the court-centered private enforcement regime, the Supreme Court has become a major *critic* of this form of adversarial legalism, frequently making it more difficult for plaintiffs to get into court, to win their cases once there, to receive attorneys fees, or to collect large damage awards. By the late 1980s a slim conservative majority on the Court had begun to whittle away at the Title VII precedents established over the preceding two decades.

Decisions of the Rehnquist Court increased the burden of proof for plaintiffs, provide additional defenses to employers, and generally make it harder for plaintiffs to prevail in "disparate impact" cases. A series of decisions announced by the Court in June, 1989, produced a firestorm of criticism from civil rights organizations, Democrats in Congress, and the now substantial employment discrimination bar. In 1990 Congress passed legislation overturning a number of Title VII decisions of the Rehnquist Court. President Bush vetoed the legislation, denouncing it as a "quota bill." Congress responded by passing the Civil Rights Act of 1991, which overturned even more Court decisions and significantly expanded the damages available to plaintiffs in employment discrimination cases. This time President Bush signed the legislation, which contained enough ambiguities to allow both sides to declare victory.[67] The 1991 Act made it easier than ever for plaintiffs to prevail in employment discrimination cases and--even more importantly--significantly increased the value of winning, the number of Title VII cases filed in federal court quickly shot up once again.

No one would ever suggest that the resulting administrative process is either pretty or efficient. Consider the following description provided by UVA law professor George Rutherglen, a leading legal expert on Title VII:

> Title VII establishes an enforcement scheme that is . . . inherently more complicated than any simple mechanism for purely administrative or judicial enforcement. . . . As result, the legal doctrine governing these issues has become ever more complex, making litigation of employment discrimination cases highly technical and specialized. The doctrinal complexity, moreover, does not point in a single direction, but serves a variety of different purposes, some favorable to plaintiffs, others to defendants. . . . [C]onsidered together, these policies yield a complex system of enforcement that threatens to sidetrack employment discrimination cases into a multitude of collateral procedural issues.[68]

Uncertainty, procedural complexity, redundancy, lack of finality, high transaction costs—these are the central features of adversarial legalism described by Robert Kagan.

The result, though, is *not* weak government regulation. Facing the prospect of paying very large damage awards if they lose in court, employers inevitably look for ways to avoid the financial risks (and bad publicity) of litigation. And the EEOC has been eager to offer them a "safe harbor" from the uncertainties of adversarial legalism. Since 1979 the EEOC has maintained that employers can protect themselves from disparate-impact suits by adopting "voluntary" affirmative action plans consistent with its Uniform Guidelines on Employee Selection Procedures and Guidelines on Affirmative Action.[69] The major effect of the 1991 Civil Rights Act was to increase employers' incentives to sail into this "safe harbor." With employers facing greater potential losses and a heavier burden of proof, Rutherglen notes, "affirmative action becomes less and less a voluntary option and more and more a mandatory requirement. It becomes the only realistic way to avoid liability under the theory of disparate impact."[70] This is why many business leaders oppose "reverse discrimination" attacks on affirmative action: victory in these cases would have left them perched precariously between the Scylla of disparate-impact lawsuits and the Charybdis of "reverse discrimination" challenges, depriving them of any "safe harbor" in a sea of legal uncertainty. Whatever the flaws of the adversarial legalism, it does not produce a less powerful central government.

The Transformation of Title VI

Title VI of the 1964 Civil Rights Act established the principle that "no person in the United States shall be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance." It directed federal agencies to issue "rules, regulations, or orders of general applicability" to carry out this provision, and to terminate funding for any "particular program" that failed to comply. Although Titles VI and VII both target racial discrimination (Title VI, unlike Title VII, makes no mention of gender), in several ways they are mirror images of one another. The original version of Title VII applied only to private employers, not public officials. Title VI, in contrast, applies primarily to state and local governments. Title VII was extremely controversial in 1963-64, the focus of the most important bargaining over the legislation. But "almost no attention was paid to Title VI," which Hugh Davis Graham describes as "the sleeper that would become by far the most powerful weapon of them all."[71]

Most importantly, while the Dirksen-Mansfield substitute made private judicial enforcement central to implementation of Title VII, Title VI was consistently presented and defended as a mechanism for replacing costly, time-consuming constitutional litigation with decisive administrative action. In his explanation of the initial version of Title VI, President Kennedy stated, "indirect discrimination, through the use of Federal funds, is just as invidious" as direct discrimination "and it should not be necessary to resort to the court to prevent each individual violation."[72] The Congress that had focused so intently on the enforcement role of the courts under Title VII said nothing about the role of the courts in implementing Title VI. There is no mention of private enforcement

suits either in the statute itself or in its legislative history. This was not an oversight. Since it was already unconstitutional either for state and local governments to discriminate on the basis of race or for the federal government to support such activity, suits by aggrieved private individuals were already available—just too cumbersome to be effective. While Title VII made illegal private activities that had previously been legal under federal law, Title VI applied new administrative sanctions against those who violated preexisting *constitutional* norms.

One consequence of this was that Congress made little effort to explain what would constitute a violation of Title VI. Another was that administration and Department of Justice officials promised members of Congress that HEW would consider any school district subject to a judicial desegregation order in compliance with Title VI—even if that order was not consistent with appellate precedent and even if there were doubts about whether the school district had obeyed that court order.[73] The ambiguous nature of Title VI's substantive requirements—part statutory, part constitutional—at first slowed down southern school desegregation, but later provided an opportunity for courts and agencies to play a game of policy leap-frog, with each building on the initiatives of the other.[74]

Congressional debate on Title VI focused exclusively on the extent of the powers granted to federal agencies. The House and the Senate imposed several constraints on their authority: rules issued under Title VI must be approved by the president himself; federal agencies must give Congress thirty days advance warning of funding terminations; state and local governments are entitled to public hearings prior to termination of funds and judicial review after the fact; and such terminations apply only to the particular program found guilty of discrimination, not to the entire institution

receiving funding. Having delegated substantial power to federal administrators, members of Congress wanted to make sure they did not wield it precipitously, arbitrarily, or without giving Congress a heads-up. Congress later prohibited agencies from using "deferrals" to avoid these restrictions.

We know from detailed accounts of school desegregation that administrative action under Title VI initially proved a potent weapon for change.[75] Desegregation guidelines issued by HEW in 1965 and 1966 were a crucial component of the "reconstruction of southern education" accomplished at long last in the late 1960s and early 1970s. The threat of fiscal sanctions was made particularly compelling by the new pot of money Congress made available to southern school systems when it passed the landmark Elementary and Secondary Education Act of 1965. But it still took a subtle combination of judicial and administrative action to desegregate southern schools. According to Gary Orfield, who has provided one of the best descriptions of OCR's early years, "The policy shift announced by the Office of Civil Rights was possible only because of a series of helpful court decisions."[76]

The breakthrough on school desegregation came in 1966-67, when judges on the Fifth Circuit incorporated key elements of HEW's guidelines into their opinions and remedies in Fourteenth Amendment cases. In a particularly important ruling, *United States v. Jefferson County Board of Education,* Judge John Minor Wisdom conceded that "the courts acting alone have failed," and acknowledged that Title VI "was necessary to rescue school desegregation from the bog on which it had been trapped for years." HEW's guidelines "offer, for the first time, the prospect that the transition from a *de jure* segregated dual system to a unitary integrated system may be carried out effectively,

promptly, and in an orderly manner."[77] If administrative guidelines provided courts with the "judicially manageable standards" essential for desegregating schools, the courts offered HEW's Office for Civil Rights crucial political support and credible sanctions. As Stephen Halpern explains in his detailed analysis of this court-agency partnership,

> HEW officials realized that federal courts were a good ally, and the agency had few allies in beginning the politically touchy task of enforcing Title VI . . . Time after time, the Fifth Circuit intervened . . . to give HEW's school desegregation efforts "a boost." Moreover, in meetings with angry southern educators HEW officials could claim that their hands were tied—that court decisions and hence, indirectly, the Constitution itself, required HEW to be as insistent as it was.[78]

According to Halpern, in the southern desegregation effort "the synergistic power of the bench and bureaucracy working together was apparent." "[F]ederal judges lauded HEW's 'expertise' in writing the Guidelines, and HEW officials, in turn, extolled and relied on the 'objective' policies of the courts." He also notes the irony of this arrangement: "The enforcement of a law intended as a substitute for litigation became heavily dependent on and linked to the standards advanced in litigation."[79]

It did not take long for administrators throughout the federal government to discover that termination of funding for state and local governments is too blunt and extreme a sanction to be politically palatable or administratively attractive in ordinary times. In a report highly critical of federal agencies' lax enforcement of Title VI, the United States Commission on Civil Rights identified a central dilemma facing these funding agencies: "Although funding termination may serve as an effective deterring to recipients, it may leave the victim of discrimination without a remedy. Funding termination may eliminate the benefits sought by the victim."[80] Just as importantly, funding cut-offs threaten to damage relations between the federal agency and those state and local officials with whom they worked on a regular basis -- not to mention

antagonizing members of Congress upon whom administrators rely for appropriations. Statistics provided by Beryl Radin vividly demonstrate the weakness of this sanction. Between 1964 and 1970, the period in which OCR was most aggressive and most successful in attacking southern school segregation, it initiated administrative proceedings against 600 of the more than 4000 school districts in the South. Federal funding was "terminated in 200; in all but four of these 200 districts, federal aid was subsequently restored, often without a change in local procedures."[81] Not only was the termination process procedurally cumbersome and politically hazardous, but some of the most recalcitrant rural districts were willing to forgo federal funds rather than desegregate.[82] At that point, litigation was the only option. As Congress replaced small categorical grants with much larger block grants in the 1970s, termination of funding became all the more awkward.

What the federal courts could offer was a much more imposing enforcement tool, the structural injunction. During the 1960s judges in school desegregation cases created detailed, demanding regulatory regimes tailored to the specific circumstances of each school district. These injunctions were modified on a regular basis. Many remained in effect for decades. Public officials who violated these injunctions could be found in contempt of court, a powerful weapon for compelling compliance. In the five years after *Jefferson County* the Fifth Circuit also adopted novel procedural rules that sharply limited the authority of obstructionist district court judges, significantly reduced the cost to civil rights organizations and the Department of Justice of mounting desegregation litigation, and in effect turned appellate review into a form of administrative oversight. Frank Read, who has provided us with a detailed account of these innovations by the Fifth Circuit,

notes that the appellate procedures produced a "quantum leap in school desegregation activities." Between December of 1969 and September of 1970, the newly created standing panels of the Fifth Circuit issued 166 "opinion orders" on desegregation.[83] With school districts throughout the South facing the near certainty of specific judicial desegregation orders, funding sanctions faded into irrelevancy.

What courts—especially those in the Fifth Circuit—needed from administrators were guidelines to make their newly acquired tasks manageable. If these agency rules had merely tracked previous court rulings defining racial discrimination under the Fourteenth Amendment, then they would have been of little help and little policy significance. But agency rules under Title VI went far beyond what the courts had deemed constitutionally required. In order to provide specific guidance to recipients of federal funding, agency rules often created a presumption in favor of racial proportionality. OCR's 1966 desegregation guidelines, the most important set of rules ever issued by that organization, set specific targets for the percentage of black students enrolled in formerly white schools. The Fifth Circuit's embrace of these guidelines not only broke the logjam on school desegregation, but constituted a major step in the redefinition of "desegregation." Although the 1964 act specifically stated that "desegregation" shall not mean the assigning children to particular schools in order to achieve racial balance, OCR took the first step in that direction and the courts, claiming to defer to agency expertise, took many more. Together they established the expectation that all school districts that had previously engaged in segregation must reconstitute their schools so that none of them are "racially identifiable"—which in effect meant that the

racial composition of each school must reflect the racial composition of the district as a whole.[84]

This redefinition of desegregation coupled with the enhanced enforcement capacity of the federal courts produced what Gary Orfield has called the "reconstruction of southern education" in the late 1960s and early 1970. It also raised the enormously controversial issue of busing, first in the South, then in northern and western cities. Both Congress and the White House prohibited OCR from participating in busing cases. This did not mean that OCR merely walked away with its tail between its legs. Instead it looked for new ways to promote equal educational opportunity using the institutional arrangements now at its disposal. With the blessing of the Nixon White House it undertook a major investigations of racial discrimination within New York City schools and promoted bilingual education for Latino students.[85]

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

> when the inability to speak and understand the English language excludes national origin minority group children from effective participation in the educational program offered by school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to those students.[86]

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

> total institutional reposturing (including culturally sensitive teachers, instructional materials and educational approaches) in order to incorporate, affirmatively recognize, and value the cultural environment of ethnic minority children so that the development of positive self-concept can be accelerated.[87]

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

The impetus for these regulations seems to have come not from newly formed Hispanic groups but from idealistic young lawyers in the Office of Civil Rights. They received unexpected political support from the White House, which was courting Hispanic voters in anticipation of the 1972 election. But OCR had neither the capacity nor the political will to translate these demanding guidelines into enforcement action. By 1974 it had reviewed only 4% of the covered school districts. It found over half of the review districts out of compliance. Some of these districts agreed to a remedial plan. Others refuse to negotiate at all. Only once did the Office of Civil Rights take even the first step towards termination federal funds.[88]

Once again it was the federal judiciary that came to the rescue of the OCR. In 1974 the Supreme Court heard a Title VI bilingual education class action suit filed by legal assistance lawyers representing Chinese American parents in San Francisco. In its brief opinion in *Lau v. Nichols*[89], the Court avoided the question of whether the Fourteenth Amendment required school districts to provide education in students' native language by finding that the school was bound by HEW's Title VI regulations. Those regulations, the Court concluded in summary fashion, were well within the power granted to HEW by Title VI. The court implied -- but did not specifically state -- that the regulations could be enforced by the federal courts. The next year HEW issued more specific bilingual education guidelines known appropriately as the "*Lau* remedies."

Federal district courts in New York and New Mexico ordered school districts with large numbers of Hispanic students to comply with them.[90]

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

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

The addition of judicial enforcement for private rights of action significantly altered this political equation. Now agencies could write broad Title VI regulations and allow others to take the political heat for enforcing them, something civil rights

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

In the 1970s private rights of action under Title VI and Title IX were usually brought by civil rights organizations. Not only were these cases too expensive for most private individuals to pursue, but prospective injunctive relief promised few benefits for those initially aggrieved. In the 1980s, though, the Supreme Court authorized federal judges to award *monetary damages* to plaintiffs in Title VI and Title IX cases. The court first permitted the award of back pay in a splintered, garbled decision on racial discrimination in the employment practices of the New York City Police Department.[91] A decade later the Court announced that federal courts can require public schools to pay damages to students who have been subjected to sexual harassment by teachers.[92] Soon thereafter it ruled that a student could sue a school district for monetary damages when it fails to take adequate steps to prevent sexual harassment by a fellow student.[93] In each

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

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

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

> This legislative design reflects a reasonable -- indeed inspired -- model for attacking the often-intractable problem of racial and ethnic discrimination. On its own terms the statute supports an action challenging policies of federal grantees that explicitly or unambiguously violate antidiscrimination norms (such as policies that on their face limit benefits or services to certain races). With regard to more subtle forms of discrimination (such as schemes that limit benefits or services on ostensibly race-neutral grounds but have the predictable and perhaps intended consequence of materially benefiting some races at the expense of others), the statute does not establish a static approach but instead empowers the relevant agencies to evaluate social circumstances to determine whether there is a need for stronger measures. Such an approach builds into the law flexibility, an ability to make nuanced assessments of complex social realities, and an admirable willingness to credit the possibility of progress.[94]

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

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

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

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

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

their own in the enforcement process. They must invoke the awkward funding termination process rather than rely on court-based enforcement by private parties.

It is much too early to write the obituary for Steven's "inspired model" for attacking discrimination. In a 2005 "retaliation" case brought under Title IX, a closely divided Court seemed to retreat from *Sandoval's* narrow interpretation of the judicially enforceable rights contained in cross-cutting federal mandates.[95] This fall the Supreme Court heard a Medicaid case that raises the private right of action issue in stark form. We will probably have to wait until summer to discover which direction the Court will take. In the past it has not been unusual for Congress (at least when Democrats are in the majority) to respond to restrictive court rulings by passing legislation explicitly authorize private damage suits to enforce agency rules.

It is probably more useful to examine the reasons behind the growth of this enforcement regime than to speculate about the likelihood of its demise. The institutional arrangements that gradually evolved under Titles VI and IX were the product of two convictions. The first is that for every federal right there should be an effective federal remedy, created, if necessary, by the courts. As the Supreme Court stated in an earlier "implied private right of action" case, *J.I. Case v. Borak,* "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose."[96] The second is that neither the tools wielded by civil rights agencies under these statutes nor those employed by the courts—most notably, structural injunctions and §1983 suits—were adequate for uprooting subtle yet invidious forms of discrimination. Implicit in the Court's marrying of private damage suits with administrative regulation

under these statutory provisions is recognition that neither federal agencies nor the federal judiciary can go it alone in creating an effective regulatory regime.

Conclusion

The most important moral of these two stories is that adversarial legalism can promote aggressive federal regulation of the private sector and subnational governments. Indeed, it has been central to the development of the American civil rights state. Private litigation under Titles VI and VII both supplemented and spurred administrative action. Federal courts and agencies developed a subtle yet effective division of labor: administrators could focus on writing rules and guidelines, which more politically insulated judges would then enforce. Freed from the politically onerous job of taking enforcement actions against well-connected businesses and state and local officials, civil rights agencies were emboldened to promulgate aggressive regulations they could never hope to carry out on their own. These administrative rules supplied judges with the "judicially manageable standards" they so often have had difficulty devising on their own. Courts' ability to issue injunctions, to award monetary damages, and to provide attorney's fees not only put real teeth into the enforcement process, but provided strong incentives for private litigants to monitor the behavior of employers and recipients of federal funding. The growth of the civil rights bar, in turn, provided crucial political support for these institutional arrangements when they were threatened by adverse Supreme Court decisions.

In the early 1970s, just as these new patterns were emerging under civil rights statutes, innovate judges on the D.C. Circuit were marking the arrival of what Judge

David Bazelon famously called "a new era in the long and fruitful collaboration of administrative agencies and reviewing courts."[97] According to his colleague Judge Harold Leventhal, courts and agencies "are in a kind of partnership for the purpose of effectuating the legislative mandate."[98] "Our duty," Judge Skelly Wright announced, "is to see that the legislative purposes hearalded in the halls of Congress, are not lost in the vast halls of the federal bureaucracy."[99] These quotations capture the sense that judges had come to view their job not as constraining administrators, but as collaborating with them to produce more effective—and often more ambitious—government programs.[100] As the history of Title VII so vividly illustrates, sometimes vindicating broad "legislative purposes" meant ensuring that inconvenient statutory provisions *are* in fact "lost in the vast halls of the federal bureaucracy." Such a purposive, non-textualist approach to statutory interpretation, Justice Stevens has told us, "builds into the law flexibility, an ability to make nuanced assessments of complex social realities, and an admirable willingness to credit the possibility of progress."

These new institutional arrangements were not carefully planned, but slowly evolved through accidents, miscalculations, experimentation, opportunistic lawyering, and assorted other forms of "muddling through." In the long run these arrangements survived and prospered because they fit so well with key features of the new political environment. Years of divided government eroded Democrats' and civil rights leaders' faith in the executive branch and in New Deal institutional norms. Growing public suspicion of "big government"—and especially centralized bureaucracy—led advocates to search for ways to attack various forms of discrimination without seeming to expand the power of federal bureaucrats. In the case of civil rights, those leading the demand for

"total justice" not only confronted "a set of governmental structures that reflected mistrust of concentrated power,"[101] but increasingly rejected New Deal-style efforts to overcome fragmentation of power through administrative centralization. Within a decade of passage of the civil rights laws of the 1960s, it was clear that the days of "enlightened administration" had come and gone. The era of it adversarial legalism was upon us.

The Rehnquist Court's decisions in *Sandoval*, in the Title VII cases overturned by the Civil Rights Act of 1991, and in a large number of cases limiting the jurisdiction of the federal courts indicate that since the late 1980s the Supreme Court has had second thoughts about the wisdom of the policies and institutional arrangements described above. Indeed, over the past two decades opposition to adversarial legalism has become a guiding theme of Supreme Court jurisprudence.[102] One cannot hope to understand the divisions within the Rehnquist and Roberts Courts without appreciating the extent to which the justices disagree profoundly on whether the civil rights state created through adversarial legalism constitutes an "inspired model" for attacking discrimination or a judicially abetted perversion of federalism and separation of powers.

As every "institutionalist"—old or new—recognizes, once created institutions are usually hard to displace. Despite repeated warnings about imminent retrenchment, the civil rights policies and institutions established in the 1960s and 1970s have proved remarkably resilient. Legal protections first provided to African-Americans on the basis of the extraordinary and (I do not use this word lightly) unique injury done to them have now been extended to a variety of additional groups, some of them defined in rather ambiguous terms. Much of this regulatory regime remains, to use Suzanne Mettler's term, submerged. But it is not weak or ineffective, and it will not soon fade away.

ENDNOTES

[1] Orlando Patterson**.** "The Paradox of Integration," in The Ordeal of Integration: Progress and Resentment in America's "Racial" Crisis (Basic Books, 1997); and Jennifer Hochshild, "You Win Some, You Lose Some: Explaining the Pattern of Success and Failure in the Second Reconstruction," in Keller and Melnick, eds. Taking Stock: American Government in the Twentieth Century (Woodrow Wilson Center Press and Cambridge University Press, 1999).
[2] The phrase initially appeared in Michael Sovern, Legal Restraints on Racial Discrimination in Employment (Twentieth Century Fund, 1966), p. 205
[3] Quoted in Gareth Davies, See Government Grow, (Kansas, 2007), pp. 112-13
[4] The phrase comes from Franklin D. Roosevelt's Commonwealth Club Address, September 23, 1932. For an extended explanation of its significance, see Sidney Milkis, The President and the Parties (Oxford, 1993).
[5] I am indebted to Sean Farhang for pointing out to me the central role the NLRB model played in the thinking of both liberal Democrats and conservative Republicans in the mod-1960s. See below, pp. --.
[6] Howard, The Welfare State Nobody Knows (Princeton, 2007); Mettler, "Reconstituting the Submerged State: The Challenges of Social Policy Reform in the Obama Era, Perspectives on Politics, Vol. 8 #3 (2010), p. 803-24; William Novak, "The Myth of the 'Weak' American State," American Historical Review 113 (2008) and The *People's Welfare:* Law and Regulation in Nineteenth-Century America (UNC Studies in Legal History); Brian Balogh, A Government Out of Sight: The Mystery of National Authority in Nineteenth-Century America (Cambridge, 2009); Adam Sheingate, "Why Can't Americans See the State," The Forum Volume 7, Issue 4 (2009).
7 "Weak State, Strong Policy: Paradoxes of Race Policy in the United States, Great Britain, and France," Studies in American Political Development, vol. 16, fall 2002, p. 139. Also see Robert Lieberman's Shaping Race Policy: The United States in Comparative Perspective (Princeton, 2005)
8 What is Sexual Harassment?" From Capital Hill to the Sorbonne, (University of California Press). Also see Steven Teles, "Positive Action or Affirmative Action? The Persistence of Britain's Antidiscrimination Regime," and Erik Bleich, "The French Model: Color-Blind Integration," both in John Skrenty, ed., The Color Lines: Affirmative Action, Immigration, and Civil Rights Options for America (Chicago, 2001)
9 Pedriana and Stryker, "The Strength of a Weak Agency: Enforcement of Title VII of the 1964 Civil Rights Act and the Expansion of State Capacity, 1965-71", 110 American Journal of Sociology, 709-760 (2004); Frank Dobbin and John R. Sutton, "The Strength of a Weak State: The Rights Revolution and the Rise of Human Resources Management Divisions, 104 American Journal of Sociology, 441-76 (1998), Frank Dobbin, Inventing Equal Opportunity (Princeton, 2009). The first chapter of Dobbin's book is titled, "Regulating Discrimination: The Paradox of a Weak State."
[10] Race Politics in Britain and France: Ideas and Policymaking since the 1960s (Cambridge, 2003), ch.4.
11 Robert Kagan, Adversarial Legalism: The American Way of Law (Harvard, 2001), p. 15
12 Paul Frymer, "Law and American Political Development," 33 Law and Social Inquiry (2008), p. 789; Skrentny, "Law and the American State," Annual Review of Sociology, 2006. vol. 32, pp. 213-44
[13] Frymer, Black and Blue, p. 16
[14] See, for example, Brian K. Landsberg, Free at Last to Vote: The Alabama Origins of the 1965 Voting Rights Act (Kansas, 2007)
[15] Hugh Davis Graham, The Civil Rights Era: Origins and Development of National Policy (Oxford, 1990), p. 103; and, more generally, Ken Kersch, Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law (Cambridge, 2004), ch. 3.
[16] Sean Farhang, The Litigation State: Public Regulation and Private Lawsuits in the U.S. (Princeton, 2010), p. 99.
[17] Quoted in Graham, The Civil Rights Era, p. 426
[18] Ibid, p. 130
[19] House Report #570, p. 19, quoted in Farhang, Litigation State p. 101.
[20] Graham, Civil Rights Era, p. 146
[21] Quoted in Farhang, Litigation State," p. 111
[22] Ibid, p. 106, emphasis added
[23] Graham, Civil Rights Era, pp. 430-31

[24] Blumrosen, Modern Law: The Law Transmission System and Equal Employment Opportunity, (University of Wisconsin Press, 1993), pp. 48-49
[25] Farhang, Litigation State," p. 147.
[26] Greenberg, Crusaders in the Courts: Legal Battles of the Civil Rights Movement, Anniversary Edition (Twelve Tables Press, 2004), p. 443.
[27] Ibid, p. 454
[28] Ibid, p. 443
[29] Blumrosen provides a detailed account of the many ways the EEOC attacked discrimination, encouraged litigants, and promoted affirmative action, Modern Law, chaps. 5, 6, 10, 12, and 14-16. Graham and John Skrentny provide accounts that are not quite as detailed, but more balanced: Civil Rights Era, pp. 190-254 and The Ironies of Affirmative Action, (Chicago, 1996) ch. 5. Robert Lieberman offers a brief description of the cooperation between the EEOC and civil rights groups in his paper, "Private Power and American Bureaucracy: The EEOC and Civil Rights Enforcement," March, 2007.
[30] §703(h), also known as the "Tower amendment." This was a congressional response to the much publicized Motorola decision in Illinois. See Graham, Civil Rights Era, p. 149-50.
[31] George Rutherglen, Employment Discrimination Law: Visions of Equality in Theory and Doctrine, second edition (Foundation Press, 2007), p. 152
[32] Quarles v. Phillip Morris, 279 F. Supp. 505 (E.D.Va., 1968), at 516.
[33] 7036(g), emphasis added
[34] Quoted in Rutherglen, Employment Discrimination Law, p. 17. Justice Rehnquist's dissent in *Weber* provides many more examples of such statements by the leading of supporters of the Civil Rights Act.
[35] 110 Congressional Record 6549 (1964)
[36] Quoted in Graham, Civil Rights Era, p. 150-51
[37] Graham, Civil Rights Era, p. 120
[38] Quoted in Graham, Civil Rights Era, p.106
[39] Blumrosen, Modern Law, 67
[40] Skrentny, Ironies of Affirmative Action, p. 115, emphasis in the original.
[41] Ibid, p. 127
[42] Graham, Civil Rights Era, p. 250, emphasis added
[43] Quoted in Graham Civil Rights Era, p. 250
[44] Blumrosen, Modern Law, p. 75
[45] Blumrosen, Black Employment and the Law (Rutgers, 1971), p. 53
[46] United Steelworkers of America v. Weber 443 U.S. 193 (1979)
[47] See, for example, Justice Rehnquist's dissent in *Weber*, Justice Scalia's dissent in *Johnson v. Transportation Agency*, Nelson Lund, "The Law of Affirmative Action In and After the Civil Rights Act of 1991: Congress Invites Judicial Reform," 6 George Mason Law Review 87 (1997), Herman Belz, Equality Transformed: A Quarter-Century of Affirmative Action (Transaction, 1991), and Graham, Civil Rights Era, chs. 9 and 15.
[48] Black and Blue: African Americans, the Labor Movement, and the Decline of the Democratic Party (Princeton, 2008), p. 87. The most extensive and sophisticated effort to justify the courts' deviation from conventional statutory interpretation is William Eskridge's Dynamic Statutory Interpretation (Harvard, 1994). I highlight the connection between *Weber* and Eskridge's theory of statutory interpretation in "Statutory Reconstruction: The Politics of Eskridge's Interpretation," Georgetown Law Journal (November, 1995).
[49] 401 U.S.424 (1971)
[50] Albemarle Paper Co. v. Moody
[51] 422 U.S. 405 (1975)
[52] 424 U.S.747 (1976)
[53] 480 U.S. 616 (1987)
[54] 279 F. Supp. 505 (E.D. Va.,1968)
[55] 442 F.2d 159 (3rd Cir, 1971)
[56] These decisions are described in Blumrosen, Modern Law, pp. 95-96
[57] Quoted in Derthick, Policymaking for Social Security, p. 26
[58] The Ironies of Affirmative Action, p. 159-60

[59] Quoted in Farhang, Litigation State," p. 145.
[60] Ibid, p. 146.
[61] Ibid,
[62] Ibid. pp. 2, 131-32, and 201.
[63] Thomas Burke, Lawyers, Lawsuits, and Legal Rights: The Battle over Litigation in American Society. (University of California Press, 2002), esp. chs. 2 and 5.
[64] The following paragraph draws on Farhang, pp. 147-55.
[65] I develop this theme at greater length in "From Tax and Spend to Mandate and Sue: Liberalism after the Great Society," in Sidney Milkis and Jerome Mileur, eds., The Great Society and the High Tide of Liberalism (University of Massachusetts Press, 2005).
[66] Quoted in Farhang, Litigation State, p. 155.
[67] For a detailed review of these events, see Reginald C. Govan, "Honorable Compromises and the Moral High Ground: The Conflict between the Rhetoric and the Content of the Civil Rights Act of 1991," 46 Rutgers Law Review 1 (1993).
[68] Rutherglen, Employment Discrimination Law, pp. 157-59
[69] Blumrosen, Modern Law, ch. 15
[70] Environmental Discrimination Law, p. 90
[71] Civil Rights Era, p. 83
[72] H.R. Document #124, 88th Cong., 1st Sess. (1963), p. 12
[73] Orfield, The Reconstruction of Southern Education: The Schools and the 1964 Civil Rights Act (Wiley-Interscience, 1969), pp. 72-75; Beryl Radin Implementation, Change and the federal Bureaucracy: School desegregation Policy in H.E. W., 1964-1968 (Teachers College Press, 1978), pp. 106-107; Allan Wolk, The Presidency and Black Civil Rights: Eisenhower to Nixon (Fairleigh Dickinson University Press, 1971), p.126.
74 I have developed this theme in excessive length in "The Crucible of Desegregation: 'Unitary' Schools in a Divided Court," Paper Prepared for delivery at the Annual Meeting of the American Political Science Association, Seattle, Washington Sept. 1-4, 2011.
[75] Stephen Halpern, On the Limits of the Law: The Ironic Legacy of Title VI of the Civil Rights Act (Johns Hopkins, 1995); Orfield, The Reconstruction of Southern Education; Hugh Davis Graham, "Since 1964: The Paradox of American Civil Right Regulation," in Melnick and Keller, eds., Taking Stock: American Government in the Twentieth Century (Woodrow Wilson Center Press and Cambridge University Press, 1999); Skrentny, The Ironies of Affirmative Action.
[76] Orfield, Reconstruction, p. 340
[77] Quoted in Halpern, On the Limits of the Law, p. 61
[78] Ibid, p. 73
[79] Ibid, pp. 73, 67, and 76,
[80] Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs, Report of the .S. Commission on Civil Rights, June, 1996, p. 40. Beryl Radin adds that within a funding agency the final decision on termination will usually be made by the Office of General Counsel and the Office of the Secretary, not the Office of Civil Rights. The former are usually less willing to cut off funds than is the latter. Implementation, Change, and the Federal Bureaucracy (Teachers College Press, 1977), pp. 125-26
[81] Implementation, p. 14
[82] Halpern, On the Limits of the Law, p. 51-52; Orfield, Reconstruction, pp, 241-43
[83] Frank Read, "Judicial Evolution of the Law of School Integration since Brown v. Board, *39 Law and Contemporary Problems* 7 (1975) at 32. For an extended and intriguing examination of the innovations and internal politics of the Fifth Circuit during the 1960s, see Frank Read and Lucy McGough, Let Them Be Judged: The Judicial Integration of the Deep South (Scarecrow Press, 1978),.
[84] I describe the roles played by OCR, the Fifth Circuit, and the Supreme Court in moving toward a policy of desegregation "by the numbers" in "The Crucible of Desegregation: 'Unitary' Schools in a Divided Court."
[85] For an extended examination of the former, see Michael Rebell and Arthur Block, Equality and Education: Federal Civil Rights Enforcement in the New York City School System(Princeton, 1985). On the latter, see Gareth Davies, See Government Grow, ch. 6 and John Skrentny, The Minority Rights Revolution (Harvard, 2002), ch. 7.

[86] Quoted in Davies, p. 151.
[87] Quoted in Davies, p. 153
[88] Davies, pp. 147-57.
[89] Lau v. Nichols 414 U.S.563 (1974)
[90] Davies, See Government Grow, pp. 160-1
[91] Guardians Association of NYC Police Dept. v. Civil Service Commission 463 U.S. 582 (1983)
[92] Franklin v. Gwinnett County Public Schools 503 U.S. 60 (1992) and Gebster v. Lago Vista Independent School District 524 U.S. 274 (1998)
[93] Davis v. Monroe County Board of Education 526 U.S. (1999)
[94] Alexander v. Sandoval 532 U.S. 275 (2001).
[95] Jackson v. Birmingham Boar of Education 544 U.S. --- (2005)
[96] 377 U.S. 426 (1964), at 433
[97] EDF v. Ruckelshaus, 439 F.2d 589 (D.C. Circuit, 1971) at 597
[98] Portland Cement Assoc. v. Ruckelshaus, 486 F. 2d 375(D.C. Cir., 1973), at 394
[99] Calvert Cliffs Coordinating Committee v AEC, 449 F. 2d 1109(D.C. Cir., 1971), at 1111
[100] I provide additional support for this argument in "The Politics of Partnership," 45 Public Administration Review 653 (1985)
[101] Kagan, Adversarial Legalism, p. 15
[102] See Andrew Siegel. "The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence," 84 Texas Law Review 1097 (2006); and Melnick, "Deregulating the States: The Political Jurisprudence of the Rehnquist Court," in Tom Ginsburg and Robert Kagan, eds., Institutions and Public Law: Comparative Approaches (Peter Lang, 2005).