

# The Political Development of Job Discrimination Litigation, 1963–1976

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*In lobbying for the job discrimination provisions of the Civil Rights Act (CRA) of 1964, liberal civil rights advocates wanted an administrative job discrimination enforcement regime modeled on the National Labor Relations Board (NLRB), with no private lawsuits. Pivotal conservative Republicans, empowered by a divided Democratic Party and the filibuster in the Senate, defeated an administrative framework and provided instead for private lawsuits with incentives for enforcement, including attorney's fees for winning plaintiffs. They were motivated by native suspicion toward bureaucratic regulation of business in general, as well as fear that they would not be able to control an NLRB-style civil rights agency in the hands of their ideological adversaries. In the political environment of 1963–64, some meaningful enforcement provisions were necessary, and to conservative Republicans private litigation was preferable to public bureaucracy.*

*This choice had important self-reinforcing policy feedback effects. Civil rights advocates were initially optimistic about agency implementation and skeptical about the efficacy of private litigation to enforce Title VII, even with attorney's fees for winning plaintiffs. In the late 1960s and early 1970s, however, civil rights advocates observed an agency lacking the material resources and political will and commitment to carry out its mission. At the same time, they observed levels of private enforcement that far exceeded their expectations, as well as courts inclined toward broadly proplaintiff interpretations of Title VII. The CRA of 1964's attorney's fees provisions also had the effect of contributing funds to civil rights groups that prosecuted lawsuits and of conjuring into being a private, for-profit bar to litigate civil rights claims in general, and job discrimination claims in particular. These developments drove a transformation in the enforcement preferences of civil rights groups toward private litigation, weakening their historic support for administrative implementation. Working together with the burgeoning for-profit civil rights bar, they mobilized to expand the fee-shifting provisions of the CRA of 1964 across the entire field of civil rights, which they accomplished by successfully lobbying for enactment of the Civil Rights Attorney's Fees Awards Act of 1976. Thus was created the modern civil rights enforcement framework.*

## INTRODUCTION

Next to petitions by prisoners to be set free, job discrimination lawsuits are the single largest category of litigation in federal courts. Between 2000 and 2005, the annual number of such lawsuits averaged 20,305, representing an astonishing 18 percent of all nonprisoner lawsuits filed to enforce federal statutes.<sup>1</sup> The federal government prosecuted two percent of these job discrimination suits, whereas 98 percent were litigated by private parties. This article asks a

straightforward question: Why has the United States relied so overwhelmingly on private lawsuits to implement federal job discrimination statutes? The answer I provide is deeply grounded in political and policy conflict among lawmakers and their constituents, channeled through the fragmented structure of the American state.

I start from the premise that a critical part of the answer concerns the way federal job discrimination statutes—the most important of which is the foundational Title VII of the Civil Rights Act (CRA) of 1964—are written. The existence and extent of private litigation enforcing a statute is to an important degree the product of legislative choice over questions of statutory design.<sup>2</sup> One need only consider two of the largest major federal interventions in the

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1. *Annual Report of the Administrative Office of the United States Courts*, Table C-2, 2000–2005.

2. See, e.g., Robert A. Kagan, *Adversarial Legalism: The American Way of Law* (Cambridge: Harvard University Press, 2001); Thomas F. Burke, *Lawyers, Lawsuits, and Legal Rights: The Battle Over Litigation in American Society* (Berkeley: University of California Press, 2002);

employment relationship—one before the CRA of 1964 and one after it—to drive this point home. Although they created a wide array of rights for workers, neither the National Labor Relations Act of 1935 nor the Occupational Safety and Health Act of 1970 allowed private enforcement lawsuits for implementation. In those laws, Congress instead opted for bureaucracy-centered enforcement regimes that empowered administrators to undertake investigations, hold hearings, and issue orders. When Congress does choose to rely on private litigation by including a private right of action in a statute, it faces a series of additional choices of statutory design concerning available remedies, who will bear the costs of litigation, judge-versus-jury finding, and rules of standing and proof that together can have profound consequences for how much or how little private enforcement litigation will actually be mobilized. I refer to this system of rules as a statute's *private enforcement regime*.

Although private plaintiff-driven civil rights litigation is so familiar a part of the American legal landscape that it has an air of inevitability, this approach to implementing job discrimination laws was not foreordained. To the contrary, a resolutely bureaucracy-centered approach to remedying job discrimination, founded on administrative cease-and-desist authority and excluding the private right to sue, actually represented the overwhelmingly dominant model in 1964. Of twenty-eight states with fair employment practice laws in 1964, twenty-one utilized the administrative cease-and-desist model, four utilized only criminal and no civil sanctions, and three lacked enforcement provisions and were strictly voluntary.<sup>3</sup> Only a single United States territory—Puerto Rico—utilized the enforcement model that Congress would ultimately follow in the job discrimination provisions of the CRA of 1964: private civil actions in court, with economic damages and attorney fee awards for winning plaintiffs.<sup>4</sup> The dominance of private litigation in enforcing the federal job discrimination laws that we take for granted today was a remarkably anomalous departure in 1964. That departure powerfully figured the civil rights landscape in the United States, and with it the federal civil docket. Why did it happen?

### Existing Accounts of Congress' Choice to Incentivize Private Title VII Lawsuits

Scholars attempting to explain why Congress relied so overwhelmingly on private litigation for implementation of Title VII have emphasized not just its private right of action, but also its provision allowing winning plaintiffs to recover attorney's fees, which was clearly intended to facilitate, rather than merely permit, private enforcement litigation. As will be discussed below, earlier civil rights laws allowing for private enforcement and civil liability, but lacking fee recovery for winning plaintiffs, had gone severely under-enforced despite widespread discrimination. Title VII's fee-recovery provision provided an important mechanism to actually generate substantial levels of private enforcement. One line of argument contends that Congress included the fee-shifting provision in Title VII due to lack of state capacity to fulfill enforcement needs. On this view, Congress's inclusion of the fee-shifting provision expressed a "realiz[ation] that the federal government would be unable to handle all of the cases involving this type of discrimination,"<sup>5</sup> and represented, according to Lee Epstein and Karen O'Connor, a "[r]ecognition of the fact that the resources of the federal government would be inadequate to enforce fully" Title VII's promise of equality.<sup>6</sup> The dominance of private litigation in Title VII implementation, then, resulted from Congress's policy judgment that the national government lacked the resources to handle the enforcement task. Lack of state resources to enforce, or the desire to avoid raising revenue for this purpose, has been suggested as an explanation for legislators' choice to fashion laws in a manner calculated to mobilize private litigants across the whole range of policy domains.<sup>7</sup>

A second and quite different line of argument is proffered by Paul Frymer in his recent book, *Black and Blue: African Americans, the Labor Movement, and the Decline of the Democratic Party*. Frymer maintains that the legislators who crafted and passed the CRA of 1964 were primarily concerned with taking credit for popular and high-sounding civil rights policies, but not with the technical details of enforcement provisions. Rent-seeking "trial lawyers'" associations, which had "concentrated interests" in obtaining "particularized benefits" in the form of monetary gains from litigating employment discrimination claims, acted "under the radar," scarcely noticed by civil

R. Shep Melnick, *Between the Lines: Interpreting Welfare Rights* (Washington, D.C.: The Brookings Institution, 1994).

3. Equal Employment Opportunity Commission, *Legislative History of Titles VII and XI of Civil Rights Act of 1964* (Washington D.C.: United States Government Printing Office, 1968), 5–6; Bureau of National Affairs, *State Fair Employment Laws and Their Administration: Texts, Federal State Cooperation, Prohibited Acts* (Washington, D.C.: Bureau of National Affairs, Inc., 1964).

4. Bureau of National Affairs, *State Fair Employment Laws and Their Administration*, 237–38.

5. Mary Frances Derfner, "One Giant Step: The Civil Rights Attorney's Fees Awards Act of 1976," *Saint Louis University Law Journal* 21 (1977): 441–451, 422.

6. Karen O'Connor and Lee Epstein, "Bridging the Gap between Congress and the Supreme Court: Interest Groups and the Erosion of the American Rule Governing Awards of Attorneys Fees," *Western Political Quarterly* 38 (1985): 238–49, 239.

7. Kagan, *Adversarial Legalism*, 15; Burke, *Lawyers, Lawsuits, and Legal Rights*, 15–16.

rights opponents, to persuade legislators to adopt enforcement provisions utilizing private litigation and attorney's fees for winning plaintiffs.<sup>8</sup> According to Frymer, Title VII's private right of action, with fee shifting for winning plaintiffs, was not motivated by policy judgment at all. Rather, "non-ideological factors"—the pursuit of money by lawyers—"explain why lawyers and courts became the chief enforcers of labor civil rights."<sup>9</sup> To the extent that there was any political calculation by legislators, the Democratic Party, which controlled Congress and the presidency in 1964, preferred court-centered enforcement because, posing a lesser threat of rupturing a party coalition so deeply divided over race, it was a "quieter" and "politically safer" implementation vehicle.<sup>10</sup> The contention that legislators, particularly congressional Democrats, have written regulatory laws in a manner promoting private litigation in response to demand by rent-seeking lawyers has been broadly asserted across the entire range of policy domains.<sup>11</sup>

### Theoretical Perspectives on Institutional Creation and Development

The construction, consolidation, and spread of Title VII's private enforcement regime, which I trace in this paper, represent important events of institutional creation and development. Before turning to them, it will be useful to highlight some theoretical perspectives on institution building that help to crystallize key dynamics of the story presented, which differs sharply from the existing accounts just sketched. The events are best captured by a braiding of both strategic rational choice accounts of institutional creation, and developmental theories (which can also be rationalist) that incorporate unanticipated postcreation self-reinforcing processes as critical variables for explaining institutional persistence and growth.

According to standard rational choice assumptions, explains Peter Ordershook, "political institutions are the products of the self-interest of those who establish

them."<sup>12</sup> As a result, rational choice scholars generally try to explain the existence and contours of institutions by examining the incentives faced by the actors who created them. In this sense, according to Robert Keohane, in rational choice explanations for institutions "effect explains cause."<sup>13</sup> Paul Pierson has observed that in practice, rational choice scholars have sometimes *inferred* the interests of institution creators from the *current performance* of institutions.<sup>14</sup> This move, of course, entails an assumption that institutions will perform consistently with the expectations of their creators. Indeed, James Alt and Kenneth Shepsle suggest that a defining characteristic of rational choice explanations for institutions is the "recognition that those responsible for changing an institution can anticipate any effect of an institutional change."<sup>15</sup> While this assumption will rarely be fully met, the more it holds up, the more plausible it is that we can gain a reasonable understanding of the causes of an institution from a "snapshot," as Pierson puts it, of evidence at the time of its creation.

This approach of retrospectively inducing the cause of an institution from its current effects, while sometimes quite powerful, has important limitations that are relevant to understanding the origins and development of job discrimination litigation. The first is that institution designers may not have had a unitary intent at all. Sometimes institutions represent a negotiated compromise between rational, goal-oriented actors with *conflicting* goals. Eric Schickler characterizes such institutions as "common carriers," emphasizing that their existence is explicable precisely in terms of their ability to serve multiple and even conflicting constituencies; such compromise institutions are especially likely when the institution being created is "distributional" in the sense that the more it gives to one party to the negotiation, the less it gives to another, as contrasted with institutions that overcome coordination problems.<sup>16</sup>

That multiple and conflicting intents can be embedded in a single institution, of course, is not at all in conflict with a rationalist account of institutional design, and in fact can be quite consistent with it; however, it does counsel in favor of the need for

8. Paul Frymer, *Black and Blue: African Americans, the Labor Movement, and the Decline of the Democratic Party* (Princeton: Princeton University Press, 2007): 14–15, 76–94, 130–37.

9. Frymer, *Black and Blue*, 78.

10. Frymer, *Black and Blue*, 7, 14.

11. See, e.g., Phillip B. Heymann and Lance Liebman, "No Fault, No Fee: The Legal Profession and Federal No-Fault Automobile Insurance Legislation," *The Social Responsibilities of Lawyers*, ed. Phillip B. Heymann and Lance Liebman (Westbury: Foundation Press, 1988), 309; Alan S. Rau, Edward F. Sherman, and Scott R. Peppet, *The Process of Dispute Resolution: The Role of Lawyers* 4th ed. (New York: Foundation Press, 2006), 56; Michelle J. White, "Legal Complexity and Lawyers' Benefit from Litigation," *International Review of Law and Economics* 12 (1992): 381–95, 394–95; Randolph I. Gordon and Brook Assefa, "A Tale of Two Initiatives: Where Propaganda Meets Fact in the Debate Over America's Health Care," *Seattle Journal for Social Justice* 4 (2006): 693; Roberta Romano, "The Sarbanes-Oxley Act and the Making of Quack Corporate Governance," *Yale Law Journal* 114 (2005): 1521–1611.

12. Peter Ordershook, "The Emerging Discipline of Political Economy," in *Perspectives on Positive Political Economy*, ed. James Alt and Kenneth Shepsle (Cambridge: Cambridge University Press, 1990), 9–30, 13.

13. Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton: Princeton University Press, 1984), 80.

14. Paul Pierson, *Politics in Time: History, Institutions, and Social Analysis* (Princeton: Princeton University Press, 2004), ch. 4.

15. James Alt and Kenneth Shepsle, "Editors' Introduction," in *Perspectives on Positive Political Economy*, ed. James Alt and Kenneth Shepsle (Cambridge: Cambridge University Press, 1990), 1–5, 2.

16. Eric Schickler, *Disjointed Pluralism: Institutional Innovation and the Development of the U.S. Congress* (Princeton: Princeton University Press, 2001), 13; Michael McFaul, "Institutional Design, Uncertainty, and Path Dependency during Transitions: Cases from Russia," *Constitutional Political Economy* 10 (1999): 27–52, 29–30.

historically specific evidence of the motives behind an institution's creation. Even when institutions perform consistently with their creators' expectations, multiple and conflicting intents—as contrasted with a unitary intent scenario—will be less apparent from simply examining the content and performance of the institution. Put another way, retrospectively inducing the logic of institutional creation from current institutional effects will be especially prone to error in the case of multiple and conflicting intents.

A second limitation of retrospectively inducing the intent of institution creators from the institution's subsequent performance is that the strong rational choice assumption of the predictability of institutional effects is sometimes violated. When significant gaps open up over time between the intent of institution designers and subsequent institutional effects, a cross-sectional snapshot perspective focusing on the time of creation will likely be inadequate to provide a causal account of the institution's current form and performance. In such a scenario the researcher may be aided by taking a long-run developmental perspective, viewing the institution's creation and subsequent transformations through a wider historical lens.<sup>17</sup> Gaps between the intent of institution designers and subsequent institutional effects can arise because designers often face considerable uncertainty and their institutional choices may have unanticipated consequences, sometimes powerfully so.

This uncertainty stems from a combination of the complexity of modern polities and the boundedness of human rationality. The complexity of modern polities creates considerable interdependence among social actors and interests, and in this dense environment of action and reaction, significant policy interventions can have consequences that are very hard to predict. This problem is exacerbated by the cognitive limits of human beings, who have a constrained capacity to predict the sometimes very complex and attenuated chain of “feedbacks” that will flow from a policy intervention. The result of complexity and bounded rationality is that sometimes the expectations of important policy actors about the consequences of a policy intervention are badly mistaken.<sup>18</sup>

Among forms of unanticipated policy feedback, the “self-reinforcing” type is critical to the story of job discrimination litigation. The long-run growth and entrenchment of an institution can turn upon whether it generates self-reinforcing dynamics. If so, a policy intervention can set in motion self-

reinforcing processes that lead to its growth into an intervention of far larger than anticipated magnitude.<sup>19</sup> Two distinctive self-reinforcing feedback processes are critical to the present discussion. First, an initial policy intervention can generate policy learning that transforms the preferences of important policy actors, altering their understanding of what is possible or desirable, thereby increasing demand to retain the policy and expand its application.<sup>20</sup> Second, an initial policy intervention can create valuable goods—political, policy, or personal resources and opportunities—that social groups mobilize to defend and enlarge.<sup>21</sup>

Such self-reinforcing policy feedback processes, causing the growth and entrenchment of an institution in a manner or to an extent unanticipated by its creators, should be distinguished from what institutional scholars characterize as wholly “unintended consequences” of a policy intervention. Paul Pierson observes, for example, that due to “interaction effects” among parts of complex social systems, policy interventions sometimes produce “important consequences for *realms outside those originally intended* [and] . . . generate elaborate feedback loops . . . [that] decision makers cannot hope to fully anticipate.”<sup>22</sup> With self-reinforcing policy feedback effects, intervention A endeavors to have an effect on B, and it succeeds, but to a much greater extent than expected. In the strong formulation of the unintended consequences scenario, intervention A endeavors to have an effect on B, and it ends up, through interaction effects, having an unintended and important effect on Q. The two processes are related but distinct.

### An Overview of the Narrative to Follow and its Significance

It is abundantly clear that those who did battle over the framing of Title VII's enforcement provisions in

19. Pierson, “The Study of Policy Development,” 38–39; Jervis, *System Effects*, ch. 4; Christopher Howard, *The Hidden Welfare State* (Princeton: Princeton University Press, 1997), 93–94.

20. Pierson, *Dismantling the Welfare State?*, 41–42; Hugh Helco, *Modern Social Politics in Britain and Sweden* (New Haven: Yale University Press, 1974), 305–16; Edwin Amenta, Elisabeth Clemens, Jefren Olsen, Sunita Parikh, and Theda Skocpol, “The Political Origins of Unemployment Insurance in Five American States,” *Studies in American Political Development* 2 (1987): 137–82; Jervis, *System Effects*, ch. 4.

21. Paul Pierson, *Dismantling the Welfare State? Reagan, Thatcher and the Politics of Retrenchment* (Cambridge: Cambridge University Press, 1994), 40; Margaret Weir and Theda Skocpol, “State Structures and the Possibilities for ‘Keynesian’ Responses to the Great Depression in Sweden, Britain, and the United States,” *Bringing the State Back In*, ed. Peter Evans, Dietrich Rueschemeyer, and Theda Skocpol (Cambridge: Cambridge University Press, 1985): 107–63, 143–44; Theda Skocpol, “The Origins of Social Policy In the United States,” *The Dynamics of American Politics*, ed. Lawrence C. Dodd and Calvin Jillson (Boulder: Westview Press, 1994); Eric Patashnik, “After the Public Interest Prevails: The Political Sustainability of Policy Reform,” *Governance* 16 (2003): 203–34.

22. Paul Pierson, “The Study of Policy Development,”<sup>43</sup> (emphasis added).

17. Pierson, *Politics in Time*, ch. 4.

18. Paul Pierson, “The Study of Policy Development,” *Journal of Policy History* 17 (2005): 34–51; Robert Jervis, *System Effects: Complexity in Political and Social Life* (Princeton: Princeton University Press, 1997), chapter 4; Barbara Levitt and James G. March, “Organizational Learning,” *Annual Review of Sociology* 14 (1988): 319–40, 323.

1963–64 and ultimately determined their content were goal-oriented, purposive, and strategic actors self-consciously attempting to maximize on policy objectives. The ultimate outcome was a compromise between conservative Republicans and liberal Democrats. In 1963–64, liberal Democrats and civil rights groups wanted an agency modeled on the National Labor Relations Board (NLRB) with adjudicatory and cease-and-desist powers for Title VII enforcement, *without* private litigation. They were skeptical about the capacity of private litigation, even with fee shifting, to overcome obstacles faced by private enforcers in the job discrimination context.

Conservative Republicans, made pivotal to the CRA of 1964's passage both by southern Democrats' vehement opposition to civil rights legislation and by the filibuster in the Senate, authored Title VII's private enforcement regime. Republicans were natively circumspect toward bureaucratic regulation of their business constituents in general. Given American separation of powers arrangements, they were also acutely fearful, with ample historical precedent, that they would not be able to control aggressive enforcement by an NLRB-style civil rights agency under the ideological influence of interventionist Democratic presidents. At the same time, given the explosive salience of civil rights in the electoral environment of 1963–64, they had to offer a meaningful enforcement alternative to civil rights advocates or risk killing the bill and being blamed for its death. Civil rights advocates insisted that if private enforcement was the best they could do, provisions aimed at overcoming economic obstacles to private civil rights enforcement, such as allowing winning plaintiffs to recover attorney's fees, had to be included. Republicans wielded their veto powers to beat back bureaucratic state building by liberal civil rights advocates, offering in its stead private litigation with attorney's fees for winning plaintiffs. Title VII's private enforcement regime was a "common carrier" of pivotal Republicans' desire to defeat bureaucratic state building, and civil rights liberals' desire to maximize enforcement if private litigation was the best they could do.

Although the founding, in 1963–64, of Title VII's private enforcement regime was rooted in ideological conflict on the terrain of America's fragmented political institutions, its entrenchment and expansion in the 1970s flowed mainly as policy feedback effects from the 1964 Act. These feedback effects were self-reinforcing and led to the entrenchment and growth of private civil rights enforcement, both by generating policy learning that transformed civil rights advocates' preferences, and by creating resources and opportunities that groups mobilized to defend and extend. By the late 1960s, during a campaign to give the EEOC cease-and-desist powers, civil rights advocates refused to give up private lawsuits with fee shifting in exchange for the pure administrative cease-and-desist framework that they had

unsuccessfully sought in 1963–64. They pushed instead for a hybrid private litigation/cease-and-desist model in which private litigation would essentially serve as a safety valve, providing a measure of insulation from deficiencies in agency performance.

In Title VII's early years, civil rights advocates had witnessed an executive enforcement machinery lacking both the material resources and the political will and commitment to carry out its mission as they conceived it. At the same time, empowered by the private enforcement provisions offered by Republicans in 1963–64, they found themselves at the leading edge of Title VII enforcement, wielding the weapon of private litigation to make what they judged to be new, meaningful, and gratifying inroads into labor markets previously foreclosed to African Americans. By the late 1960s, civil rights advocates decided they could not afford to rely solely upon the beneficence of bureaucrats. Private litigation with fee shifting, as an insurance policy against under-enforcement by the executive branch, was too valuable to give up.

Additional self-reinforcing policy feedback effects from Title VII's private enforcement regime reverberated through the first half of the 1970s, ultimately causing its fee-shifting approach to spread across the entire field of civil rights. Title VII's central reliance on private enforcement, with attorney's fees for successful plaintiffs, was critical in fostering the growth of civil rights legal advocacy groups and spawning a for-profit civil rights bar, which together increased demand for fee shifting in the domain of civil rights. By the early to mid-1970s, the successful mobilization of considerable levels of private enforcement by for-profit attorneys had dispelled skepticism among civil rights advocates about the capacity of fee shifting to generate an adequate volume of private enforcement. With the NAACP leading the way in the lobbying effort, civil rights groups succeeded in securing legislative extension of Title VII's fee-shifting language, verbatim, across the entire field of civil rights, most significantly with the Civil Rights Attorney's Fees Awards Act of 1976. To justify passage, a broad and bipartisan coalition of legislators pointed both to the success of fee shifting in mobilizing robust private enforcement under the CRA of 1964, and to its ability to do so without increasing budgets or bureaucracy. Thus was created the modern approach to civil rights enforcement.

Title VII's private enforcement regime proved, over time, to be far more robust than either conservatives or liberals had expected. However, it would be a mistake to regard these effects as "unintended consequences" in the sense that institutional scholars often use that phrase to mean producing effects in "realms outside those originally intended."<sup>23</sup> The purpose of

23. Pierson, "The Study of Policy Development," 43.

the private enforcement regime was to provide for enforcement through private litigation, and its details were the subject of extensive scrutiny and controversy. Civil rights advocates insisted on fee shifting (among other provisions) with the specific aim and hope of actually mobilizing private enforcers in significant numbers. That the volume and efficacy of Title VII litigation far exceeded anyone's expectations is a story of self-reinforcing policy feedback: the effects occurred in precisely the realm intended, but their magnitude was far greater than expected. The question naturally arises as to whether the conservative Republican defeat of liberal administrative state building, in favor of an enforcement framework that ultimately generated a huge number of lawsuits against employers, was a mistake from their own point of view. This question is complicated, and I take it up in the conclusion.

The story of job discrimination litigation's political development offers two linked lessons. First, one virtue of studying policy choices and their ramifications within a wide historical lens is that their significance will sometimes be missed if the inquiry is limited to understandings contemporaneous with the policy transaction. All participants in the legislative events that produced the CRA of 1964 understood Republicans' substitution of private litigation for administrative power as a move that diminished the assertiveness of the enforcement regime. Many scholarly treatments of these events are marked by an elegiac tone echoing liberal disappointment expressed in 1963–64 and bemoaning the Republican evisceration and enfeeblement of what might have been a muscular apparatus for policing job discrimination.<sup>24</sup> The historical analysis offered here, however, reveals that Republicans' substitution of private litigation for administrative authority had powerful self-reinforcing feedback effects that, over time, transformed civil rights activists' preferences to the point that the private litigation-centered

framework, regarded by civil rights advocates as a defeat in 1964, came to be embraced as their salvation.

A second and linked lesson concerns American regulatory state capacity. Many scholars have mistaken strength for weakness in the Republican-authored Title VII enforcement provisions. Students of state capacity among political scientists and political sociologists largely operate within a narrow, bureaucracy-centered conception of what the state is. "State-centered regimes," according to James Q. Wilson, "are executive-centered regimes, and executive-centered regimes are dominated by their bureaucracies . . . [and] mak[e] the administrative apparatus the center of official action."<sup>25</sup> The literature on American political development, which has given greater attention to American state capacity than any other literature in American political science, operates squarely within this conceptual framework, treating state capacity "as a function of instrumental resources including money, trained personnel and formal powers, and also of the infrastructural resource of bureaucratic development."<sup>26</sup>

Private enforcement litigation, however straightforwardly coercive, falls outside the scope of vision characteristic of this approach to the state and, more broadly, beyond conventional definitional boundaries of the state. Consequently, its crucial role in the functioning of the American regulatory state—indeed, its very "stateness"—has been neglected by scholars who study state capacity. The story of federal job discrimination laws highlights why this conceptual orientation toward the state is so limiting. The existence and extent of private job discrimination litigation emanated from choices intentionally made in Congress between 1963 and 1976. Private enforcement litigation was self-consciously deployed by legislators, who recognized it largely as a substitute for administrative power, with the purpose of achieving state objectives.

24. See, e.g., Judith Stein, *Running Steel, Running America: Race, Economic Policy and the Decline of Liberalism* (Chapel Hill: University of North Carolina Press, 1998), 84–85; Tony Chen, *The Fifth Freedom: Jobs, Politics, and Civil Rights in the United States, 1941–72* (Princeton: Princeton University Press, 2009), ch. 5 (all citations are to a draft manuscript provided by Chen); Daniel Rodriguez and Barry Weingast, "The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and its Interpretation," *University of Pennsylvania Law Review* 151 (2003): 1489–96; John D. Skrentny, *The Ironies of Affirmative Action: Politics, Culture, and Justice in America* (Chicago: University of Chicago Press, 1996), 120–25. Two recent works deviate from this tendency: Robert Lieberman suggests that the EEOC's hand was actually strengthened by lack of formal powers, which led it to forge effective alliances with civil rights groups, and Paul Frymer emphasizes that private litigation, with fee shifting, proved to be a potent weapon wielded against discriminatory practices by labor unions by imposing large financial costs on them. Robert C. Lieberman, *Shaping Race Policy: The United States in Comparative Perspective* (Princeton, NJ: Princeton University Press, 2005); Frymer, *Black and Blue*.

## THE CIVIL RIGHTS ACT OF 1964

### Institutional and Political Strategic Context

Understanding the legislative outcome on fair employment practice enforcement in 1964 requires bearing in mind the institutional and electoral strategic context that produced it. In the two post-war decades leading to passage of the CRA of 1964, the most vociferous opponents of civil rights legislation, overwhelmingly southern Democrats, regularly

25. James Q. Wilson, *Bureaucracy: What Government Agencies Do and Why They Do It* (New York: Basic Books, 1989), 311.

26. Nicholas Pedriana and Robin Striker, "The Strength of a Weak Agency: Enforcement of Title VII of the 1964 Civil Rights Act and the Expansion of State Capacity, 1965–1971," *American Journal of Sociology* 110 (2004): 709–760, 711.

exploited the veto points riddling Congress to kill civil rights bills that could have commanded a simple majority in a floor vote.<sup>27</sup> The committee system in which seniority was paramount, coupled with the longevity of southern legislators in what was effectively a one-party regime in the region, guaranteed to southerners gate-keeping control of key committees, which they used to quash civil rights bills time and again. The Senate Judiciary Committee, chaired from the 84<sup>th</sup> to the 95<sup>th</sup> Congresses by Mississippi Democrat and fervent civil rights foe James Eastland (D-MI), was widely known as a “graveyard of civil rights legislation.”<sup>28</sup> The most significant obstacle, however, was the Senate filibuster rule that allowed a bill to be defeated by 34 votes against ending debate. The southern Democratic anticivil rights block needed a relatively modest number of conservative Republicans, with antibusiness regulation and/or states rights leanings, to join them in order to defeat cloture, something they consistently achieved to repulse race legislation that would threaten Jim Crow. As an institutional terrain that civil rights legislation had to circumnavigate, Congress was a counter-majoritarian minefield.

In the years leading up to the battle over the CRA of 1964, however, both parties had electoral incentives to try. Between the mid-1950s and the early 1960s, the historic, moving, and, to some, frightening achievements of the black civil rights movement in Montgomery, Little Rock, Greensboro, and Birmingham, and the often brutal and sometimes deadly white southern reactions to them, effected dramatic change in the climate of opinion in the United States in favor of civil rights legislation. Civil rights were thereby forced onto the federal legislative agenda and became an important locus of party competition.<sup>29</sup> Although the black vote was solidly Democratic in the presidential elections of 1956 and 1960, it was not overwhelmingly so, as it would become and remain for decades after the bid for the presidency in 1964 by Goldwater, who had voted

against the act.<sup>30</sup> In view of their southern wing, Democrats were no more identified in the mind of the American voter as the party of black civil rights than were Republicans during this period, and Republicans had successfully underscored southern Democratic obstruction of civil rights legislation to make some inroads among black voters.<sup>31</sup> Following introduction of the Kennedy administration’s omnibus civil rights bill in 1963, although northern Democrats were certainly its keenest advocates, a majority of both parties, with an uneasy gaze fixed on the 1964 elections, would want to claim credit for its successes, and perhaps even more were anxious to avoid having responsibility for its failures laid at their feet.

In 1963–64, members of Congress could be broadly grouped into three types on civil rights issues.<sup>32</sup> Northern liberals, predominantly but not exclusively Democrats, were ardent civil right advocates. Nearly all southern Democrats and the most staunchly conservative Republicans were devoted and predictable opponents. Between these two poles, moderate and many conservative Republicans, largely from the Northeast and Midwest, were possible supporters of civil rights legislation, though there were definite limits to the level of intervention in the economy and encroachment on state prerogative that they would tolerate. A substantial share of these Republicans, neither certain supporters nor certain opponents of civil rights legislation, would be needed to pass the Kennedy administration’s bill, particularly in the Senate to break the filibuster. These Republicans were the pivotal voters in the legislative process that produced the Civil Rights Act of 1964.<sup>33</sup>

### Conflicts Over Civil Rights Enforcement in the Late 1950s

Growing demand for civil rights legislation in the second half of the 1950s produced the Civil Rights Acts of 1957 and 1960, the first federal civil rights laws to be enacted since 1875. The 1957 Act created the U.S. Commission on Civil Rights to study violations of voting and other civil rights and to recommend remedial legislation; created the Civil Rights Division in the Justice Department; and

27. Robert A. Caro, *Master of the Senate* (New York: Alfred A. Knopf, 2002), 78–108; William N. Eskridge, “Reneging on History? Playing the Court/Congress/President Civil Rights Game,” *California Law Review* 79 (1991): 613–84, 619 & n.27; Rodriguez and Weingast, “The Positive Political Theory of Legislative History,” 1417–1542; Chen, *The Fifth Freedom*, ch. 5.

28. Charles and Barbara Whalen, *The Longest Debate: A Legislative History of the 1964 Civil Rights Act* (Washington, D.C.: Seven Locks Press, 1985), 4.

29. Thomas Byrne Edsall and Mary D. Edsall, *Chain Reaction: The Impact of Race, Rights, and Taxes on American Politics* (New York: Norton, 1992), 36; James L. Sundquist, *Politics and Policy: The Eisenhower, Kennedy, and Johnson Years* (Washington, Brookings Institution, 1968), 221–71; Denton L. Watson, *Lion in the Lobby: Clarence Mitchell, Jr.’s Struggle for the Passage of Civil Rights Laws* (New York: Morrow, 1990), 485–625; Whalen and Whalen, *The Longest Debate*, 13; Chen, *The Fifth Freedom*, ch. 5.

30. Edward G. Carmines and James A. Stimson, *Issue Evolution: Race and the Transformation of American Politics* (Princeton, N.J.: Princeton University Press), 46.

31. Edsall and Edsall, *Chain Reaction*, 36; Sundquist, *Politics and Policy*, 230.

32. Rodriguez and Weingast, “The Positive Political Theory of Legislative History,” 1456.

33. Chen, *The Fifth Freedom*, ch. 5; David B. Filvaroff and Raymond E. Wolfinger, “The Origin and Enactment of the Civil Rights Act of 1964,” *Legacies of the 1964 Civil Rights Act*, ed. Bernard Grofman (Charlottesville: University Press of Virginia, 2000), 14–18; Lieberman, *Shaping Race Policy*, 160–61; Rodriguez and Weingast, “The Positive Political Theory of Legislative History,” 1481–87.

empowered the Justice Department to file civil actions and obtain injunctions in certain voting rights cases.<sup>34</sup> The 1960 Act empowered federal judges, upon finding a “pattern or practice” of voting discrimination, to appoint federal referees authorized to register voters, laid out standards for doing so, and required the maintenance of certain voting records.<sup>35</sup> Most salient to the present discussion, however, were provisions of both bills struck as a condition of passage in the Senate.

The essential legislative conflicts in both 1957 and 1960 were focused overwhelmingly on the allocation of powers to enforce civil rights laws, not on substantive rights.<sup>36</sup> Civil rights advocates in Congress proposed in both laws inclusion of provisions authorizing the Attorney General to prosecute civil actions and obtain injunctions on behalf of aggrieved parties under all federal civil rights laws. This would have included, perhaps most prominently, the Civil Rights Act of 1871, which prohibited the deprivation of *any* federal right by a state actor, including the Fourteenth Amendment right to equal treatment without respect to race, in such domains as schooling, voting, employment, and public facilities of any kind. The prospect of across-the-board civil rights enforcement by national authorities provoked fierce opposition by southerners in both 1957 and 1960.<sup>37</sup> In order to overcome opposition and pass some civil rights legislation, the across-the-board federal enforcement powers were dropped in both years.

The Reconstruction civil rights laws that would have been covered by the defeated federal enforcement authority already contained private rights of action, as did many state civil rights laws. However, civil rights proponents regarded federal enforcement authority as critical, because private civil suits had proven an ineffective enforcement mechanism. They were, in practice, much too infrequent, despite widespread discrimination, to meet even minimal enforcement requirements.<sup>38</sup> Civil rights advocates diagnosed this under-enforcement problem as resulting from a number of sources, the most important of which were economic. Civil rights plaintiffs were typically poor and thus unable to pay the considerable legal costs of federal litigation.<sup>39</sup>

Under the standard “American rule” on legal fees, each side pays their own whether they win or lose.<sup>40</sup> Although counsel could take civil rights cases based upon a contingency agreement to keep a share of damages recovered, economic damages in most civil rights cases were both small and highly speculative.<sup>41</sup> Consequently, Jack Greenberg explained in 1959 when an NAACP lawyer, soon to succeed Thurgood Marshall as Director-Counsel, “these cases involve . . . the expense of engaging counsel, whose fee is unlikely to be recompensed by the amount of damages awarded, even if they won.”<sup>42</sup> Civil rights advocates well understood, according to Greenberg, that without “counsel fees for prevailing plaintiffs . . . virtually no lawyers could undertake difficult time consuming cases.”<sup>43</sup> In economic terms, most civil rights claims were not just low value; they were negative value.

In addition to this dire economic calculus, there were several other factors that led to the paucity of litigation under civil rights statutes providing private rights of action. Greenberg reported that in some parts of the South it was not possible for blacks to retain counsel in civil rights cases even if they could pay. “The Southern white attorney who will handle a desegregation case is almost unique,” Greenberg wrote in 1959, and “many large Negro centers and even some important cities in the South still have no Negro lawyer or but a few.”<sup>44</sup> A plaintiff who did sue could expect business and governmental defendants with bountiful legal resources to cause extensive delay and drive up costs through the use of elaborate opportunities for procedural gamesmanship in court proceedings.<sup>45</sup> In the South, where enforcement was most needed, prospective plaintiffs had good reason to fear harassment, possibly violent, for filing suit,<sup>46</sup> and to anticipate biased juries and judges if they had the courage to do so.<sup>47</sup> Private litigation was inherently limited as a civil rights enforcement mechanism, thought civil rights groups, and thus it was absolutely imperative that national authorities be given strong enforcement powers.

40. See, e.g., O'Connor and Epstein, “Bridging the Gap between Congress and the Supreme Court.”

41. Greenberg, *Race Relations and American Law*, 16, 283.

42. Stein, *Running Steel, Running America*, 84; Greenberg, *Race Relations and American Law*, 16.

43. Jack Greenberg, correspondence with the author, 22 August 2007.

44. Greenberg, *Race Relations and American Law*, 22.

45. Watson, *Lion in the Lobby*, 362–63; Greenberg, *Race Relations and American Law*, 138.

46. Robert D. Loevy, *To End All Segregation: The Politics of the Passage of the Civil Rights Act of 1964* (Lanham, MD: University Press of America, 1990), 29; Greenberg, *Race Relations and American Law*, 271; Stein, *Running Steel, Running America*, 84; R. Wayne Walker, “Title VII: Complaint and Enforcement Procedures and Relief and Remedies,” *Boston College Industrial & Commercial Law Review* 7 (1966): 495–524, 501.

47. Greenberg, *Race Relations and American Law*, 101.

34. 71 Stat. 634, Public Law 85–315.

35. 74 Stat. 86, Public Law 86–449.

36. Daniel M. Berman, *A Bill Becomes a Law: The Civil Rights Act of 1960* (New York: Macmillan, 1962); Caro, *The Master of the Senate*, 910–1012; Sundquist, *Politics and Policy*, 222–250.

37. Chen, *The Fifth Freedom*, ch. 5.

38. Morroe Berger, *Equality by Statute: The Revolution in Civil Rights* (Garden City, N.Y.: Doubleday, 1967), 160; Jack Greenberg, *Race Relations and American Law* (New York: Columbia University Press, 1959), 109 n.17, 309; Michael I. Sovern, *Legal Restraints on Racial Discrimination in Employment* (New York: Twentieth Century Fund, 1966), 79.

39. Greenberg, *Race Relations and American Law*, 271; Stein, *Running Steel, Running America*, 84; Watson, *Lion in the Lobby*, 362–63.

### Developments in the House: From Administrative to Judicial Power

The job discrimination bill that ultimately became Title VII of the CRA of 1964, after the considerable amendment process traced below, was initially introduced in the House as H.R. 405 in January 1963 by Representative James Roosevelt (D-CA), the son of Franklin Delano Roosevelt and a liberal Democrat with a record of devoted advocacy for strong job discrimination legislation.<sup>48</sup> The bill was referred to the House Committee on Education and Labor, chaired by another vigorous civil rights advocate, Democrat Adam Clayton Powell (D-NY) of Harlem, and in July 1963 the committee reported the bill and recommended passage.<sup>49</sup> Struggles over the bill reflect that by 1963, for legislators outside the South, the central field of battle on job discrimination legislation did not concern what rights should be enacted, but rather how and by whom they should be enforced.

H.R. 405 framed a robust administrative enforcement machinery closely modeled on the NLRB. It created the Equal Employment Opportunity Commission (EEOC), which was composed of a board and an office of the administrator. The board would be a quasi-judicial body, constituted by five members appointed by the president and serving staggered seven-year terms, with authority to hold administrative hearings on complaints and issue enforceable orders to cease-and-desist, reinstate, hire, and award back pay.<sup>50</sup> The administrator, also appointed by the president and serving a four-year term, was empowered to conduct investigations, including the authority to demand and inspect records and compel testimony, and would prosecute cases before the board.<sup>51</sup> Judicial review would be directly to the court of appeals on the record developed by the agency, and agency findings of fact were deemed conclusive provided they were supported by substantial record evidence.<sup>52</sup> The judicial review framework, governed by the Administrative Procedures Act, was highly deferential to the agency.<sup>53</sup> Complaint processing within this framework would proceed as follows: The administrator would investigate all charges; if it was determined upon investigation that no "probable cause" existed to credit the charge, it would be

dismissed. If, upon investigation, it was determined that probable cause did exist to credit the charge, the administrator would attempt voluntary conciliation, and failing that, would conduct an evidentiary hearing and present the hearing record together with a recommended decision to the board, which in turn would render a final decision.<sup>54</sup>

This initial formulation of what would become Title VII was like the National Labor Relations Act in one other respect: the administrative venue was exclusive, and there would be no private right to prosecute enforcement actions in court.<sup>55</sup> H.R. 405, with its administratively centered enforcement framework—with no trial court proceeding and no private right of action—embodied the enforcement preferences of civil rights proponents among legislators and activists.<sup>56</sup> Democrats had consistently advocated for this administrative enforcement framework, with no private right to litigate, in job discrimination bills since 1944,<sup>57</sup> and, as already noted, it was the overwhelmingly dominant model at the state level.<sup>58</sup>

Civil rights advocates regarded the administrative cease-and-desist model as superior to court-based implementation for a number of reasons. Probably most important, it was relatively fast and cheap. As compared with procedurally complex, temporally protracted, and financially draining litigation, the administrative process—being more flexible and less rigidly encumbered by formal legal procedures—would be a more expeditious venue in which individual workers could enforce their rights, and would be less costly, with the investigation and prosecution conducted and paid for by the government. Whereas federal judges are generalists, an administrative approach would better leverage needed administrative expertise. Whereas courts passively wait for often fearful and vulnerable individuals to step forward and initiate civil

54. H.R. 405, § 10; House Report No. 570, 10–11.

55. The only role for trial courts (federal district courts) was that in the event the administrator found reasonable cause to credit the claim of discrimination, did not secure voluntary compliance, and failed to proceed with a hearing within a "reasonable time," the complainant was empowered to petition a district court for an order directing the administrator to proceed with the hearing. H.R. 405, § 10(c). The court was not empowered to adjudicate the merits of the case, but rather only to direct the administrator to hold a hearing pursuant to the terms of H.R. 405.

56. Loevy, *To End All Segregation*, 56–57; Joseph Rauh, "The Role of the Leadership Conference on Civil Rights in the Civil Rights Struggle of 1963–64," *The Civil Rights Act of 1964: The Passage of the Law that Ended Racial Segregation*, ed. Robert D. Loevy (Albany: State University of New York Press, 1997), 49–75, 54–56; Whalen and Whalen, *The Longest Debate*, 16, 36–38, 46, 66.

57. House Report No. 187, 79<sup>th</sup> Cong., 1<sup>st</sup> sess., 20 February 1945; Hugh Davis Graham, *The Civil Rights Era: Origins and Development of National Policy, 1960–1972* (New York: Oxford University Press, 1990), 132.

58. Equal Employment Opportunity Commission, *Legislative History of Titles VII and XI of Civil Rights Act of 1964*, 5–6; Bureau of National Affairs, *State Fair Employment Laws and Their Administration*.

48. Francis J. Vaas, "Title VII: Legislative History," *Boston College Industrial & Commercial Law Review* 7 (1966): 431–58, 433–35.

49. House Report No. 570, 88<sup>th</sup> Cong., 1<sup>st</sup> sess., 22 August 1963 (hereinafter "House Report No. 570").

50. H.R. 405, 88<sup>th</sup> Cong., 1<sup>st</sup> sess., 1963, reprinted in *Hearings on Miscellaneous Proposals Regarding the Civil Rights of Persons Within the Jurisdiction of the United States Before Subcommittee No. 5 of the House Committee on the Judiciary*, 88<sup>th</sup> Cong., 1<sup>st</sup> sess., 1963, 2328–2336 (hereinafter H.R. 405), §§ 8, 10; House Report No. 570, 2–3, 9–11.

51. H.R. 405, §§ 9–10, 13–14; House Report No. 570, 4–6, 12–13.

52. H.R. 405, § 11; House Report No. 570, 11.

53. H.R. 405, § 11; House Report No. 570, 17.

rights suits, an administrative organ of government could proactively pursue a systematic enforcement program. As compared with a multitude of trial judges making civil rights policy in a piecemeal and decentralized manner, in response to individual complaints, a centralized agency could create policy that is unified, coherent, and more predictable.<sup>59</sup> Bureaucracy, civil rights advocates thought, would be better than lawsuits: far better.

Of the CRA of 1964's two radical new interventions in the private sector—employment (Title VII) and public accommodations (Title II)—civil rights advocates anticipated that the real enforcement battles would be fought out in the job discrimination context, and thus they were far more concerned with securing administrative enforcement of that title. Although their first preference for public accommodations enforcement was also administrative, they anticipated ready compliance with the public accommodations provisions, which they believed would actually serve business proprietors' economic interests, and the violation of which would be quite simple and straightforward to prove. Thus, the judicial enforcement venue in the initial formulation of the public accommodations title in the bipartisan bill worked out between the Kennedy administration and Republican leadership was never contested by civil rights groups. However, civil rights advocates anticipated fierce resistance to Title VII in some sectors of American labor markets, and they regarded the prospect of proving intentional discrimination, which generally would entail proving decision makers' subjective state of mind, to be far more challenging. From civil rights groups' perspective, Title VII presented a monumental enforcement challenge, and thus it was particularly important to secure an administrative enforcement framework.<sup>60</sup>

Seven Republicans on the Education and Labor Committee voiced strenuously dissenting views in the Report on H.R. 405. Of the seven, five articulated clear support for the substantive antidiscrimination prohibitions in the bill. However, all of the dissenters, in three separate opinions, trained their twofold attack on the enforcement provisions. First, they claimed that the proposed agency mirrored the excessive bureaucratic regulation of business that was characteristic of the NLRB, and of so much administrative state building since the New Deal. It epitomized the "ever-increasing encroachment on the part

of administrative tribunals,"<sup>61</sup> which resembled "the arbitrary fiat of king or baron,"<sup>62</sup> and would "involve the federal government in the most intimate details of the operation of every business enterprise" in the nation.<sup>63</sup>

Second, they stressed that these agencies, whose leadership had been appointed by Democratic presidents in all but eight of the last thirty-one years, were ideologically slanted against business and susceptible to the president's political influence in ways that Congress could not control. On this point, the analogy of the proposed EEOC to the NLRB, on which it was so clearly modeled, was repeatedly invoked by Republicans as emblematic of the political mischief that could emanate from strong bureaucratic powers placed in the hands of overzealous administrators appointed by liberal interventionist presidents. Republican committee members Dave Martin (R-NE) and Paul Findley (R-IL) warned in their dissent from the committee report: "It is a major mistake to model legislation in this field on the National Labor Relations Board, which has one of the sorriest records of all the Federal agencies for political involvement."<sup>64</sup> This concern was echoed by fellow Republican dissenters Peter Frelinghuysen (R-NJ) and Robert Griffin (R-MI), who also likened the proposed EEOC to the NLRB, complaining that "administrative tribunals . . . too often operate in an atmosphere of political and emotional pressures."<sup>65</sup> Roosevelt's and Truman's NLRB had vigorously pursued labor policies abhorred by the conservative coalition of Republicans and southern Democrats—policies which that coalition regarded as grounded more in executive ideology than legislative intent, and which produced perennial, intense, and memorable legislative-executive conflict over control of the agency.<sup>66</sup> Similar executive politicization could surely be expected at Kennedy's EEOC. In sum, the Republican dissenters—who would live to fight another day, as we shall see—opposed an NLRB-like enforcement regime for job discrimination because they disfavored bureaucratic regulation of business in general, and saw bureaucracy as susceptible to political influence beyond their control, particularly by the proregulatory Democratic presidents who had dominated the executive branch for decades and would appoint EEOC leadership at least in the short run and possibly in the long run.

61. House Report No. 570, 17.

62. House Report No. 570, 20.

63. House Report No. 570, 19.

64. House Report No. 570, 19. See also 15, 17.

65. House Report No. 570, 15, 17.

66. Melvyn Dubofsky, *The State and Labor in Modern America* (Chapel Hill: University of North Carolina Press, 1994), ch. 6; James A. Gross, *The Reshaping of the National Labor Relations Board: National Labor Policy in Transition, 1937–1947* (Albany: State University of New York Press, 1981); Seymour Scher, "The Politics of Agency Organization," *Political Research Quarterly* 15 (1962): 328–44.

59. Greenberg, *Race Relations and American Law*, 15–17, 114, 271; see also George P. Sape and Thomas J. Hart, "Title VII Reconsidered: The Equal Employment Opportunity Act of 1972," *George Washington Law Review* 40 (1972): 824–889, 841; House Report No. 570, 5; House Report No. 238, 92<sup>nd</sup> Cong., 1<sup>st</sup> sess., 2 June 1971, 10–13.

60. Greenberg, *Race Relations and American Law*, 114, 154–207; Greenberg, correspondence with the author, 22 August 2007; Loevy, *To End All Segregation*, 331.

The Republican dissenters also converged on what the enforcement scheme should be: they demanded the “historic safeguard of trial before an impartial judiciary.”<sup>67</sup> Rejecting the NLRB-like administrative adjudication model, they called for a prosecutorial one. The agency should be stripped of the power to hold hearings and issue cease-and-desist orders and instead limited to conducting investigations and prosecuting actions in federal trial courts, which would render fact-finding, liability, and remedy determinations. Republicans had supported the committee in reporting a fair employment practices bill in 1962 with such court-centered enforcement provisions and the administrator acting as prosecutor.<sup>68</sup> They had long complained that the informality of administrative proceedings against business in New Deal agencies such as the NLRB, in the hands of overzealous and interventionist enforcers, resulted in relaxing the burden of proving violations, and in loosening the standard of what evidence could be introduced to establish liability, to the point of stacking the deck against business.<sup>69</sup> Dissenters from the House Report chided that the “NLRB-type administrative tribunal” which H.R. 405 proposed to create to enforce Title VII, “ha[s] acquired a well-deserved reputation for ignoring the rules of evidence,” and it is one before which “the accused . . . must bear the burden of proving his freedom from guilt.”<sup>70</sup>

As compared to such proceedings, Republicans concerned with protecting business interests reasoned that it would be more difficult to establish the liability of defendant-employers in federal courts, in which more extensive and formalized procedural rules, such as the plaintiff bearing the burden of proof by a preponderance of the evidence, and the constraints imposed by the federal rules of evidence, were institutionalized. A judicial venue had other potential benefits, from defendant-employers’ point of view, which were the flip side of reasons that civil rights groups wanted an administrative venue. The lawyer-dominated procedural formality and complexity of court would allow employers with deep pockets, and concomitant access to legal resources, to cause enforcement actions to be protracted and very costly, thereby discouraging them. Further, and perhaps most important, it was absolutely beyond question that the EEOC would be capable of adjudicating vastly more administrative complaints than it would be capable of prosecuting federal lawsuits, and thus far fewer claims would actually be adjudicated in a court-centered framework. At this stage, though, the Republican dissenters had lost the fight.

The next move for proponents of H.R. 405 was to get it incorporated into the Kennedy administration’s civil rights bill (H.R. 7152), then being considered by Subcommittee No. 5 of the House Judiciary Committee, which held hearings on numerous comprehensive civil rights bills during the summer of 1963.<sup>71</sup> In crafting H.R. 7152 the administration’s strategy was to collaborate closely with Republican leadership in order to produce a bipartisan bill that would attract sufficient Republican support to overcome the inevitable southern Democratic opposition, particularly the filibuster in the Senate. William McCulloch (R-OH), the ranking Republican on the House Judiciary Committee, insisted on two things as a condition of cooperation with the administration: that the administration publicly share credit with Republicans for a successful civil rights law, and that any bipartisan compromise bill agreed to in the House be capable of commanding a cloture vote in the Senate.<sup>72</sup> With respect to the latter condition, House Republican leadership wanted to avoid pressing members from more conservative districts to cast risky votes for an overly ambitious bill that would subsequently be cut back in any event. They also wanted to avoid presenting conservative Republicans in the Senate, who would occupy the filibuster pivot, with a more sweeping bill than they could stomach, thereby cornering their party brethren into the role of pruning it back and handing Democrats an electoral club with which to beat them in 1964.<sup>73</sup>

The bipartisan compromise reached—H.R. 7152—had no provisions prohibiting discrimination in private employment.<sup>74</sup> The president’s view was that prohibiting discrimination in private employment was among the most controversial items on the civil rights agenda; including it would provoke such fierce opposition by Republican opponents of business regulation that it had no chance of survival and might kill any bill to which it was attached.<sup>75</sup> However, leading civil rights groups and their liberal Democratic allies in Subcommittee No. 5 proved unwilling to acquiesce to the administration’s conservatism on this issue. They pressed energetically for incorporation of H.R. 405 as reported by the Education and Labor Committee, with its compulsory employment discrimination provisions governing private employment and its strong administrative enforcement machinery, into the administration’s civil rights bill. They succeeded, and along with a number of other important strengthening measures,

71. Vaas, “Title VII: Legislative History,” 434.

72. Whalen and Whalen, *The Longest Debate*, 13.

73. Filvaroff and Wolfinger, “The Origin and Enactment of the Civil Rights Act of 1964,” 15–16.

74. Vaas, “Title VII: Legislative History,” 434.

75. Loevy, *To End All Segregation*, 31, 53, 68–72; Filvaroff and Wolfinger, “The Origin and Enactment of the Civil Rights Act of 1964,” 14; Whalen and Whalen, *The Longest Debate*, 26–27, 95.

67. House Report No. 570, 15.

68. House Report No. 1370, 87<sup>th</sup> Cong., 2<sup>nd</sup> sess., 21 February 1962.

69. Graham, *The Civil Rights Era*, 129–31.

70. House Report No. 570, 15.

Subcommittee No. 5 voted to incorporate H.R. 405 before referring the administration's bill to the full Judiciary Committee.<sup>76</sup> The Republican leadership with whom the administration had fashioned the bipartisan compromise bill cried foul and threatened that if reported by the full committee, this stronger version of H.R. 7152 would be cut to pieces via amendments on the House floor.<sup>77</sup> The administration intervened aggressively and, after intense negotiations, managed to restore enough of the compromise embodied in the original H.R. 7152 to retain the support of Republican House leadership for a bill that liberal Democrats on the Judiciary Committee would also vote for.<sup>78</sup>

When the controversy blew up over the expansiveness of Subcommittee No. 5's amendments to the compromise bill, the adoption of the strong employment discrimination provisions (H.R. 405) was arguably the single most controversial change.<sup>79</sup> However, as with the views of the Republican dissenters from the Education and Labor Committee Report on H.R. 405, Republican grievances were focused on the proposed administrative enforcement machinery rather than on the substantive rights themselves. The compulsory job discrimination prohibitions governing the private sector were retained in the new compromise bill reported by the Judiciary Committee—as Title VII—but the provisions for enforcing the prohibitions were radically altered.

These new Title VII enforcement provisions were drafted by Republicans, to meet Republican preferences, as a condition of Republican support.<sup>80</sup> Robert Griffin (R-MI), Charles Goodell (R-NY), and Albert Quie (R-MN) were the chief architects of the new enforcement provisions.<sup>81</sup> They precisely reflected the preferences of the Republican dissenters in the House Report on H.R. 405 (of whom Griffin had been one), outlined above, which were grounded in grave concern about an overzealous agency politicized through executive appointments. The enforcement regime was transformed from an administrative adjudicatory model to a prosecutorial model. Agency powers to hold hearings and issue judicially enforceable orders to cease-and-desist, to reinstate, to hire, and for back pay were deleted. In their place was substituted agency authority to act as

prosecutor in federal district courts. The new language provided that if two or more of the five-member commission found, after investigation, reasonable cause to believe that discrimination had occurred, the commission "shall" bring a civil action.<sup>82</sup> It would be up to courts to find facts and elaborate the concrete meaning of Title VII's broadly formulated prohibitions.

Vote counts in the House indicated that there was majority support for giving the EEOC cease-and-desist powers.<sup>83</sup> A number of observers close to the negotiations, including Leadership Conference General Counsel Joseph Rauh, stated that the elimination of cease-and-desist powers was aimed at the Senate, where it was believed that they could not make it past the filibuster pivot, which, it was widely recognized, would be controlled by Senate minority leader Everett Dirksen (R-IL).<sup>84</sup> This move was consistent with the House Republican leadership's strategy that any bipartisan compromise bill agreed to in the House be capable of commanding a cloture vote in the Senate. Cease-and-desist powers did, however, face opposition by important conservative House Republicans as well. William McCulloch (R-OH), ranking minority member of the House Judiciary Committee and a key Republican with whom the administration negotiated the version of H.R. 7152 that was reported, included in the committee report a statement of additional views on behalf of himself and six other committee Republicans that laid out their reasons for supporting the switch from administrative cease-and-desist to court-based implementation.

Their reasons closely paralleled those of the dissenters in the earlier House Report on H.R. 405. Politicization of the agency by an ideologically distant executive branch was again a central concern. These Republicans, facing a Kennedy White House and writing at a time when six of the last eight presidential administrations were Democratic, were strongly disinclined to fashion new and potent administrative powers and deliver them into the hands of their Democratic opponents. They expressed anxiety about the likelihood of an ideologically liberal commission, to be appointed, they thought, by Kennedy, hell bent on pursuing an agenda of "forced racial balance" with "mathematical certainty" in employment. The more extensive and formalized procedural regimen of federal courts would be far

76. Graham, *The Civil Rights Era*, 125–27; Vaas, "Title VII: Legislative History," 35.

77. Whalen and Whalen, *The Longest Debate*, 42; Filvaroff and Wolfinger, "The Origin and Enactment of the Civil Rights Act of 1964," 19–20.

78. Loevy, *To End All Segregation*, 66–73; Whalen and Whalen, *The Longest Debate*, 40–58.

79. Filvaroff and Wolfinger, "The Origin and Enactment of the Civil Rights Act of 1964," 18; Loevy, *To End All Segregation*, 55, 68.

80. Filvaroff and Wolfinger, "The Origin and Enactment of the Civil Rights Act of 1964," 21; Graham, *The Civil Rights Era*, 129–32; Whalen and Whalen, *The Longest Debate*, 56–58, 63.

81. Whalen and Whalen, *The Longest Debate*, 58.

82. §§ 707(a) and (b) of H.R. 7152, as reported by the House Judiciary Committee, reprinted in House Report No. 914, 88<sup>th</sup> Cong., 1<sup>st</sup> sess., 20 September 1963 (hereinafter "House Report No. 914"), 12.

83. Lieberman, *Shaping Race Policy*, 160.

84. Clifford L. Alexander, "The EEOC Solution," *The Washington Post*, 25 July 1989, A11; Herbert Hill, "Lichtenstein's Fictions: Meany, Reuther and The 1964 Civil Rights Act," *New Politics* 7 (1999): 82–107, 92; Chen, *The Fifth Freedom*, ch. 5.

more conducive to employers "establishing innocence," and, as already noted, it would certainly lead to adjudication of many fewer claims than a commission that could investigate and adjudicate complaints at no cost to the claimant. According to the committee Republicans:

As the title was originally worded, the Commission would have had authority to not only conduct investigations, but also institute hearing procedures and issue orders of a cease-and-desist nature. A substantial number of committee members, however, preferred that the ultimate determination of discrimination rest with the Federal judiciary. Through this requirement . . . we believe that the employer . . . will have a fairer forum to establish innocence since a trial de novo is required in district court proceedings together with the necessity of the Commission proving discrimination by a preponderance of the evidence.

It must also be stressed that the Commission must confine its activities to correcting abuse, not promoting equality with mathematical certainty. . . . [T]he Commission will only jeopardize its continued existence if it seeks to impose forced racial balance upon employers . . .<sup>85</sup>

The suspicion that the Kennedy administration would pursue an aggressive policy of racial preferences, if given the power to do so, was expressed more sharply in the Minority Report, which claimed that such practices were already being carried out in Kennedy's Department of Labor.<sup>86</sup> The proposed civil rights bill "vests . . . almost unlimited authority in the President and his appointees to do whatever they desire," complained the dissenters, and this authority would be used to force employers "to hire according to race, to 'racially balance' those who work for him in every job classification or be in violation of Federal law."<sup>87</sup>

It is in the House Republican amendments, diminishing administrative power and enhancing judicial power, that the prospect of *private* enforcement litigation makes its first appearance in Title VII's legislative history, though in an extremely qualified sense. The bill provided that if the commission failed or declined to bring a civil action, "the person claiming to be aggrieved may, if one member of the Commission gives permission in writing, bring a civil action to obtain relief."<sup>88</sup> There is no private *right* to sue, for private suit is wholly dependent on administrative authorization.

Further, this version of Title VII does not include a fee-shifting provision allowing a winning plaintiff to recover attorney's fees, a tool legislators were certainly aware of because one was included in the public accommodations title in the same bill.<sup>89</sup> Given that in the bill, the only economic damages provided for under Title VII were back pay,<sup>90</sup> the need to deduct attorney's fees from that award would have rendered a rather modest, and in many cases negative, economic incentive for private enforcement, even in the event of administrative authorization to proceed.

It bears emphasis that, although weakening and circumscribing the agency role, in the House-passed Title VII the agency was still given solid enforcement powers of a kind that had largely eluded civil rights proponents in the Acts of 1957 and 1960, and the power to issue binding orders had not been eliminated from the enforcement regime, but rather had been transferred from the agency to courts. The House-passed bill created a mission agency, charged it with the initial investigation and evaluation of complaints, empowered it as prosecutor to set and execute a federal enforcement agenda, and allowed it to utilize, or decline to utilize, private enforcement litigation.

### Developments in the Senate: Privatizing the Prosecutorial Function

It was a forgone conclusion that there would be a southern Democratic filibuster in the Senate. It was also clear that non-southern Democrats would have to attract the support of at least twenty Republicans to secure cloture. Although there were approximately a dozen moderate or liberal Republicans who could likely be recruited without much difficulty, there would be no cloture without a sizable share of the conservative Republicans.<sup>91</sup> As has been widely observed in the historical literature on the legislative events leading to passage of the CRA of 1964, Everett Dirksen, minority leader and ranking Republican on the Judiciary Committee, would play a decisive role in securing, or not, the votes of the conservative Republicans needed for cloture. Although Dirksen faced a political climate in which appearing anticivil rights could cost Republicans in the upcoming election of 1964, his pivotal role gave him leverage to shape the legislation to suit his and his constituents' preferences better than the House-passed version.<sup>92</sup>

85. House Report No. 914, Part II, Additional Views of William M. McCulloch, John V. Lindsay, William T. Cahill, Garner E. Shriver, Clark MacGregor, Charles McC. Mathias, and James E. Bromwell, 150.

86. House Report No. 914, Minority Report, 68.

87. House Report No. 914, Minority Report, 69 (emphasis in original).

88. House Report No. 914, 12, § 707(c).

89. House Report No. 914, 3, § 204(b).

90. House Report No. 914, 12, § 707(e).

91. Filvaroff and Wolfinger, "The Origin and Enactment of the Civil Rights Act of 1964," 22; Rodriguez and Weingast, "The Positive Political Theory of Legislative History," 1463.

92. Lieberman, *Shaping Race Policy*, 161; Rodriguez and Weingast, "The Positive Political Theory of Legislative History," 1474–96; John G. Stewart, "The Civil Rights Act of 1964: Tactics I," *The*

Whereas the key move of House Republicans on the fair employment provisions 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, produce levels of private enforcement litigation beyond their imagining. Although a number of important changes to Title VII occurred in the Senate,<sup>93</sup> I constrain myself here to those concerning who would have the power to enforce the law and under what circumstances.

Dirksen was particularly influential among the Republican wing representing the strongly antiregulatory preferences of American business. As negotiations in the Senate over the House-passed H.R. 7152 were unfolding, Murray Kempton observed in *The New Republic* regarding this wing of the party:

[L]ike Dirksen, they feel their kinship with those businessmen who dislike fair employment practice laws if only because they mean keeping even more records and entertaining even more federal agents.

Dirksen is the senator most trusted to represent the American businessman in his distaste for any visitor from government.... There are no less than a dozen Republican Senators whose inclinations to sympathy, like Dirksen's, are vulnerable to no appeal so much as the one which comes from a chamber of commerce....<sup>94</sup>

Indeed, according to participants in the negotiations, during their course Dirksen was in communication with representatives of the National Association of Manufacturers, which did not oppose the bill, concerning ways that its job discrimination provisions could be amended to minimize their encroachment on employer prerogative.<sup>95</sup>

In laying out on the Senate floor what he regarded as deficiencies in the House-passed version of Title VII, Dirksen forcefully struck the same two linked notes that House Republicans had: it created excessive bureaucratic regulation of business, and the overzealous liberals who would be chosen to wield the proposed new instruments of administrative power would abuse them. He exhorted that the EEOC's

envisioned investigatory powers were boundless, affording no protection whatsoever "to an employer from fishing expeditions by investigators, in their zeal to enforce title VII."<sup>96</sup> He complained of "layering upon layer of enforcement," which would be used by ideologically biased administrators to "draw and quarter the victim," by which he meant American business.<sup>97</sup> In pursuing amendments to Title VII's enforcement provisions, Dirksen sought to minimize its "infringement on business freedom"<sup>98</sup> and "harassment of businessmen,"<sup>99</sup> particularly as it affected big business in the North, a critical Republican constituency.<sup>100</sup>

The compromise that was ultimately achieved, securing sufficient Republican votes for cloture and opening the way to passage of the landmark legislation, was principally negotiated off the Senate floor among Dirksen, the Kennedy Justice Department, and Democratic and Republican Party leaders in Congress. The details and language of the compromise were mainly hammered out in the minority leader's conference room by several conservative Republican lawyers on Dirksen's Judiciary Committee staff, working together with Justice Department lawyers, including: Nicholas deB. Katzenbach, Deputy Attorney General; Burke Marshall, Assistant Attorney General heading the Civil Rights Division; David Filvaroff, special assistant in the Department of Justice; and Harold Green, chief of appeals and research, Civil Rights Division.<sup>101</sup> John G. Stewart, legislative assistant to Hubert Humphrey (D-MN)—Democratic floor manager in the Senate for the CRA of 1964—recounts that while the substantive employment discrimination prohibitions in Title VII, as passed by the House, were not seriously contested by Dirksen, the details of how those prohibitions would be enforced was among the most difficult issues on which to achieve compromise in the entire bill.<sup>102</sup> Dirksen was adamant from the outset, and ultimately proved impossible to move, in his insistence that the central burden of enforcing Title VII lay with private plaintiffs. In the first circulated draft of Dirksen's proposed amendments to Title VII, "Dirksen proposed shifting the burden of enforcing the equal employment standards in Title VII

*Civil Rights Act of 1964: The Passage of the Law that Ended Racial Segregation*, ed. Robert D. Loevy (Albany: State University of New York Press, 1997), 211–73; Chen, *The Fifth Freedom*, ch. 5.

93. For a detailed accounting, see Vaas, "Title VII: Legislative History."

94. Murray Kempton, "Dirksen Delivers the Souls," *The New Republic*, 2 May 1964, 9.

95. Filvaroff and Wolfinger, "The Origin and Enactment of the Civil Rights Act of 1964," 31 n.11.

96. *Congressional Record*, 88<sup>th</sup> Cong., 2<sup>nd</sup> sess., 26 March 1964, 6449.

97. *Ibid.*

98. Graham, *The Civil Rights Era*, 146–47.

99. Stewart, "The Civil Rights Act of 1964: Tactics I," 256.

100. Comment, "Enforcement of Fair Employment Under the Civil Rights Act of 1964," *The University of Chicago Law Review* 32 (1965): 430–470, 432–35; Vaas, "Title VII: Legislative History," 450–52; Rodriguez and Weingast, "The Positive Political Theory of Legislative History," 1491–97.

101. John G. Stewart, legislative assistant to Hubert Humphrey in 1963–64, interview with the author, 29 December 2008.

102. Stewart, "The Civil Rights Act of 1964: Tactics I," 245–59. See also "Dirksen Influence the Key to Successful Cloture Vote," *Congressional Quarterly Weekly* 15 May 1964, 947–50.

from the ... [EEOC] to the individual complainant,"<sup>103</sup> eliminating the EEOC's right to sue and reducing its authority to nothing more than investigator and supervisor of voluntary conciliation efforts, leaving the national government with no enforcement authority whatsoever.

After extensive negotiations, a compromise was reached in which Title VII would have a blend of public and private enforcement, with private enforcement clearly predominating. Dirksen secured Democratic agreement to stripping the EEOC of any enforcement powers whatsoever. Under limited circumstances (discussed below), the Department of Justice, rather than the EEOC, would be allowed to prosecute Title VII claims. Dirksen well understood "that the Justice Department was a relatively small, elite cabinet agency, ... and so prided itself on enforcement through key case selection rather than through massive litigation, ... pos[ing] a smaller threat of potential harassment to employers than would a new mission agency like the EEOC, which reminded Dirksen and his more conservative colleagues uncomfortably of its crusading early model: the NLRB."<sup>104</sup> This weaker organ of administrative power would also be authorized, relative to the EEOC's right to sue in the House-passed Title VII, to prosecute a much narrower range of cases. The Attorney General could only initiate suits based upon a "pattern or practice" of discrimination. With this language, Dirksen sought to limit federal enforcement to circumstances in which regular, repeated, consistent, and officially sanctioned discrimination could be documented. Its purpose was to focus federal enforcement on employers in the South, where systematic policies of discrimination were widespread, and minimize it in the North, where employment discrimination was overwhelmingly *de facto* rather than *de jure*.<sup>105</sup>

Further, the House-passed version had stated mandatorily that the EEOC "shall" file suit upon a finding of discrimination that it could not conciliate, whereas the Dirksen substitute stated that the Justice Department "may" file suit, in its discretion, upon finding a pattern or practice of discrimination.<sup>106</sup> It would be under no obligation to do so. Although the Justice Department could not initiate non-pattern or practice suits, it was given authority, only in the court's discretion, and only upon a finding that the case implicates issues of "general public importance,"

to intervene in such cases if an individual had already elected to file suit.<sup>107</sup> To the extent that it had the resources and commitment, the Justice Department could only set an affirmative and coordinated enforcement agenda in the limited pattern or practice context, and even in that limited context, it was not required to prosecute manifestly meritorious claims. Dirksen regarded the net effects of these concessions on executive enforcement powers by supporters of the Kennedy administration's bill to be extremely significant, and he trumpeted them to conservative Republicans whose support for his compromise bill he sought to win.<sup>108</sup>

Whereas Republicans' evisceration of the EEOC has been widely recognized, the private alternative proffered by the Dirksen compromise is either ignored or receives only passing mention, with its significance unrecognized in contemporary treatments of Title VII's legislative history. This was the critical moment in which the foundation was laid for an approach to enforcing job discrimination laws totally dominated by private litigation—one that would, in time, produce more federal lawsuits than any other issue in the federal system, save for prisoners petitioning to be set free. What Dirksen took away in governmental enforcement power he gave back in private enforcement power. Under the amendments to Title VII introduced by Dirksen in the Senate, if the EEOC were unable to facilitate a voluntary settlement, the person claiming discrimination would have a right, regardless of the EEOC's assessment of the merits of the case, and without the need for authorization by a Commission member, to proceed with a private lawsuit in federal district court after the agency processes the claim.<sup>109</sup> The lawsuit would be *de novo*—meaning a completely fresh proceeding, as distinguished from appellate review—with no presumptions in favor of or deference to the agency determination. Further, the court was granted authority to waive filing fees and appoint an attorney for plaintiffs and to award winning plaintiffs attorney's fees and other costs of suit to be paid by defendants.<sup>110</sup> The amendments to Title VII's enforcement

107. 78 Stat. 260, § 706(e); Stewart, "The Civil Rights Act of 1964: Tactics I," 252.

108. John G. Stewart, legislative assistant to Hubert Humphrey in 1963-64, interview with the author, 29 December 2008.

109. Dirksen introduced omnibus amendments to the CRA of 1964 twice. He did so first on 26 May 1964, *Congressional Record*, 88<sup>th</sup> Cong., 2<sup>nd</sup> sess., 26 May 1964, 11926-11935 (the Title VII provisions are at 11930-11934), and a second time, with further revisions, on 10 June 1964, *Congressional Record*, 88<sup>th</sup> Cong., 2<sup>nd</sup> sess., 10 June 1964, 13310-19 (the Title VII provisions are at 13314-13318). The proposed Title VII amendments were the same in both versions. The private right of action appears at *Congressional Record*, 88<sup>th</sup> Cong., 2<sup>nd</sup> sess., 26 May 1964, 11932-11933, §706(e), and *Congressional Record*, 88<sup>th</sup> Cong., 2<sup>nd</sup> sess., 10 June 1964, 13316, §706(e).

110. *Congressional Record*, 88<sup>th</sup> Cong., 2<sup>nd</sup> sess., 26 May 1964, 11932-11933, § 706(e) and (k), and *Congressional Record*, 88<sup>th</sup> Cong., 2<sup>nd</sup> sess., 10 June 1964, 13316, § 706(e) and (k). The

103. Stewart, "The Civil Rights Act of 1964: Tactics I," 249.

104. Graham, *The Civil Rights Era*, 146. See also Stein, *Running Steel, Running America*, 85.

105. Comment, "Enforcement of Fair Employment Under the Civil Rights Act of 1964," 450-51; Loevy, *To End All Segregation*, 258; Rodriguez and Weingast, "The Positive Political Theory of Legislative History," 1492; Stewart, "The Civil Rights Act of 1964: Tactics I," 211, 257-59.

106. 78 Stat. 261, § 707(a).

regime introduced by Dirksen were ultimately adopted, and their exact language was retained in the law as passed.<sup>111</sup>

It bears emphasis that these provisions regarding appointment of counsel, filing fees, and attorney's fees are departures from the default rules in the American legal system that would control if Congress did not specifically override them. In federal civil actions, absent an explicit statutory directive, counsel is appointed only in "exceptional circumstances," which in practice has meant almost never.<sup>112</sup> Likewise, unless Congress specifies in a statute that a winning plaintiff can recover attorney's fees from the defendant, the "American rule" applies and each side is generally responsible for its own attorney's fees, regardless of case outcome. When Congress has wished to proactively facilitate private enforcement of statutes, it has developed a practice of including a provision expressly overriding the American rule and allowing winning plaintiffs to recover attorney's fees.<sup>113</sup> This practice was not new in 1964. It was inaugurated in federal statutory law with the Civil Rights Act 1870 and was used in landmark regulatory laws in the Progressive and the New Deal eras.<sup>114</sup> Economic damages under Title VII were limited to back pay,<sup>115</sup> which could be quite insubstantial and easily less than the costs of prosecuting an action, especially for workers in low-wage labor pools. Accordingly, the appointment of counsel and attorney fee provisions would facilitate the litigation

of claims that, under default rules, would have produced a net loss, even to winning plaintiffs.

Why were these provisions included in the amendments introduced by Dirksen? The evidence is indirect, but quite strong. Civil rights groups were concerned about lack of enforcement through private lawsuits in court, and they advocated for provisions to encourage it. Earlier in the legislative process, the NAACP, the ACLU, and the National Lawyers Guild had successfully urged the inclusion of a fee-shifting provision in the public accommodations title of the Kennedy administration's original bill.<sup>116</sup> According to the NAACP Legal Defense Fund (LDF) Director-Counsel Jack Greenberg, by 1963–64, whereas the first preference of civil rights groups was for strong administrative enforcement of civil rights, if private litigation was the best they could do, "we always supported counsel fees for prevailing plaintiffs as the only way to make private enforcement feasible. Otherwise, virtually no lawyers could undertake difficult time-consuming cases."<sup>117</sup>

Indeed, recall that it was the meagerness of private enforcement of Reconstruction civil rights laws with private rights of action, but without provisions providing for recovery of attorney's fees or appointment of counsel, that had motivated the urgent but unsuccessful push by civil rights advocates in 1957 and 1960 to empower the Attorney General to bring civil actions to enforce those laws. The potential under-enforcement problem with Title VII was even greater than under Reconstruction civil rights laws, because those laws allowed recovery of more extensive economic damages than permitted under Title VII's back pay-only rule.<sup>118</sup> Civil rights advocates clearly recognized major economic impediments to private civil rights enforcement. They worried that many potential plaintiffs were poor and thus unable to pay the costs of litigation; the costs of prosecution often exceeded small and uncertain damages in civil rights cases, so attorneys would not litigate them on a contingency basis; and in many parts of the south there were no attorneys willing to take civil rights cases.<sup>119</sup>

According to David Filvaroff, a Justice Department lawyer who participated in negotiating and drafting

precise language of the fee shift was that fees may be awarded to "prevailing parties." In *Newman v. Piggy Park Enters, Inc.*, 390 U.S. 400 (1968), the Supreme Court held that prevailing plaintiffs could recover fees under this language as a matter of course but that prevailing defendants could do so only in extraordinary circumstances. As discussed below, this reading of the CRA of 1964's fee shift is consistent with legislative intent.

111. 78 Stat. 260–61, § 706(e) and (k).

112. See, e.g., *Lassiter v. Dept. of Social Services*, 452 U.S. 18 (1981); *U. S. ex rel. Gardner v. Madden*, 352 F.2d 792 (9th Cir. 1965).

113. O'Connor and Epstein, "Bridging the Gap between Congress and the Supreme Court."

114. The Civil Rights Act of 1870, also known as the Fore Act 1870, created voting rights protections aimed at combating terrorism orchestrated by the Ku Klux Klan against black voters in the Reconstruction South, where states had proved unwilling or unable to control widespread violence against blacks. The statute's voting rights protections were enforceable through civil actions for monetary damages, along with attorney's fees for prevailing plaintiffs. 16 Stat. 140–41, §§ 2–4. None of the other Reconstruction civil rights laws contained a plaintiffs' fee-shifting provision. Most Reconstruction legislation governing voting rights, including the voting provisions of the CRA 1870, were repealed in 1894 after Democrats retook control of Congress. Greenberg, *Race Relations and American Law*, 135; Bernard Schwartz, *Statutory History of the United States, Civil Rights* (New York: Chelsea House Publishers, 1970), Part 1, 445. Fee shifting was also employed, for example, in such major legislation as the Interstate Commerce Act of 1887, the Sherman Antitrust Act of 1890, the Securities Exchange Act of 1934, and the Fair Labor Standards Act of 1938. It was hardly a new idea in 1964.

115. 78 Stat. 261.

116. O'Connor and Epstein, "Bridging the Gap between Congress and the Supreme Court," 239–40; H.R. 7152, § 204(b), 88th Cong., 1st sess., 1963, reprinted in *Hearings on Miscellaneous Proposals Regarding the Civil Rights of Persons Within the Jurisdiction of the United States Before Subcommittee No. 5 of the House Committee on the Judiciary*, 88th Cong., 1st sess., 1963, Serial No. 4, Part I, 653.

117. Jack Greenberg, correspondence with the author, 22 August 2007.

118. Charles F. Abernathy, *Cases & Materials on Civil Rights & Constitutional Litigation*, 4th ed. (Saint Paul: West Law School, 2006).

119. Sovern, *Legal Restraints on Racial Discrimination in Employment*, 79–80; Greenberg, *Race Relations and American Law*, 16–17, 22, 100–114, 138, 270–83; Walker, "Title VII," 501–02; Watson, *Lion in the Lobby*, 362–63.

the details of the Dirksen compromise on behalf of the Department, the Civil Rights Division's leadership "thought the fee provision was very important."<sup>120</sup> Justice Department lawyers negotiating with Dirksen and his staff were regularly apprised of civil rights groups' views on the issues under consideration, and they understood that fee recovery could provide a very important benefit to would-be plaintiffs lacking the resources to pay an attorney.<sup>121</sup> High level Justice Department lawyers like Burke Marshall and Nicholas deB. Katzenbach, and Democratic leaders such as Hubert Humphrey, were also concerned that any compromise bill retain the support of civil rights groups. They were acutely sensitive to the prospect of being accused in a press conference by NAACP's lead lobbyist Clarence Mitchell, or Leadership Conference General Counsel Joseph Rauh, of having caved in to pressures from Dirksen to gut the bill.<sup>122</sup> If they were to trade public enforcement for private enforcement to secure Dirksen's help in overcoming the southern Democratic filibuster, then the private enforcement framework had to be made meaningful.

Democratic Senate floor manager Hubert Humphrey, advocating in favor of the fee shifting and appointment of counsel provisions, was the only legislator to explain in the record why they were included in the law. Humphrey was well positioned to know: of Democratic Party leaders who participated in negotiating the compromise with Dirksen, he was among those in most regular communication with both Dirksen and civil rights groups as the process developed.<sup>123</sup> For a decade and a half Humphrey had been a primary proponent of civil rights legislation among members of Congress and had worked closely with civil rights groups in crafting civil rights bills and pressing them in the legislative process.<sup>124</sup> As a result, he had strong and long-standing relationships with Mitchell and Rauh, and he worked closely

with both, meeting with them frequently as the legislative battle transpired.<sup>125</sup>

According to Humphrey, the provisions in the Title VII amendments introduced by Dirksen regarding appointment of counsel and waiver of the filing fee were included because "it is recognized that the maintenance of a suit may impose a great burden on a poor individual complainant";<sup>126</sup> the attorney's fees provision "should make it easier for a plaintiff of limited means to bring a meritorious suit";<sup>127</sup> and the appointment of counsel provision was also included "because Negroes in some areas are unable to obtain legal representation to institute civil rights suits."<sup>128</sup> These explanations given by Humphrey are straightforwardly responsive to the reasons previously identified by civil rights leaders—important Humphrey constituents, with whom he was in close contact—for the dearth of private civil actions, despite widespread discrimination, under Reconstruction and state civil rights laws. Dirksen, in negotiating agreement to a predominantly private enforcement framework as an alternative to strong governmental enforcement powers—thereby stripping the law of *all* federal authority to initiate enforcement in ordinary individual discrimination claims—agreed to address the well-known impediments to private civil rights enforcement and thus included the attorney's fees and appointment of counsel provisions desired by civil rights advocates.

Dirksen was not oblivious to the possible problem of lawsuits for his business constituents. He included two provisions in his amendments that were calculated to limit the use of the private right of action that he created, though it is doubtful that either was very effective. First, the amendments introduced by Dirksen specified that only aggrieved claimants, and not third parties such as the NAACP—the most prominent civil rights litigator in the United States—would have standing to initiate claims, and his goal with this provision was to contain the volume of litigation.<sup>129</sup> The amendment overrode language in the House-passed version of Title VII, which had allowed groups to initiate claims "on behalf of" an

120. David Filvaroff, special assistant in the Department of Justice in 1963-64, correspondence with author, 25 November 2008.

121. Raymond Wolfinger, an aid to Senator Hubert Humphrey in 1963-64, interview with author, 12 November 2008; John G. Stewart, legislative assistant to Hubert Humphrey in 1963-64, interview with author, 29 December 2008. Wolfinger reports that Hubert Humphrey was an open conduit of communication between civil rights groups and Justice Department lawyers. According to Stewart, these were largely the same Justice Department lawyers that had drafted the original version of the Kennedy administration's bill, which contained a public accommodations title with a private right of action and fee recovery for successful plaintiffs. See H.R. 7152, § 204(b), 88<sup>th</sup> Cong., 1<sup>st</sup> sess., 1963, reprinted in *Hearings on Miscellaneous Proposals Regarding the Civil Rights of Persons Within the Jurisdiction of the United States Before Subcommittee No. 5 of the House Committee on the Judiciary*, 88<sup>th</sup> Cong., 1<sup>st</sup> sess., 1963, Serial No. 4, Part I, 653.

122. John G. Stewart, legislative assistant to Hubert Humphrey in 1963-64, interview with author, 29 December 2008.

123. Whalen and Whalen, *The Longest Debate*, 167-68; Loevy, *To End All Segregation*, 227-30; Watson, *Lion in the Lobby*, 598.

124. Watson, *Lion in the Lobby*, passim.

125. Watson, *Lion in the Lobby*, 606, and ch. 18 generally; Interview of Raymond Wolfinger, an aid to Senator Hubert Humphrey in 1963-64, 12/11/08.

126. *Congressional Record*, 88<sup>th</sup> Cong., 2<sup>nd</sup> sess., 4 June 1964, 12722.

127. *Congressional Record*, 88<sup>th</sup> Cong., 2<sup>nd</sup> sess., 4 June 1964, 12724.

128. *Congressional Record*, 88<sup>th</sup> Cong., 2<sup>nd</sup> sess., 4 June 1964, 13839.

129. *Congressional Record*, 88<sup>th</sup> Cong., 2<sup>nd</sup> sess., 26 May 1964, 11930-11934, § 706(e) (Title VII as introduced by Dirksen the first time); *Congressional Record*, 88<sup>th</sup> Cong., 2<sup>nd</sup> sess., 10 June 1964, 13314-13318, § 706(e) (Title VII as introduced by Dirksen the second time); 78 Stat. at 260, § 706(e) (Title VII as passed); Graham, *The Civil Rights Era*, 146.

employee.<sup>130</sup> However, this provision had no bearing upon the ability of a third party, such as the NAACP, to serve as counsel to an individual claimant, which, as discussed below, would be a frequent occurrence in Title VII's early years. Second, Dirksen's amendments required that before a person could initiate a claim with the EEOC, he or she would be required to exhaust administrative remedies available under state fair employment practice laws, though they would generally be free to exit state systems for the federal process sixty days after initiating a state claim.<sup>131</sup> Although this provision would delay plaintiffs in states with fair employment practice procedures in pursuing their federal claims, it was only mandatory for two months, and once a claimant initiated the federal process, there would be no deference owed to state administrative determinations.

That public enforcement powers had been traded for private litigation in the Dirksen compromise, and that the details of Title VII's private enforcement regime were a critical part of the bargain, was well understood by observers and legislators. One contemporaneous commentator characterized the provisions regarding appointment of counsel and attorney's fees as "the price that had to be paid to secure bipartisan agreement on striking out the power of the EEOC to enforce Title VII by court action."<sup>132</sup> Another explained that "[t]he system of individual enforcement was the result of a conscious, explicit rejection of a system of administrative enforcement."<sup>133</sup> Humphrey characterized the transfer of authority to bring suit from the commission to the individual claimant, and the allowance of appointment of counsel and recovery of attorney's fees, as "the most significant change . . . in Title VII" to occur in the Senate,<sup>134</sup> a sentiment echoed by Republican Leverett Saltonstall (R-MA).<sup>135</sup>

### Voting Alignments and Rollcalls on Private Enforcement

There were rollcalls on numerous dimensions of the CRA of 1964's private enforcement provisions, demonstrating that legislators regarded the details of these provisions, such as rules governing fee

shifting and appointment of counsel, to be extremely important. Such details were the focus of intense scrutiny, deliberation, and conflict among lawmakers. Saltonstall remarked, concerning the task of nailing down the details of the private right of action in Title VII in the ultimate compromise, "We struggled over this section for a long time."<sup>136</sup> The public accommodations title in the original Senate version of the bill (S. 1732), considered in the Commerce Committee, had contained an attorney's fee-shifting provision, which, according to Strom Thurmond, the committee deleted "after much careful deliberation."<sup>137</sup>

When faced with the same fee-shifting provision in the House-passed version of the public accommodations title that made it to the Senate floor (Title II), Thurmond offered a roll call to strike it out, urging his colleagues to uphold the earlier deal made in the Commerce Committee, but they rejected his pleas and defeated the amendment.<sup>138</sup> The next day, undeterred by this defeat, Senator Sam Ervin (D-NC) offered the same amendment to strike out the fee-shifting provision, warning that it would unleash a stampede of "ambulance chasing" lawyers "chosen and controlled by the NAACP and its subsidiary corporations."<sup>139</sup> Republican Jack Miller (R-IA) countered that since plaintiffs could recover fees only if they prevailed, "the ambulance chaser—if we wish to use that term—will be on his guard not to go after anything except meritorious cases." Ervin shot back that "the attorney who had a meritorious case would probably be crushed to death in the rush of attorneys seeking cases regardless of their merits."<sup>140</sup> In support of Ervin's amendment, Senator Bourke Hickenlooper (R-IA), a conservative Republican opponent of the bill, in perhaps the most ominous admonition ever uttered about a fee-shifting provision, offered biblical counsel: "He that passeth by, and meddleth with strife belonging not to him, is like one that taketh a dog by the ears." Humphrey replied, "That is a partisan remark."<sup>141</sup> The roll call was defeated and the fee-shifting provision was retained.<sup>142</sup>

In addition to these two roll calls, southerners in the Senate offered an additional six aimed at

130. Equal Employment Opportunity Commission, *Legislative History of Titles VII and XI of Civil Rights Act of 1964*, 1011.

131. *Congressional Record*, 88<sup>th</sup> Cong., 2<sup>nd</sup> sess., 26 May 1964, 11930–11934, § 706(b) (Title VII as introduced by Dirksen the first time); *Congressional Record*, 88<sup>th</sup> Cong., 2<sup>nd</sup> sess., 10 June 1964, 13314–13318, § 706(b) (Title VII as introduced by Dirksen the second time); 78 Stat. at 259–60, § 706(b) (Title VII as passed); Rodríguez and Weingast, "The Positive Political Theory of Legislative History," 1492.

132. Vaas, "Title VII: Legislative History," 454. See also 437.

133. Walker, "Title VII," 495–524, 506. See also Comment, "Enforcement of Fair Employment Under the Civil Rights Act of 1964," 454, 467.

134. *Congressional Record*, 88<sup>th</sup> Cong., 2<sup>nd</sup> sess., 10 June 1964, 12722.

135. *Congressional Record*, 88<sup>th</sup> Cong., 2<sup>nd</sup> sess., 17 June 1964, 14188.

136. *Congressional Record*, 88<sup>th</sup> Cong., 2<sup>nd</sup> sess., 17 June 1964, 14188.

137. *Congressional Record*, 88<sup>th</sup> Cong., 2<sup>nd</sup> sess., 16 June 1964, 13878.

138. *Congressional Record*, 88<sup>th</sup> Cong., 2<sup>nd</sup> sess., 16 June 1964, 13879 (ICPSR Roll Call Number 366).

139. *Congressional Record*, 88<sup>th</sup> Cong., 2<sup>nd</sup> sess., 17 June 1964, 14201, 14213–14.

140. *Congressional Record*, 88<sup>th</sup> Cong., 2<sup>nd</sup> sess., 17 June 1964, 14214.

141. *Congressional Record*, 88<sup>th</sup> Cong., 2<sup>nd</sup> sess., 17 June 1964, 14213.

142. *Congressional Record*, 88<sup>th</sup> Cong., 2<sup>nd</sup> sess., 17 June 1964, 14214 (ICPSR Roll Call No. 406).

diminishing private enforcement under Titles II and/or VII: the Thurmond amendment to delete any private right of action under Title VII, substituting criminal prosecutions with attendant proof beyond a reasonable doubt and trial by jury;<sup>143</sup> the Thurmond amendment to delete court authority to appoint counsel under Title VII;<sup>144</sup> the Ervin amendment providing that an attorney would have to consent to be appointed under Titles II and VII;<sup>145</sup> the Thurmond amendment to delete any private right to sue under Title II, substituting criminal prosecutions;<sup>146</sup> the Long amendment to stipulate that an individual may recover attorney's fees under Title II only on a "showing of good cause";<sup>147</sup> and the Thurmond amendment requiring exhaustion of all administrative remedies before commencing private litigation under Title II.<sup>148</sup> Southerners offered two more amendments aimed at giving the very same benefits to civil rights defendants that they sought to take away from civil rights plaintiffs: the Stennis amendment to authorize the court to appoint counsel and award attorney's fees for a defendant sued by the Attorney General under any part of the act, including Title VII;<sup>149</sup> and the Thurmond amendment to allow the court to appoint an attorney for defendants under Title II.<sup>150</sup>

All eight roll calls to limit private enforcement were defeated, as were the two to aid civil rights defendants. Legislators from the eleven former confederate states voted in the roll calls to restrict enforcement by private plaintiffs at a rate of 91 percent, whereas Democrats outside the South voted against restricting enforcement by private plaintiffs at a rate of 98 percent, and Republicans outside the south (all but one) voted against at a rate of 79 percent. A bivariate logistic regression indicates that the odds of voting in support of private enforcement incentives were

ninety-two times larger among legislators who voted in favor of the Act as compared to legislators who voted against it. These roll calls show that legislators were abundantly aware of the details of Title VII's private enforcement provisions. Lawmakers opposed to the law sought to minimize their litigant-mobilizing effect, and non-southern Democrats and Republicans who supported the law voted together to sustain the details of the private enforcement regime—a cornerstone of the Dirksen compromise—against southern attack.

### Private Enforcement as Compromise

The Dirksen compromise on Title VII enforcement was exactly that. Although southerners and the most conservative Republicans warned of "ambulance-chasing" lawyers "chosen and controlled by the NAACP," devoted civil rights advocates were also disappointed by the settlement. They denounced the evisceration of the EEOC and regarded the civil action provisions as clearly weaker than the administrative cease-and-desist powers they actually thought necessary, worrying that potential civil rights plaintiffs, often poor and vulnerable to retaliation, would not be in a position to take on American business in the courtroom.<sup>151</sup> Richard Berg, who worked in the Office of Legal Counsel in the Kennedy Justice Department when the deal was struck and then became Deputy General Counsel of the EEOC shortly afterward, expressed liberals' low expectations of the effects of the law after it was passed, but before it came into effect:

The enforcement procedures of the title ... bear only too visibly the marks of compromise, and seem to me to contain serious deficiencies. It seems questionable that much can be accomplished through suits in federal court by persons aggrieved by acts of discrimination. The practical advantages will lie heavily with the defendants, and even where the evidence of discrimination is overwhelming, it cannot be expected that many complainants will undertake the burden of an individual suit.<sup>152</sup>

The Leadership Conference concluded, no doubt in exaggerated rhetoric, that the changes in Title VII's enforcement provisions in the Dirksen compromise rendered it "virtually meaningless."<sup>153</sup> Writing in 1966, law professor and civil rights advocate Michael Sovern agreed, remarking that "[l]etting the

143. *Congressional Record*, 88<sup>th</sup> Cong., 2<sup>nd</sup> sess., 17 June 1964, 14182 (ICPSR Roll Call No. 396). Southerners had consistently advocated for criminal rather than civil proceedings in the civil rights context on the expectation that the higher burden of proof, coupled with trial by all-white southern juries, would make convictions all but impossible. Greenberg, *Race Relations and American Law*, 15; Watson, *Lion in the Lobby*, 365.

144. *Congressional Record*, 88<sup>th</sup> Cong., 2<sup>nd</sup> sess., 17 June 1964, 14196 (ICPSR Roll Call No. 401).

145. *Congressional Record*, 88<sup>th</sup> Cong., 2<sup>nd</sup> sess., 17 June 1964, 14201 (ICPSR Roll Call No. 405).

146. *Congressional Record*, 88<sup>th</sup> Cong., 2<sup>nd</sup> sess., 12 June 1964, 13647–48 (ICPSR Roll Call No. 330). As with the same amendment offered with respect to Title VII, Thurmond proposed, as an alternative to civil liability, the use of ordinary criminal process with associated jury trials and proof beyond a reasonable doubt.

147. *Congressional Record*, 88<sup>th</sup> Cong., 2<sup>nd</sup> sess., 16 June 1964, 13934 (ICPSR Roll Call No. 383).

148. *Congressional Record*, 88<sup>th</sup> Cong., 2<sup>nd</sup> sess., 16 June 1964, 13904–05 (ICPSR Roll Call No. 371).

149. *Congressional Record*, 88<sup>th</sup> Cong., 2<sup>nd</sup> sess., 12 June 1964, 13669 (ICPSR Roll Call No. 337).

150. *Congressional Record*, 88<sup>th</sup> Cong., 2<sup>nd</sup> sess., 15 June 1964, 13839–40 (ICPSR Roll Call No. 361).

151. Richard Berg, "Equal Employment Opportunity Under the Civil Rights Act of 1964," *Brooklyn Law Review* 31 (1964): 96–97; Comment, "Enforcement of Fair Employment Under the Civil Rights Act of 1964," 430; Graham, *The Civil Rights Era*, 189–90; Skrentny, *The Ironies of Affirmative Action*, 121–22; Stewart, "The Civil Rights Act of 1964: Tactics I," 249–52.

152. Berg, "Equal Employment Opportunity Under the Civil Rights Act of 1964," 96–97.

153. Stein, *Running Steel, Running America*, 85.

complainant sue was one of the original models of anti-discrimination enforcement . . . and it has never worked.”<sup>154</sup>

Between southern fears and liberal disappointment, it is important to stress that the enforcement provisions of Title VII were meaningful and important. They embodied a compromise on enforcement, not an abdication. With respect to Title VII, the Attorney General received some, though not all, of the type of enforcement powers long sought by civil rights groups and defeated in 1957 and 1960. However, the lion's share of enforcement responsibility would lie with private litigants. In light of the well-recognized scarcity of private enforcement of existing civil rights laws with private rights of action, the compromise, to succeed, had to go beyond merely allowing aggrieved individuals to sue. It had to overcome a key obstacle to private enforcement—the difficulty of retaining and paying counsel—and thereby encourage meritorious actions. The compromise sought to address this issue and *facilitate* litigation, as compared with existing civil rights laws, which merely *allowed* it, with its provisions concerning appointment of counsel and attorney's fees awards. To be sure, the effects of this compromise were uncertain.

Pivotal conservative Republicans, empowered by a profoundly divided Democratic Party and the filibuster in the Senate, authored the compromise. Natively circumspect toward bureaucratic regulation of business in general, and acutely fearful, with ample historical precedent, that they would not be able to control an NLRB-style civil rights agency in the hands of their ideological adversaries, they would not countenance H.R. 405's EEOC. At the same time, given the explosive salience of civil rights in the electoral environment of 1963–64, they had to offer a meaningful alternative. Attempting to steer a middle course, House Republicans judicialized the enforcements venue, striking Title VII's cease-and-desist powers, substituting an EEOC right to sue in federal court, and introducing for the first time the prospect of private enforcement suits, though only with agency permission and without any effort to surmount longstanding and well-recognized economic obstacles to private civil rights litigation. Conservative Republicans in the Senate then largely privatized the prosecutorial function. They stripped the EEOC of the obligation to sue in meritorious cases in which conciliation failed, instead conferring upon the Justice Department, a weaker organ of administrative power, the discretionary right to initiate suit, but even then only in the limited pattern or practice context. There would be no governmental authority to initiate enforcement of ordinary individual claims under Title VII. In

exchange for these reductions in executive enforcement power, the Dirksen compromise created an unconditional private right of action under Title VII, including the appointment of counsel and attorney's fees provisions, which were clearly calculated to address the economic impediments already inhibiting private enforcement of Reconstruction civil rights laws. In sum, pivotal conservative Republicans, whose support for civil rights legislation could not be expected unconditionally, wielded their veto powers to beat back bureaucratic state building by liberal civil rights advocates, substituting private enforcement litigation in its stead.

This legislative move would have profound long-run consequences for the implementation of job discrimination laws under Title VII and beyond. As new forms of job discrimination were prohibited under federal law, Congress, not surprisingly, simply inserted the new prohibitions into the existing enforcement model founded upon private litigation. The Age Discrimination in Employment Act of 1967 followed the enforcement model of private litigation with no administrative cease-and-desist powers. The Rehabilitation Act of 1973, prohibiting employment discrimination based upon disability by the federal government and federal contractors, and the Americans with Disabilities Act of 1990, prohibiting employment discrimination based upon disability in the private sector and by states, simply incorporated Title VII's enforcement provisions by reference. Thirty years on, this job discrimination enforcement framework would produce more non-prisoner civil litigation in the federal system than any other.

### Interest Groups on the Scene

A final note is in order about the interest group presence in the halls of Congress during the legislative struggle over the CRA of 1964. It provides an interesting point of contrast with later lawmaking episodes addressing civil rights enforcement. A massive interest group effort lay behind the watershed legislation. A *Congressional Quarterly Weekly Report* article titled “Intensive Lobbying Marked House Civil Rights Debate,” observed that the CRA of 1964 “was the subject of some of the most intensive and effective behind-the-scenes lobbying in modern legislative history,” and provided an inventory of all organizations that lobbied for the bill.<sup>155</sup> The forty-four organizations listed as lobbying in favor of the 1964 act were predominantly civil rights groups, labor organizations, and church groups. Only a single lawyers' association—the American Bar Association (ABA)—is listed, though it must be acknowledged that the ABA was surely the most powerful lawyers' association in the United States. The non-governmental

154. Sovern, *Legal Restraints on Racial Discrimination in Employment*, 79.

155. “Intensive Lobbying Marked House Civil Rights Debate.” *Congressional Quarterly Weekly* 21 February 1964, 364–66.

witnesses to appear in the hearings before Subcommittee No. 5 were likewise dominated by civil rights and other issue groups, labor organizations, and religious groups. Of forty-one non-governmental witnesses invited to testify, none represented lawyers' associations (the ABA was not invited), and only two were from specifically *legal* advocacy organizations: the American Civil Liberties Union and the Lawyers Committee for Civil Rights Under Law.<sup>156</sup> Lawyers' associations were simply not on the scene. This would soon change, as we shall see.

### THE ROAD TO THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972

The worries of the liberal critics of the Dirksen compromise on enforcement appeared to be born out almost immediately, soon giving rise to a bipartisan consensus on the need to shore up Title VII's enforcement provisions. Shortly after Title VII became effective in July 1965, the EEOC was drowning in a far larger than anticipated volume of complaints, which it struggled to process with a modest budget. Its rapidly growing backlog created processing delays of 15 months by 1967 and of two years by 1968 and 1969.<sup>157</sup> By the end of 1966, the agency, having received nearly 15,000 complaints, had achieved conciliation—meaning some relief for the claimant voluntarily conceded by the employer—in only 330, or 2 percent of them.<sup>158</sup> With the EEOC lacking any powers of coercion, employers were, by and large, simply unmoved by agency suasion, making efficient and expeditious settlement of complaints impossible.<sup>159</sup> In a 1967 interview with the *Wall Street Journal*, EEOC Chairman Stephen Shulman characterized the agency's problem: "We're out to kill an elephant with a fly gun."<sup>160</sup>

This state of affairs was not a logical correlate of the lack of EEOC enforcement powers. Theoretically, in the absence of cease-and-desist powers or a right to sue vested in the EEOC, its ability to achieve voluntary

conciliation where it found discrimination would depend on the threat of litigation posed by the attorney general or private litigants. However, by the end of 1967, when Title VII had been in effect for two and a half years, the Justice Department had filed only ten pattern or practice suits.<sup>161</sup> The Civil Rights Division within the department was small, and it was responsible for covering the whole domain of civil rights, within which employment discrimination was a low priority, of only marginal concern relative to voting rights and school desegregation.<sup>162</sup>

Private lawsuits were also few in number during Title VII's early years, notwithstanding the provisions meant to facilitate them. By September 1967, more than two years after Title VII's effective date, only fifty-six private suits had been filed, and of these at least thirty-seven were filed by the NAACP's LDF, such that at most nineteen Title VII cases were prosecuted by non-interest group private attorneys in the entire country.<sup>163</sup> Whereas the LDF and other non-profit civil rights groups could certainly play an important role in developing policy through impact litigation—one they had long played, most notably in the litigation campaign culminating in *Brown*—they lacked the resources to provide day-to-day enforcement of ordinary claims for the entire national workforce. Moreover, the LDF's focus was on race cases, and thus it appears that Title VII was scarcely enforced at all in cases relating to gender, religion, and national origin in the law's first few years. Testifying before a Senate committee in 1969, EEOC Chairman William Brown reported that in cases in which the agency found that discrimination had occurred and the agency's conciliation efforts failed to secure any relief for the claimant, over 90 percent of the time he or she did not proceed with litigation.<sup>164</sup> It appeared to observers at the time that because of the massive expense of litigation, the typically small and uncertain economic damages involved, the gross imbalance of resources and legal sophistication between employers and often poor and uneducated employees, the notorious slowness of the judicial process, employee fear of retaliation, and bigoted judges in the South, litigation brought by private sector attorneys simply would not produce an adequate volume of suits to address enforcement requirements.<sup>165</sup> If the Dirksen compromise on enforcement

156. *Hearings on Miscellaneous Civil Rights Legislation Before Subcommittee No. 5 of the House Judiciary Committee*, 88<sup>th</sup> Cong., 1<sup>st</sup> sess., 1963.

157. *Hearings on Equal Employment Opportunity Enforcement Act (S. 2453) Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare*, 91<sup>st</sup> Cong., 1<sup>st</sup> sess., 1969 (hereinafter *Senate Hearings on S. 2453*), 50 (testimony of William Brown, chairman of the EEOC); Graham, *The Civil Rights Era*, 190, 203, 235–36, 239, 422.

158. James P. Gannon, "Uphill Bias Fight: After Faltering Start, Agency Readies Attack On Job Discrimination," *Wall Street Journal*, 12 April 1967, 1.

159. House Report No. 238, 92d Cong., 1<sup>st</sup> sess., 1972 ("Instead of cooperating with the EEOC to resolve charges against them, employers ignored the conciliation process and relied, often successfully, on the assumption that aggrieved employees would fail to litigate their claims independently."); Graham, *The Civil Rights Era*, 235; 422–23; Chen, *The Fifth Freedom*, ch. 5.

160. Gannon, "Uphill Bias Fight," 1.

161. Richard P. Nathan, *Jobs and Civil Rights: The Role of the Federal Government in Promoting Equal Opportunity in Employment and Training* (Washington: United States Government Printing Office, 1969), 76.

162. Graham, *The Civil Rights Era*, 236–37, 422.

163. Nathan, *Jobs and Civil Rights*, 74–75.

164. *Senate Hearings on S. 2453*, 40.

165. *Senate Hearings on S. 2453*, 43 (statement of Senator Ralph Yarborough); 60 (statement of Clifford Alexander, member and former chairman of the EEOC); 66 (statement of Wendell Freeland, member of the board of trustees of the National Urban League); Graham, *The Civil Rights Era*, 424; Nathan, *Jobs and Civil*

had been engineered by its author to minimize “harassment” of business under Title VII, from the vantage point of the late 1960s it appeared to have worked.

As a result of the insubstantial level of enforcement by private litigants and the attorney general, and the consequent weakening of EEOC conciliation efforts, not long after the agency opened its doors, President Johnson, liberal legislators and civil rights groups urged that Title VII be amended to give the EEOC cease-and-desist powers. Bills containing cease-and-desist powers for the EEOC, among a number of other Title VII-strengthening measures, were introduced in every Congress between 1965 and passage of the Equal Employment Opportunity Act (EEOA) of 1972. Though a bipartisan consensus emerged that Title VII’s enforcement provisions were feeble and in need of strengthening, many Republicans who favored strengthening amendments ultimately rejected cease-and-desist, preferring instead to empower the EEOC to enforce through lawsuits, following the prosecutorial agency model in the version of Title VII initially passed by the House in 1963.<sup>166</sup>

Although champions of cease-and-desist would get their proposed amendments passed in the House in 1965 and in the Senate in 1970,<sup>167</sup> in the end they would fail. When the EEOA of 1972 was ultimately passed, cease-and-desist was defeated. Instead, the EEOC was given the authority to prosecute both pattern or practice and ordinary individual suits.<sup>168</sup> Given the agency’s resource starvation and immense backlogs, however, it was not clear how much additional enforcement this would actually produce. The legislative coalition dynamics that produced this outcome were similar to those in 1964. Civil rights groups allied with liberal legislators, primarily non-southern Democrats, were vigorous supporters of cease-and-desist, and southern opposition to any strengthening of Title VII’s enforcement provisions was vehement, producing a filibuster in the Senate. Between these two poles, the pivotal voters were again conservative Republicans, who rejected cease-and-desist in favor of the court-based prosecutorial agency model, once again deriding what they regarded as liberal efforts at excessive bureaucratic state building and expressing fear that they would not be able to control an agency in the wrong political hands.<sup>169</sup> The essential character of the Dirksen compromise on Title VII enforcement was confirmed and

entrenched, mixing public and private enforcement lawsuits with the lion’s share of enforcement responsibility laying with private plaintiffs and their attorneys.

In the course of the failed campaign for EEOC cease-and-desist powers between 1965 and 1972, there was a gradual and important shift in civil rights groups’ perspective on the value of private Title VII lawsuits. Although they had not sought private enforcement in 1963–64, by the end of the 1960s they guarded it fiercely. During the renewed push for cease-and-desist, there was a move among some elements to demand striking the private right of action as the price to be paid for it.<sup>170</sup> In 1966, the AFL-CIO, by far the most powerful labor organization within the Leadership Conference, conditioned its support for cease-and-desist authority upon eliminating the private right of action. A number of the early and successful Title VII suits had targeted large and important AFL-CIO unions, and federal court decisions proved to be far more intrusive into union affairs than had administrative enforcement under state fair employment practice commissions. The AFL-CIO thus would support cease-and-desist *instead of*, but not in addition to, private litigation.<sup>171</sup>

In 1967, civil rights groups within the Leadership Conference, following the lead of Jack Greenberg of the LDF, which had been involved in financing and prosecuting a large majority of Title VII suits filed up until that time, refused to support a bill trading private enforcement for cease-and-desist, which would have effectively reproduced H.R. 405. They did, however, reluctantly agree to accept a significantly weakened private right of action in exchange for AFL-CIO support for cease-and-desist powers.<sup>172</sup> A bill subsequently proposed by the Johnson administration in 1967, and introduced by liberal Democrats Emanuel Celler (D-NY) in the House and Philip Hart (D-MI) in the Senate, embodied this compromise. The EEOC was given cease-and-desist powers, and a private right of action was retained under certain circumstances outlined below, but the provisions allowing appointment of counsel, waiver of the filing fee, and awards of attorney’s fees to winning plaintiffs were stricken.<sup>173</sup>

This hybrid cease-and-desist/private litigation enforcement regime would work as follows. If upon initial investigation the commission did not find “reasonable cause” to credit the charge of discrimination, then the complaint would be dismissed

*Rights*, 47–50, 75; Sovern, *Legal Restraints on Racial Discrimination in Employment*, 79; Chen, *The Fifth Freedom*, ch. 5.

166. Sape and Hart, “Title VII Reconsidered,” 830–31, 835–41; Chen, *The Fifth Freedom*, ch. 5.

167. Sape and Hart, “Title VII Reconsidered,” 830–35.

168. 86 Stat. 106–07, §706(f)(1), and §707(c)–(e).

169. Sape and Hart, “Title VII Reconsidered,” 841–45; Chen, *The Fifth Freedom*, ch. 5.

170. Senate Hearings on S. 2453, 72 (statement of Jack Greenberg, director-counsel, NAACP Legal Defense and Education Fund); Hill, “Lichtenstein’s Fictions,” 91–92; Sape and Hart, “Title VII Reconsidered,” 832.

171. Hill, “Lichtenstein’s Fictions,” 91–92.

172. Hill, “Lichtenstein’s Fictions,” 92.

173. *Congressional Record*, 90<sup>th</sup> Cong., 1<sup>st</sup> sess., 20 February 1967, 3949–52.

without a hearing, and the complainant would be free to proceed with private litigation de novo in district court. Under H.R. 405, if the complaint were dismissed at this stage, after investigation but without a hearing, the complainant would only have had access to appellate review, which is extremely deferential to the agency. Civil rights advocates were no longer willing to give the agency the power to effectively terminate a claim following investigation but without a full evidentiary hearing. Like H.R. 405, if the agency did find reasonable cause to credit the complaint, then it would attempt to conciliate a voluntary settlement, and failing that, it would hold an evidentiary hearing and render a decision, which would be subject only to deferential appellate review on the agency record. If the commission had not initiated the hearing procedure within 180 days from when the complaint was filed, the complainant would be free to exit the administrative process and file a lawsuit. Civil rights advocates were no longer willing to wait indefinitely for agency action. It is critical to stress that agency powers under this framework are considerable, though less so than in H.R. 405. If the agency elected to hold an evidentiary hearing and acted quickly, a genuine cease-and-desist model would prevail and courts would play only a limited role. However, if the agency elected not to hold an evidentiary hearing or moved too slowly, claimants would be free to litigate.

The 99<sup>th</sup> Congress failed to act on this bill. In 1968, civil rights groups within the Leadership Conference, again led by the LDF's Jack Greenberg, reversed course, repudiated their deal with the AFL-CIO, and refused to agree to eliminate the provisions regarding appointment of counsel, waiver of the filing fee, and attorney's fees awards, even if this meant turning the most powerful labor organization in the United States against EEOC cease-and-desist powers.<sup>174</sup> Instead, civil rights advocates wanted those provisions attached to the private right of action within the hybrid cease-and-desist/private litigation framework just outlined. This is what they lobbied for between 1968 and passage of the EEOA of 1972.<sup>175</sup>

Why would civil rights groups no longer accept H.R. 405? Why did their preferences change? Self-reinforcing policy feedback dynamics, in the form of policy learning effects, were clearly at play, and the change was further fostered by a rightward shift in the executive branch when Nixon took office. The logic of policy learning as a form of policy

feedback is straightforward. Under constraints of bounded rationality, the human capacity to predict the effects of new policies, created in a complex world, is limited. Actors at or near the center of the policy process, however, are able to observe and learn from the performance of past policies, and this learning guides future policy decisions.<sup>176</sup> Since 1964, civil rights groups had learned some painful lessons about limitations in executive enforcement of Title VII that went well beyond the EEOC's lack of cease-and-desist powers, and these lessons had shaken their confidence in the prospect of bureaucracy as the sole instrument of implementation. Over the same period, civil rights groups also learned some gratifying lessons about what they could achieve through litigating Title VII claims. Although only negligible private enforcement of Title VII by the for-profit bar had materialized, the NAACP's LDF, by far the largest prosecutor of Title VII actions in the country, was encountering a very hospitable judiciary and achieving some quite stunning successes. These two sets of lessons learned from experience with Title VII implementation since 1964—negative with respect to bureaucracy and positive with respect to private litigation—affected a transformation of the relative weighting of civil rights groups' preferences for administrative adjudication versus litigation in courts. This transformation was deepened when Nixon took office and open conflict broke out between civil rights groups and the new administration.

### Loss of Faith in Executive Power

The Brookings Institution and the United States Commission on Civil Rights funded a study, conducted in 1967 and 1968, on the state of Title VII enforcement, and in the course of the study leaders of civil rights groups were interviewed and surveyed on their views of the existing enforcement situation.<sup>177</sup> Although the EEOC was certainly highly sympathetic toward and cooperative with civil rights groups, particularly the NAACP, in sharing information and developing legal arguments and strategy,<sup>178</sup> civil rights groups were gravely concerned that the EEOC was so massively under-funded and under-staffed relative to the task confronting it that it was incapable of adequately processing claims,

174. Hill, "Lichtenstein's Fictions," 91–92.

175. See, e.g., Senate Hearings on S. 2453, 72 (statement of Jack Greenberg, director-counsel, NAACP Legal Defense and Education Fund), 75 (statement of Joseph Rauh, general counsel, Leadership Conference on Civil Rights); House Report No. 238, 92<sup>nd</sup> Cong., 1<sup>st</sup> sess., 2 June 1971 (hereinafter House Report No. 238), 11–13.

176. Paul Pierson, *Dismantling the Welfare State? Reagan, Thatcher and the Politics of Retrenchment* (Cambridge: Cambridge University Press, 1994), 41–42; Hugh Helco, *Modern Social Politics in Britain and Sweden* (New Haven: Yale University Press, 1974), 305–316; Edwin Amenta, Elisabeth Clemens, Jefren Olsen, Sunita Parikh, and Theda Skocpol, "The Political Origins of Unemployment Insurance in Five American States," *Studies in American Political Development* 2 (1987): 137–82.

177. Nathan, *Jobs and Civil Rights*.

178. Lieberman, *Shaping Race Policy*, 190.

even with the best of intentions.<sup>179</sup> Presidential budget requests were inadequate and actual congressional authorizations were worse, making meaningful investigation and evaluation of claims within a reasonable time period out of the question. According to the study, “[c]ivil rights leaders canvassed by questionnaire . . . came down hardest on delays in processing complaints,” reporting that years would pass after filing complaints with no contact at all from agency staff, leading from a “first flurry of hope” when complaints were filed to “a feeling of complete hopelessness when the complainants never heard from the EEOC.”<sup>180</sup> To civil rights advocates, allowing claimants to exit the administrative process for court if it dragged on too long would provide an “escape from the administrative quagmire” that agency proceedings had become.<sup>181</sup>

Civil rights leaders also objected that, even aside from funding issues, Title VII enforcement was an extremely low executive priority, even within the Johnson administration. This lack of executive commitment was in evidence both at the EEOC and the Department of Justice. Johnson was slow to staff the new agency and left EEOC leadership posts vacant for extended periods.<sup>182</sup> The agency’s individual case-by-case complaint processing approach was far too conservative, civil rights advocates complained, urging instead that it pursue a more ambitious enforcement vision targeting systemic patterns of discrimination.<sup>183</sup> In Jack Greenberg’s estimation, James Roosevelt, the EEOC’s first chair, “did little or nothing, either out of torpor or for political reasons.”<sup>184</sup> The agency’s political timidity caused Greenberg and other civil rights advocates to be concerned that giving up the private right of action for a pure administrative enforcement model could lead to agency capture. Greenberg later wrote that “I have no doubt that if there had been only administrative enforcement, employers and unions would have been all over the EEOC trying to shape what would happen,” and he further observed that the private right of action “kept the EEOC honest because it didn’t want to be shown up by private enforcers.”<sup>185</sup> Alfred Blumrosen, who was chief of conciliations at the EEOC from 1965 to 1967, worried by 1970 that giving up the private right of action for cease-and-desist would render the EEOC “a captive

of those interests which were to be regulated.”<sup>186</sup> Testifying in 1967 hearings on Title VII enforcement, Whitney Young, executive director of the National Urban League, summed up civil rights activists’ dejection about the agency: “The actual agency experience, which has demonstrated that the Commission cannot enforce compliance, has given rise to disillusionment and lack of confidence.”<sup>187</sup>

The Justice Department, whose use of its discretionary right to sue in Title VII’s early years was meek at best, was not inspiring confidence in executive enforcement among civil rights groups either.<sup>188</sup> Testifying in the 1967 congressional hearings on proposed Title VII amendments, Roy Wilkins, executive director of the NAACP, protested against “the extremely selective and limited use” that the Justice Department had made of its right to sue.<sup>189</sup> In 1969 hearings on the same subject, Greenberg, echoing his concerns about agency capture, suggested a more jaundiced perspective, noting that when the Justice Department fails to enforce against powerful unions and businesses, “suspicion arises that the Government did not act because some labor union or corporation used its political influence.”<sup>190</sup> This, in Greenberg’s view, carried over an unfortunate practice from the Kennedy administration under which civil rights groups “had repeatedly seen civil rights enforcement compromised by political considerations.”<sup>191</sup>

### Rightward Shift in Executive Enforcement Preferences

Whereas civil rights advocates’ disillusionment over executive commitment to vigorous civil rights enforcement took root under the Johnson administration, when Nixon assumed office their relationship with the executive branch worsened markedly. Nixon had deployed his storied “southern strategy” in the 1968 campaign, endeavoring to win over white southern Democrats by convincing them that the Republican party better represented their preferences on a variety of issues, importantly including civil rights.<sup>192</sup> While civil rights advocates had been disappointed by the Johnson administration’s

186. Alfred W. Blumrosen, *Black Employment and the Law* (New Brunswick: Rutgers University Press, 1971), 59.

187. Senate Hearings on Equal Employment Opportunity, 4–5.

188. Nathan, *Jobs and Civil Rights*, 45–46, 76.

189. *Hearings on Equal Employment Opportunity Before the Subcommittee on Employment, Manpower, and Poverty of the Senate Committee on Labor and Public Welfare*, 90<sup>th</sup> Cong., 1<sup>st</sup> sess., 1967 (hereinafter *Senate Hearings on Equal Employment Opportunity*), 127.

190. Senate Hearings on S. 2453, 70. See also 72.

191. Jack Greenberg, correspondence with the author, 22 August 2007.

192. Reg Murphy and Hal Gulliver, *The Southern Strategy* (New York: Scribner, 1971); Nadine Cohodas, *Strom Thurmond and the Politics of Southern Change* (New York: Simon & Schuster, 1993), 385–400; Dean J. Kotlowski, *Nixon’s Civil Rights: Politics, Principle, and Policy* (Cambridge: Harvard University Press, 2001), 15–43.

179. Nathan, *Jobs and Civil Rights*, 45–46.

180. Nathan, *Jobs and Civil Rights*, 46 (emphasis added).

181. House Report No. 238, 12. See also Senate Hearings on S. 2453, 72 (statement of Jack Greenberg, director-counsel, NAACP Legal Defense and Education Fund).

182. Skrentny, *The Ironies of Affirmative Action*, 122–23; Nathan, *Jobs and Civil Rights*, 46.

183. Nathan, *Jobs and Civil Rights*, 46.

184. Jack Greenberg, correspondence with the author, 22 August 2007.

185. Jack Greenberg, correspondence with the author, 22 August 2007.

lackluster performance on civil rights enforcement, they soon came to regard Nixon as affirmatively obstructionist, reinforcing and exacerbating their low expectations for executive enforcement of civil rights laws in general, and of job discrimination laws in particular.<sup>193</sup>

Within a few months of Nixon assuming office, conflict over Title VII enforcement erupted between civil rights advocates and the new administration. In March 1969, Senator Dirksen publicly called on the new president to oust Clifford Alexander, the still-serving EEOC chair appointed by Johnson, because of his "harassment" of businesses on the issue of job discrimination, and the White House drew fire from civil rights advocates by announcing the next day that Alexander would be replaced.<sup>194</sup> Before he could be, on April 9<sup>th</sup> Alexander resigned, attributing his decision to "a crippling lack of Administration support," and complaining that the Nixon Justice Department refused to prosecute clear violations of Title VII uncovered by Commission hearings and referred to the Department for prosecution.<sup>195</sup> In early May, the United States Civil Rights Commission issued public letters attacking as "seriously deficient" the Nixon administration's enforcement of federal laws and regulations prohibiting job discriminating, and accusing it of actually subsidizing discriminatory employment practices by contracting with firms known to discriminate.<sup>196</sup> In August, the EEOC chair appointed by Nixon to replace Alexander testified in congressional hearings, consistent with the administration's position, against giving the EEOC cease-and-desist powers (in the hybrid regime discussed above), which had been sought by Johnson, Alexander, non-southern congressional Democrats, and civil rights groups.<sup>197</sup> By the first summer of Nixon's presidency, it was unmistakable to civil rights advocates that the executive branch had moved rightward on enforcement of job discrimination laws.

To appreciate the significance of this to the enforcement preferences of civil rights advocates, it bears emphasis that the rightward executive shift on civil rights enforcement went well beyond job discrimination. In July 1969, Nixon came under sharp attack

from civil rights leaders, including NAACP executive director Roy Wilkins, for the administration's relaxation of executive pressure on southern states to desegregate public schools, and in particular its disinclination cut off federal funds, as provided for in Title VI of the CRA of 1964, to schools failing to comply with federal anti-segregation mandates.<sup>198</sup> In August, Nixon's Justice Department switched sides, relative to the Department's position under Johnson, to oppose NAACP lawyers in a desegregation lawsuit, placing the Department on the opposite side of the NAACP on a major civil rights issue for the first time since the Department began participating in civil rights litigation in the 1950s.<sup>199</sup> By 1970, civil rights groups launched a series of impact litigation suits against Nixon's Department of Health, Education and Welfare, alleging that it was failing to enforce civil rights laws prohibiting various forms of discrimination in educational institutions across the country.<sup>200</sup>

Congressional Democrats expressly linked their discontent with the Nixon administration's performance in education civil rights enforcement with the need to mobilize private litigants, following the model of Titles II and VII of the CRA of 1964. Title VII of the Emergency School Aid Act, which was part of the Education Amendments of 1972, provided for attorney's fees for winning plaintiffs in school desegregation cases brought under the Civil Rights Act of 1871.<sup>201</sup> The 1971 Democrat-led Senate Committee Report on the bill stated that the fee shift was necessary because "[t]he federal government is devoting neither the time, effort, nor the financial resources necessary for adequate law enforcement," and as a result school desegregation "laws are not being enforced throughout the nation."<sup>202</sup> Taking a chapter from Dirksen's book, it was now liberal Democrats who distrusted administrative power under Republican executive supervision, and who turned to private lawsuits as an alternative to administrative power.

193. R. Shep Melnick, "Adversarial Legalism and the Civil Rights State," paper presented at The Virtues and Vices of Legalism: A Conference to Honor the Work of Robert A. Kagan, Center for the Study of Law and Society, University of California, Berkeley, September 19, 2008.

194. Roy Reed, "Job-Rights Chief Quits in Dispute on Nixon's Goals," *New York Times*, 10 April 1969, 1; Staff Reporter, "Government Aids Job Bias by Patronizing Noncompliant Firms, Rights Unit Charges," *Wall Street Journal*, 2 May 1969, 4.

195. Reed, "Job-Rights Chief Quits in Dispute on Nixon's Goals."

196. Staff Reporter, "Government Aids Job Bias by Patronizing Noncompliant Firms."

197. Senate Hearings on S. 2453, p. 38–59 (testimony of EEOC Chairman William Brown).

198. Jonathan Spivak, "Nixon Statement on School Desegregation Stirs Doubts About His Civil Rights Stance," *Wall Street Journal*, 7 July 1969, 6.

199. Graham, *The Civil Rights Era*, 319.

200. Rosemary Salomone, "Judicial Oversight of Agency Enforcement: The Adams and WEAL Litigation," in *Justice and School Systems: The Role of the Courts in Education Litigation*, ed. Barbara Flicker (Philadelphia: Temple University Press, 1990), 111–181; Stephen C. Halpern, *On the Limits of Law: The Ironic Legacy of Title VI of the 1964 Civil Rights Act* (Baltimore: Johns Hopkins University Press, 1995), chapter 4.

201. The fee shift was codified at 20 U.S.C. § 1617. For a discussion of the winding legislative history of this fee provisions, see *Bradley v. School Board of City of Richmond*, 416 U.S. 696, 716 n. 23 (1974).

202. Senate Report No. 61, 92nd Cong, 1st sess., 1971, p. 25.

### Litigation Successes and Judicial Hospitality

In contrast with civil rights groups' flagging confidence in executive enforcement, they had a buoyant sense of their own efficacy, through litigation, as enforcers in the domain of job discrimination. Whereas for-profit sector attorneys had shown almost no interest in bringing Title VII claims, by August 1969 the NAACP's LDF had filed more than 70 cases.<sup>203</sup> In the 1969 Senate hearings on bills that led to the EEOA of 1972, testifying in favor of the hybrid cease-and-desist/private litigation approach, Greenberg expressed far greater concern for preserving private litigation, the virtues of which were the chief focus of his remarks, than for adding cease-and-desist. Said Greenberg: "[T]hat part of the proposed law which most interests us as a private agency deeply involved in the implementation of Title VII is the section which preserves the right of private parties to file suits on their own behalf."<sup>204</sup>

In favor of preserving the private right of action, Greenberg pointed to the LDF's "gratifying" successes as the single largest prosecutor of Title VII actions during the law's first five years. If civil rights groups were disappointed in executive performance, they most certainly were not disappointed in federal courts, which by the time of Greenberg's testimony in 1969 had shown a strong proclivity toward expansive, pro-plaintiff interpretations of Title VII, issuing decisions that made civil rights leaders "jubilant."<sup>205</sup> With a judiciary clearly to the left of Congress on civil rights, to many it appeared that the federal courts were interpreting Title VII far more liberally than Congress had intended.<sup>206</sup>

Further, 1966 revisions to Rule 23 of the Federal Rules of Civil Procedure widened access to class actions, and courts immediately applied the new rule permissively in Title VII cases.<sup>207</sup> In individual actions, relief ordered by the court generally only directly benefits specifically named plaintiffs. On the other hand, in class actions named plaintiffs can seek more extensive relief to benefit entire classes of employees, potentially making litigation a more effective tool for institutional reform and spreading the costs of litigation so as to make some types of claims economically feasible that would not otherwise

be.<sup>208</sup> The NAACP's LDF used the class device to great effect in receptive courts.<sup>209</sup> The Republican vision of courts as bastions of restrained adjudication in which defendants would find shelter, in retrospect, looked more than a little off the mark. Hugh Davis Graham has suggested that this Republican miscalculation may have been a mental relic of conservative battles in the 1940s to contain New Deal administrative state building using judicial power.<sup>210</sup>

In urging Congress in the 1969 Senate hearings to retain the private right of action in a hybrid enforcement regime, Greenberg recounted the facts of numerous Title VII cases in which the LDF had secured classes of African American employees broad-based access to employment opportunities previously denied them. They had secured agreement from the A&P store chain in North Carolina and South Carolina to open up previously white-only positions to black workers; in the "much celebrated *Newport News Shipbuilding* case," a large Virginia shipbuilding company submitted to a settlement in which "hundreds of Negro workers moved into craft and supervisory positions theretofore barred to them"; the Georgia State Employment Service "agreed to process the applications of Negro job seekers on the same basis as white applicants"; and these were but a few of their successes. In the *Newport News Shipbuilding* case, the EEOC and the Federal Office of Contract Compliance had investigated the company for years, but "there was no effective movement towards settlement of outstanding claims of racial discrimination," explained Greenberg, "until after we filed the lawsuit."<sup>211</sup>

"The entire history of the development of civil rights law is that private suits have led the way and government enforcement has followed," Greenberg concluded, and Title VII has and should continue in that tradition.<sup>212</sup> Greenberg spoke not just for the LDF, but for civil rights groups broadly. Joseph Rauh, appearing on behalf of the Leadership Conference and testifying immediately following Greenberg, opened his testimony by stating: "I agree without reservation . . . [with] Mr. Greenberg's statement."<sup>213</sup> Representatives of the NAACP and the National Urban League also testified in favor of the hybrid private litigation/cease-and-desist model.<sup>214</sup>

203. Senate Hearings on S. 2453, 69 (statement of Jack Greenberg, director-counsel, NAACP Legal Defense and Education Fund).

204. Senate Hearings on S. 2453, 69.

205. Stein, *Running Steel, Running America*, 116. See also 113–20; Skrentny, *The Ironies of Affirmative Action*, 161–66; Paul Frymer, "Acting When Elected Officials Won't: Federal Courts and Civil Rights Enforcement in U.S. Labor Unions, 1935–85," *American Political Science Review*, 97 (2003): 483–499.

206. Eskridge, "Reneging on History?," 646–50; Frymer, "Acting When Elected Officials Won't."

207. George Rutherglen, "Title VII Class Actions," *University of Chicago Law Review* 47 (1980): 688–741.

208. Arthur R. Miller, "Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the 'Class Action Problem'," *Harvard Law Review* 92 (1979): 664–694, 674–75; "Developments in the Law: Class Actions," *Harvard Law Review* 89 (1976): 1318–1644, 1353–54.

209. Frymer, *Black and Blue*, ch. 4.

210. Graham, *The Civil Rights Era*, 129–30, 430–31.

211. Senate Hearings on S. 2453, 70.

212. Senate Hearings on S. 2453, 70–71.

213. Senate Hearings on S. 2453, 75.

214. Senate Hearings on S. 2453, 64–68 (statement of Wendell Freeland, member of the Board of Directors of the National Urban League), 77–86 (statement of Clarence Mitchell, director of the Washington Bureau of the NAACP).

Representatives of the ACLU, too, insisted that to “deprive private parties of the right to seek redress in the Federal Courts for employment discrimination under Title VII . . . would be extremely detrimental to progress in equal employment.”<sup>215</sup> No civil rights group took a contrary position. It bears emphasis what a different enforcement vision this is as contrasted with the administrative state-centered model embodied in H.R. 405’s NLRB for civil rights, the one-time dream of ardent civil rights advocates, including the NAACP, the LDF, and the Leadership Conference. Their enforcement preferences would diverge yet more radically from the New Deal-style administrative vision in the years to come.

This is not to say that civil rights groups had given up on effective bureaucratic implementation, for they continued to press legislators hard but unsuccessfully for EEOC cease-and-desist powers within the hybrid framework into the late 1960s and early 1970s. Whereas some individual civil rights advocates may have rejected the desirability of cease-and-desist authority by this time,<sup>216</sup> representatives of the leading national civil rights organizations—including the Leadership Conference, the NAACP, the LDF, and the National Urban League—uniformly supported giving the EEOC cease-and-desist authority until they were finally defeated in the EEOA of 1972.<sup>217</sup> As already noted, a for-profit bar to prosecute Title VII claims had not materialized, and non-profit interest groups obviously lacked the capacity to prosecute ordinary claims across the nation. Civil rights groups thus wanted to retain the private right of action so as to preserve their ability to carry out the impact litigation campaign, and they wanted administrative cease-and-desist to process the huge number of ordinary claims that interest groups could not litigate.

Although they still supported cease-and-desist, the relative weighting of their preferences regarding administrative implementation versus private litigation had been decisively transformed as compared to 1963–64. They now wanted both and were unwilling to give up private enforcement for cease-and-desist powers. In Title VII’s first five years, they had witnessed an agency lacking both the material resources and the political will and commitment to carry out its mission. At the same time, empowered and partly financed (through attorney’s fees) by the private enforcement provisions of the Dirksen compromise, civil rights groups found themselves at the

leading edge of Title VII enforcement, wielding the weapon of private litigation to make what they judged to be new, meaningful, and gratifying inroads into labor markets previously foreclosed to African Americans. “[W]ith private enforcement we were the captain of our own ship,” explained Greenberg, and “we took initiatives that more cautious government agencies wouldn’t.”<sup>218</sup> Civil rights advocates could not, they had now decided, afford to rely solely upon the beneficence of bureaucrats, who themselves were dependent upon the beneficence of elected officials for resources and power, to enforce fair employment practices.

It bears noting that although conservative Republicans were pivotal in rejecting cease-and-desist and retaining a litigation-dominated framework to enforce Title VII, some expressed misgivings that “the class action device enabled [plaintiff–litigants] to enforce it *too* effectively, by greatly increasing the exposure of employers to liability for back-pay.”<sup>219</sup> The version of the EEOA of 1972 that initially passed the House in that year, sponsored by Republican Congressman John Erlenborn (R-IL), contained a provision specifically excluding Title VII plaintiffs from the right to file class actions under Rule 23 of the Federal Rules of Civil Procedure, which had proven so valuable to plaintiffs in Title VII litigation. The Senate version of the bill lacked such a provision, and in conference committee the House’s class action exclusion for Title VII cases was dropped.<sup>220</sup> This episode reflects that, whereas antiregulation Republicans still preferred litigation over bureaucracy as the central implementation vehicle, some of their business constituents, like some important labor unions, were most definitely feeling its effects.

The ultimate solution to the EEOC’s weakness, which was adopted in the EEOA of 1972—giving the agency the power to prosecute actions in court—appears ironic when viewed from the vantage point of 1964. Stripping the agency of prosecutorial powers was the prize that Dirksen secured in the 1964 compromise; the price he paid was to create Title VII’s private enforcement regime, which would become, unbeknownst to him at the time, the single largest source of non-prisoner litigation in the federal system. In the EEOA of 1972, the EEOC got back the power that Dirksen had taken away from it, and Title VII’s private enforcement provisions, fiercely defended by civil rights groups, stayed in the law. It appears that if Dirksen had simply accepted the House-passed enforcement provisions—EEOC-prosecutorial powers, private actions only with agency permission, and no attorney fee recovery—the long-run outcome may

215. Hill, “Lichtenstein’s Fictions,” 92.

216. Graham, *The Civil Rights Era*, 431.

217. Senate Hearings on S. 2453, 66–67 (statement of Wendell Freeland, member of the Board of Directors of the National Urban League), 69 (statement of Jack Greenberg, director-counsel, NAACP Legal Defense and Education Fund), 76 (statement of Joseph Rauh, general counsel, Leadership Conference on Civil Rights), 81–82 (statement of Clarence Mitchell, director of the Washington Bureau of the NAACP).

218. Jack Greenberg, correspondence with the author, 22 August 2007.

219. Rutherglen, “Title VII Class Actions,” 713; (emphasis added).

220. Sape and Hart, “Title VII Reconsidered,” 875–78.

have been a far weaker enforcement regime. I return to this issue in the conclusion.

#### A NOTE ON THE FAIR HOUSING ACT: REPLAYING THE STORY OF TITLE VII

The story of the CRA of 1968, also known as the Fair Housing Act (FHA) of 1968, is remarkably similar to that of Title VII. Though my aim here is to explain legislative choices concerning enforcement of federal job discrimination laws, the FHA bears brief examination because it provides powerful confirmation of the core dynamics that drove the dominance of private litigation in the Title VII enforcement compromise: pivotal conservative Republicans, empowered by a divided Democratic Party and super-majoritarian legislative institutions, imposed private litigation, with mobilizing incentives such as fee shifting and appointment of counsel, in order to defeat bureaucratic state building by liberal civil rights advocates. It is also significant because it demonstrates the contagiousness of the settlement on civil rights enforcement authored by Dirksen in his amendments to Title VII in 1964, and because it contributed to the growth of a civil rights bar which, as we shall soon see, became an important source of demand to extend fee awards for winning plaintiffs to other laws prohibiting employment discrimination and, more broadly, across the field of civil rights.

The FHA prohibited discrimination in the sale or rental of residential housing on the basis of race, color, national origin, religion, or sex, and was introduced in 1967 in the Senate as S. 1358 by Democrat Walter Mondale (D-MN).<sup>221</sup> Consistent with contemporaneous efforts of civil rights advocates to amend Title VII, Mondale's FHA took the hybrid approach to enforcement discussed above. It delegated authority to the secretary of the Department of Housing and Urban Development (HUD) to investigate complaints, and upon a finding of reasonable cause, to attempt voluntary conciliation, and failing that, to hold hearings and issue cease-and-desist orders when appropriate. If the secretary dismissed the complaint based upon a finding of no reasonable cause to believe that discrimination had occurred, without an evidentiary hearing, or if she failed to render a reasonable cause determination within 30 days, the complainant would be free to proceed with a private lawsuit.<sup>222</sup>

221. Hearings on the bill had been held in the first session of the 90<sup>th</sup> Congress. See *Hearings on S. 1358, S. 2114, and S. 2280 Before a Subcommittee on Housing and Urban Affairs of the Senate Committee on Banking and Currency*, 90<sup>th</sup> Cong., 1<sup>st</sup> sess., 1967. The bill made it to the floor when offered as an amendment to a bill creating protections for civil rights workers against violence and intimidation (H.R. 2516). *Congressional Record*, 90<sup>th</sup> Congress, 2<sup>nd</sup> sess., 2/6/1968, 2270–73.

222. *Congressional Record*, 90<sup>th</sup> Congress, 2<sup>nd</sup> sess., 6 February 1968, 2271.

The bill did not specify what damages were available, nor did it provide for appointment of counsel, waiver of filing fees, or awards of attorney's fees for winning plaintiffs. Therefore, plaintiffs were required to bear all the costs of federal court litigation when economic recoveries would be highly speculative, if available at all. The bill had been written and undergone hearings in 1967 within the same period, discussed above, that civil rights groups were willing to accept the weaker private enforcement regime in Title VII in exchange for a hybrid cease-and-desist/private litigation framework. Mondale's proposed FHA was energetically supported by the NAACP and the Leadership Conference, whose lead lobbyists Clarence Mitchell and Joseph Rauh worked hard to marshal support.<sup>223</sup>

Predictably, southerners mounted a filibuster in the Senate. They were joined by conservative Republicans, including Dirksen, in defeating cloture by a vote of 55 in favor and 37 against, with most Republicans voting for cloture.<sup>224</sup> Though Mondale's FHA, with its cease-and-desist authority, commanded a solid majority, the bill's proponents recognized that they lacked the two-thirds necessary to end debate, and they were prepared to make concessions, including significant reductions in the scope of the housing market covered—possibly even the exclusion of single-family dwellings.<sup>225</sup>

As in 1964, minority leader Dirksen spearheaded off-the-floor negotiations over compromise provisions that could garner enough conservative Republican support to overcome the filibuster.<sup>226</sup> A *Washington Post* editorial titled "Bow to Minority Rule" stated that it would be "disastrous to the Republican cause to defeat the civil rights bill," which commanded majority support, and that Dirksen was acting as "chief architect" of a compromise because he was "convinced that he must strive for the enactment of a civil rights bill of some kind for the sake of improving the Republican image in the election next November."<sup>227</sup> "And so we labor together precisely as we did in 1964," Dirksen remarked when

223. Jean E. Dubofsky, "Fair Housing: A Legislative History and a Perspective," *Washburn Law Journal* 8 (1969): 149–66, 156.

224. *Congressional Record*, 90<sup>th</sup> Cong., 2<sup>nd</sup> sess., 20 February 1968, 3427.

225. Dubofsky, "Fair Housing: A Legislative History and a Perspective," 156.

226. Dubofsky, "Fair Housing: A Legislative History and a Perspective," 156–57; Charles Lamb, "Congress, the Courts, and Civil Rights: The Fair Housing Act of 1968 Revisited," *Villanova Law Review* 27 (1982): 1115–1162, 1124–25; Leland B. Ware, "New Weapons for an Old Battle: The Enforcement Provisions of the 1988 Amendments to the Fair Housing Act," *Administrative Law Journal*, 7 (1993): 59–119, 73–74.

227. *Congressional Record*, 90<sup>th</sup> Cong., 2<sup>nd</sup> sess., 29 February 1968, 4670 (reprinting *Washington Post* Editorial of February 29, 1968). Richard Nixon also urged that passage of the Fair Housing Act would serve Republican interests in the upcoming election. Graham, *The Civil Rights Era*, 303.

introducing his substitute amendment, "because I am in almost the identical position."<sup>228</sup> As in 1964, Dirksen's changes focused almost entirely upon the enforcement provisions, seeking to restrict the substantive coverage of the law to a considerably lesser degree than the liberals anticipated and were prepared to concede.<sup>229</sup>

Dirksen's changes in the enforcement provisions mirrored the 1964 compromise: public enforcement authority was traded for private litigation. HUD's adjudicatory and cease-and-desist powers were eliminated, and the secretary, like the EEOC, was relegated to supervising voluntary conciliation efforts.<sup>230</sup> To compensate for the elimination of these administrative enforcement powers, the Dirksen substitute fortified the private enforcement regime relative to Mondale's. Dirksen proposed to allow winning plaintiffs to recover any economic damages suffered, plus up to \$1,000 in punitive damages. He further proposed that, like the CRA of 1964, the FHA allow the court to appoint counsel, waive the filing fee, and award attorney's fees to winning plaintiffs.<sup>231</sup> As in 1964, Dirksen's enforcement formula attracted sufficient support from conservative Republicans to secure cloture.<sup>232</sup> Private litigation was again offered by conservative Republicans as a substitute for bureaucratic state building, and it again commanded broader consensus than the administrative power sought by liberal civil rights advocates.

The FHA of 1968 was passed with Dirksen's enforcement provisions, but with one notable caveat that speaks to legislators' continuing attention to detail when crafting private enforcement regimes. Robert Byrd (D-WV), who had voted against the CRA of 1964 and the confirmation of Thurgood Marshall to the Supreme Court in 1967, offered an amendment specifying that a plaintiff only be awarded fees if "not financially able to assume said attorney's fees."<sup>233</sup> Byrd argued that, in contrast with Title VII's back pay-only rule, FHA plaintiffs could recover all actual economic damages, as well as punitive damages, thus making the recovery of attorney's fees less imperative. Mondale conceded, saying that the amendment did not interfere with the fee-shifting provision's purpose, which was to allow "an indigent or impoverished plaintiff . . . to go to an attorney and say, 'If we are successful, the court may award fees.'"<sup>234</sup> The

Byrd amendment was adopted by unanimous consent. Such details matter, and subsequently, until Byrd's language was stricken in 1988 amendments to the FHA,<sup>235</sup> courts, not infrequently, denied winning FHA plaintiffs attorney's fees because they were "financially able to assume" them.<sup>236</sup>

### CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976

After the 1972 amendments to Title VII, the next important development in the statutory framework governing enforcement of job discrimination laws was the Civil Rights Attorney's Fees Awards Act (CRAFAA) of 1976. A few civil rights laws had been individually amended in the early to mid-1970s to include a fee-shifting provision modeled on Titles II and VII of the 1964 Act. As noted above, Title VII of the Emergency School Aid Act, which was part of the Education Amendments of 1972, provided for attorney's fees for winning plaintiffs in school desegregation cases.<sup>237</sup> A fee-shifting provision was added to the Voting Rights Act in 1975 when Congress reauthorized that law.<sup>238</sup> The CRAFAA of 1976 extended the CRA of 1964's fee-shifting language, verbatim, to cover all other existing civil rights laws that permitted private enforcement but did not allow winning plaintiffs to recover fees.<sup>239</sup>

Two Reconstruction civil rights laws thereby amended would become important sources of job discrimination litigation. The Civil Rights Act of 1866 guaranteed newly freed slaves the right that "is enjoyed by white citizens," among others, to make and enforce contracts, which was interpreted by courts beginning around 1970 to prohibit race (and only race) discrimination in private employment.<sup>240</sup> The Civil Rights Act of 1871, providing a cause of action against state actors for the violation of any federal rights, encompasses within its vast scope suits by state employees against state governments for violation of constitutional rights, including discrimination in the terms and conditions of employment in violation of the equal protection clause.<sup>241</sup> More extensive economic remedies, in the form of uncapped compensatory and punitive damages, are available to successful plaintiffs under both

235. 102 Stat. 1619, 100 P.L. 430.

236. See, e.g., *Samuel v. Benedict*, 573 F.2d 580 (9<sup>th</sup> Cir. 1978); *Crumble v. Blumthal*, 549 F.2d 462 (7<sup>th</sup> Cir. 1977); *Clemons v. Runck*, 402 F.Supp. 863 (S.D. Oh. 1975).

237. 20 U.S.C. § 1617. For a discussion of the legislative history of this fee provisions, see *Bradley v. School Board of City of Richmond*, 416 U.S. 696, 716 n. 23 (1974).

238. Derfner, "Background and Origin of the Civil Rights Attorney's Fee Awards Act of 1976," 657.

239. 90 Stat. 2641, 95 P.L. 559.

240. See, e.g., *Sanders v. Dobbs Houses, Inc.*, 431 F.2d 1097 (5<sup>th</sup> Cir. 1970); *Waters v. Wisconsin Steel Workers*, 427 F.2d 476 (7<sup>th</sup> Cir. 1970).

241. *Monell v. City of New York Department of Social Services*, 436 U.S. 658 (1978).

228. *Congressional Record*, 90<sup>th</sup> Cong., 2<sup>nd</sup> sess., 28 February 1968, 4575.

229. Dubofsky, "Fair Housing: A Legislative History and a Perspective," 156-57.

230. *Congressional Record*, 90<sup>th</sup> Cong., 2<sup>nd</sup> sess., 28 February 1968, 4572.

231. *Congressional Record*, 90<sup>th</sup> Cong., 2<sup>nd</sup> sess., 28 February 1968, 4573.

232. *Congressional Record*, 90<sup>th</sup> Cong., 2<sup>nd</sup> sess., 4 March 1968, 4960.

233. *Congressional Record*, 90<sup>th</sup> Cong., 2<sup>nd</sup> sess., 6 March 1968, 5514.

234. *Ibid.*

Reconstruction laws than under Title VII's back pay-only rule,<sup>242</sup> and thus with fee shifting added, job discrimination claims under the Reconstruction laws could have much greater value than under Title VII. Other important civil rights laws covered by the CRAFAA of 1976 were Title VI of the Civil Rights Act of 1964, prohibiting discrimination in any program or activity that receives federal assistance, and Title IX of the Education Amendments of 1972, prohibiting gender discrimination in any educational program or activity receiving federal assistance.

In contrast with the period between 1963 and 1972, no one advocated for increased executive powers to administer the civil rights laws in question, and thus it was not conservative Republicans who proposed litigant mobilization to stave off bureaucratic state building. Although civil rights advocates were disappointed and reluctant recipients in 1964 of a job discrimination enforcement regime founded on private litigation, it was they who became catalysts for building upon the private enforcement foundation that conservative Republicans had laid. Whereas by the late 1960s, as we have seen, civil rights groups had become steadfastly attached to a private right of action with fee shifting to enforce Title VII, by the early 1970s they mobilized to extend the range of this enforcement approach across the entire field of civil rights.

Self-reinforcing policy feedback effects emanating from the CRA of 1964 were again at play, both because it had profoundly transformed the interest group environment and because of policy-learning effects concerning the efficacy of fee shifting in the civil rights context. I address these distinct feedback pathways in turn.

### Growth and Mobilization of the Civil Rights Bar

Political scientists have emphasized how, as Paul Pierson put it, the enactment of policies "create[s] resources and incentives that influence the formation and activity of social groups ... [and] create[s] 'spoils' that provide a strong motivation for beneficiaries to mobilize in favor of programmatic maintenance or expansion."<sup>243</sup> Attorney's fees awards contributed resources to existing civil rights groups that prosecuted lawsuits under the new civil rights laws, such as the LDF and the Lawyers' Committee for Civil Rights Under Law (Lawyers' Committee),

adding to their enforcement capacity.<sup>244</sup> The class action cases that these groups often litigated could lead to greater attorney's fees awards than individual claims.<sup>245</sup> By 1973, the Lawyers' Committee was devoting half of its staff to its job discrimination litigation unit, which had become nearly self-supporting due to attorney fee awards.<sup>246</sup> By 1975, \$550,000 of the LDF's three million dollar operating budget (over 18 percent) came from attorney fee awards.<sup>247</sup> Moreover, the availability of fee awards also contributed to the formation of significant new enforcement groups, with foundation seed money, such as the Native American Rights Fund in 1970 and the Women's Law Fund in 1972, both still in existence today, on the expectation that they would be able to draw continuing operating funds from attorney's fees awards.<sup>248</sup> The Lawyers' Committee formed an Attorney's Fees Project in the early 1970s for the purpose of compiling and disseminating to civil rights litigators information on developing case law governing fee awards, seeking to aid attorneys in recovering fees and to move the law in a direction favorable to fee awards.<sup>249</sup>

In addition to increasing enforcement resources available to civil rights groups, and more important, the private enforcement regimes of the CRA of 1964 (substantially replicated in the civil rights private enforcement regimes of the Age Discrimination in Employment Act of 1967, the FHA of 1968, the Emergency School Aid Act of 1972, and the Rehabilitation Act of 1973) had the feedback effect of fostering the growth of a private bar to litigate civil rights claims in general and job discrimination claims in particular. By the early 1970s, it appeared that the initial impression that Title VII would not generate much private litigation was premature. From the modest 56 private suits filed in Title VII's first two years,<sup>250</sup> the number climbed approximately to 100 in 1968,<sup>251</sup> to 429 in 1970, to 1,802 in 1973, and to 4,002 in 1975, where it roughly plateaued (ranging between 3,986 and

244. Armand Derfner, "Background and Origin of the Civil Rights Attorney's Fee Awards Act of 1976," *Urban Lawyer* 37 (2005): 653–661, 656; O'Connor and Epstein, "Bridging the Gap between Congress and the Supreme Court," 241.

245. Rutherglen, "Title VII Class Actions," 688.

246. *Hearings on Legal Fees Before the Subcommittee on Representation of Citizen Interests of the Senate Judiciary Committee*, 93<sup>rd</sup> Cong., 1st sess., 1973 (testimony of Armand Derfner), 1112–13.

247. O'Connor and Epstein, "Bridging the Gap between Congress and the Supreme Court," 241.

248. Robert B. McKay, *Nine for Equality Under Law: Civil Rights Litigation. A Report to the Ford Foundation* (New York: Ford Foundation, 1977); O'Connor and Epstein, "Bridging the Gap between Congress and the Supreme Court," 240.

249. Derfner, "Background and Origin of the Civil Rights Attorney's Fee Awards Act of 1976," 656; Armand Derfner, correspondence with the author, 26 July 2007.

250. Nathan, *Jobs and Civil Rights*, 74–75.

251. Graham, *The Civil Rights Era*, 422.

242. Charles R. Richey, *Manual on Employment Discrimination Law and Civil Rights Actions in the Federal Courts*, 2<sup>nd</sup> ed. (Saint Paul: Thomson/West, 1994).

243. Paul Pierson, *Dismantling the Welfare State?*, 40. See also Margaret Weir and Theda Skocpol, "State Structures and the Possibilities for 'Keynesian' Responses to the Great Depression in Sweden, Britain, and the United States," *Bringing the State Back In*, ed. Peter Evans, Dietrich Rueschmeyer, and Theda Skocpol (Cambridge: Cambridge University Press, 1985), 107–63, 143–44.

4,584) for the balance of the decade.<sup>252</sup> There seems to have been a lag of about five years before plaintiffs' lawyers began to practice in this new and unknown area of law, but once they did, the growth in Title VII filings during the first half of the 1970s was dramatic, exploding by a factor of nearly ten between 1970 and 1975.<sup>253</sup> Moreover, contrary to fears among some civil right advocates that such private enforcement litigation would be rare in the South, where most needed, due to unique obstacles there, it was actually disproportionately concentrated in the South. Although the eleven former confederate states represented about 26 percent of the United States population in 1975, 37 percent of federal job discrimination lawsuits were filed there.<sup>254</sup>

Immediately following passage of the CRAFAA of 1976, which she testified in support of before Congress, Mary Derfner, then Director of the Lawyers'

Committee's Attorney's Fees Project, observed that during the first half of the 1970s, fee-shifting provisions in recent civil rights laws helped "public interest laws firms burgeon," and that "[p]rivate practitioners and individual members of smaller commercial law firms began to undertake civil rights cases in addition to their other work."<sup>255</sup> "Fee awards," observed Derfner, "made civil rights law a financially viable practice."<sup>256</sup> Title VII's fee provision in particular, explained another Lawyers' Committee attorney to testify in favor of the CRAFAA, had "led to the development of a highly skilled group of specialist lawyers" to enforce it.<sup>257</sup> A 1977 report of the Ford Foundation on civil rights litigation observed that "[u]ntil at least the mid-1960s the NAACP Legal Defense and Education Fund stood almost alone" as a prosecutor of civil rights suits, but by the mid-1970s "fee-generating private practice has in many areas of the South enabled an indigenous bar, engaged in litigating cases of racial discrimination, to survive."<sup>258</sup> In the same vein, an April 1976 *Washington Post* article titled "Civil Rights Turns to Gold Lode for Southern Lawyers" declared: "The lure of legal fees, paid by the loser, is fertilizing a whole new practice in civil rights disputes. . . . Congress intended it that way in passing laws specifying that legal fees be awarded in such cases."<sup>259</sup> Although ascertaining what "Congress intended" is often complex and elusive, it seems more than a little doubtful that Senator Everett Dirksen intended to create a bar of lawyers who would earn their living suing employers, at the expense of employers.

It should be noted that these commentators are focused on fee-shifting provisions and not appointment of counsel. Title VII's appointment of counsel provision, although controversial when enacted, proved to be a dog that didn't bark. Congress never appropriated funds to pay appointed counsel and cover the extensive outlay of costs that often attend litigation, and courts proved unwilling to make compulsory appointments, which would entail requiring attorneys to provide free legal services and bear litigation costs.<sup>260</sup> One Alabama district judge concluded, more than a little ironically, that Title VII's provision authorizing appointment of counsel, apparently without compensation, violated the Thirteenth

252. The figures for 1970 and after come from *Federal Court Cases: Integrated Data Base, 1970–2000*, maintained by the Inter-University Consortium for Political and Social Research. Cases coded 442 ("civil rights, employment") in this dataset include suits filed under Title VII; the Age Discrimination in Employment Act of 1967; the Rehabilitation Act of 1973, which prohibited certain forms of disability discrimination in employment by the federal government or by federal contractors; and employment discrimination claims filed under the Civil Rights Acts of 1866 and 1871. A content analysis of a sample of cases coded "civil rights, employment" during this period shows that approximately 80 percent were Title VII claims. John J. Donohue III and Peter Siegelman, "The Changing Nature of Employment Discrimination Litigation," *Stanford Law Review* 43 (1991) 983–1033, 885 n.3. This is how I estimated the figures presented.

253. It is possible that the delay was caused, in part, by uncertainty about the legal standard courts would use in deciding whether to award attorney's fees because the statute stipulated that courts "may" make such an award. In 1968 the Supreme Court held unanimously that winning plaintiffs would automatically get fees unless special circumstances dictated otherwise. This bolstered plaintiffs' lawyers' confidence that they would be paid if they won civil rights cases under statutes with fee-shifting provisions. Derfner, "One Giant Step," 442; Derfner, "Background and Origin of the Civil Rights Attorney's Fee Awards Act of 1976," 654. Amendments in 1966 to the class-action provisions in the Federal Rules of Civil Procedure, which increased judges' discretion to recognize plaintiff classes, and liberal construction of those provisions by federal courts, likely also contributed to the increase, though individual (non-class) claims have always constituted the overwhelming majority of Title VII claims. George Rutherglen, "Title VII Class Actions," *University of Chicago Law Review* 47 (1980): 688–741; *Federal Court Cases: Integrated Data Base, 1970–2000*, maintained by the Inter-University Consortium for Political and Social Research. Finally, some of the increase in filings also can be attributed to the EEOA of 1972, which extended Title VII coverage to (i) employers with between 15 and 24 employees (the original law only covered employers with 25 or more employees); (ii) employees of federal and state governments, and (iii) employees of educational institutions. These incremental increases in the covered workforce could only account for a small share of the nearly *tenfold* increase in total Title VII filings between 1970 and 1975.

254. The litigation figures come from *Federal Court Cases: Integrated Data Base, 1970–2000*, maintained by the Inter-University Consortium for Political and Social Research. The population figures come from linear interpolation between the 1970 and 1980 United States Census.

255. Derfner, "One Giant Step," 441–451, 444–45.

256. Derfner, "One Giant Step," 445.

257. *Hearings on Legal Fees Before the Subcommittee on Representation of Citizen Interests of the Senate Judiciary Committee*, 93<sup>rd</sup> Congress, 1st sess., 1973 (testimony of Armand Derfner), 1113.

258. McKay, *Nine for Equality Under Law*, 8, 13.

259. Bill Crider, "Civil Rights Turns to Gold Lode for Southern Lawyers," *Washington Post* 4 April 1976, 59.

260. See, e.g., *Bradshaw v. U.S. Dist. Court for Southern Dist. of California*, 742 F.2d 515, 516 (9<sup>th</sup> Cir. 1984); *Vymetalik v. E.E.O.C.*, 1987 WL 19005, 2 n.3. (D. D.C. 1987); *Johnson v. NCT Services*, 631 F. Supp. 606, 607 n.1; (D. Hi. 1986); *Sol v. I.N.A. Ins. Co.*, 414 F. Supp. 29, 30 (E.D. Pa. 1976).

Amendment's prohibition of involuntary servitude.<sup>261</sup> Courts would only seek to coordinate voluntary free representation, which had obvious limits. The fee-shifting provision, on the other hand, operating as a source of funding for civil rights litigation independent of Congressional budget allocations, was proving to be a reliable mechanism through which civil rights counsel would be paid if the plaintiff prevailed.

The burgeoning civil rights bar—both non-profit and for-profit—fertilized by private rights of action coupled with fee-shifting rules in the new civil rights laws, sought to extend the CRA of 1964's fee-shifting approach to cover all existing civil rights laws that allowed private enforcement but did not provide for fee recovery. The motivations of civil rights groups, according to Armand Derfner, then an attorney at the Lawyers' Committee who helped to lead the campaign, were threefold. It would provide much-needed funds to support enforcement among civil rights groups and for-profit lawyers already litigating civil rights cases on shoestring budgets; it would attract new lawyers to civil rights practice, helping to grow the civil rights bar; and it would add a punishing economic sanction, which would operate as a deterrent on would-be violators, in cases that otherwise involved little or no economic penalty.<sup>262</sup> In the early to mid-1970s, the civil rights bar pursued its goal of across-the-board fee shifting in civil rights cases on both judicial and legislative tracks.

Based explicitly on the precedent of the 1964 Act, civil rights lawyers pressed courts to infer the availability of attorney's fees under civil rights statutes lacking fee-shifting provisions, including the CRAs of 1866 and 1871, under which job discrimination claims could be asserted.<sup>263</sup> Although this court-based campaign met with some success in the early 1970s,<sup>264</sup> it was shut down in 1975 by the Supreme Court in *Alyeska Pipeline Service Co. v. Wilderness Society*,<sup>265</sup> where the Court held that any departures from the American rule on fees would have to take the form of an explicit statutory directive from Congress. During the same period, civil rights groups, led by NAACP lead lobbyist Clarence Mitchell, lobbied Democrats in Congress to statutorily extend the CRA of 1964's fee-shifting provision to other

civil rights laws lacking one.<sup>266</sup> The Senate Judiciary Committee examined the issue in hearings in 1973 but failed to act,<sup>267</sup> and in response to the *Alyeska* decision it held additional hearings in 1975<sup>268</sup> that would ultimately lead to passage of the CRAFAA of 1976.

### Lessons Learned About Fee Shifting

Self-reinforcing policy feedback effects from the CRA of 1964, in addition to and in conjunction with the feedback effects that increased demand for civil rights fee shifting by fostering the growth of the civil rights bar and its dependence on fee awards, also operated through the mechanism of policy learning. Recall that when the Dirksen compromise was struck, liberal civil rights advocates were disappointed at the loss of an administrative framework partly because they were concerned that the fee-shifting provision would not overcome impediments to private enforcement litigation in the job discrimination context and thus would not generate a sufficient volume of suits to meet day-to-day enforcement requirements. Immediately following Title VII's passage, for example, Richard Berg, a civil rights proponent high in the Kennedy Justice Department and soon to be EEOC General Counsel, warned that private litigation was fundamentally limited as an enforcement strategy. Because litigation was exceedingly costly and time-consuming, and the pool of potential plaintiffs was poor, vulnerable to retaliation, and facing an adversary with far more material and legal resources, said Berg, "even where the evidence of discrimination is overwhelming, it cannot be expected that many complainants will undertake the burden of an individual suit." Thus, he continued, "it seems questionable that much can be accomplished through suits in federal court by persons aggrieved by acts of discrimination."<sup>269</sup> This view was shared by the Leadership Conference, the NAACP, the LDF, and the civil rights community broadly.<sup>270</sup> Of course, civil rights advocates were well

266. Derfner, "Background and Origin of the Civil Rights Attorney's Fee Awards Act of 1976," 653–58.

267. *Hearings on Legal Fees Before the Subcommittee on the Representation of Citizen Interests of the Senate Judiciary Committee*, 93rd Cong., 1st sess., 1973. Although these hearings considered attorney fee shifting in a number of different policy areas, civil rights was included among them, and the Senate Report on the CRAFAA of 1976 states explicitly that it relied upon these hearings. Senate Report No. 1011, 94th Cong., 2nd sess., 29 June 1976, 2.

268. *Hearings on Awarding of Attorneys' Fees Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Committee*, 94th Cong., 1st sess., 1975.

269. Berg, "Equal Employment Opportunity Under the Civil Rights Act of 1964," 96–97.

270. Graham, *The Civil Rights Era*, 424; Greenberg, *Race Relations and American Law*, 16, 101, 138, 271; Nathan, *Jobs and Civil Rights*, 47–50, 75; Sovern, *Legal Restraints on Racial Discrimination in Employment*, 79; Stein, *Running Steel, Running America*, 85; Watson, *Lion in the Lobby*, 362–63; Senate Hearings on S. 2453, 43 (statement of Senator Ralph Yarborough), 60 (statement of Clifford

261. *In re Nine Applicants*, 475 F. Supp. 87 (N.D. Al. 1979); *Brooks v. Central Bank of Birmingham*, 1982 WL 365 (N.D. Al. 1982).

262. Derfner, "Background and Origin of the Civil Rights Attorney's Fee Awards Act of 1976," 656.

263. See, e.g., *Stanford Daily v. Zurcher*, 366 F. Supp. 18 (D.C. Ca. 1973) (plaintiff successfully arguing for the availability of attorney's fees under the CRA of 1871, drawing analogy to the fee provisions in the CRA of 1964); *Lee v. Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1972) (plaintiff successfully arguing for the availability of attorney's fees under the CRA of 1866, drawing analogy to the fee provisions in the CRA of 1964); Derfner, "One Giant Step."

264. *Ibid.*

265. 421 U.S. 240 (1975).

aware of civil rights groups' capacity to shape the law through impact litigation, as the NAACP had in the momentous *Brown* decision, but they clearly lacked the resources to provide day-to-day enforcement of ordinary claims across the nation.

This concern, widely shared among civil rights activists, was not unfounded. In 1963, the year in which Title VII was introduced, there had been only 424 private civil rights enforcement actions across the country, under all federal civil rights statutes that allowed (or had been interpreted to allow) private enforcement, including the CRAs of 1866, 1870, 1871, 1957, and 1960, and under state civil rights laws brought in federal court via pendant or diversity jurisdiction.<sup>271</sup> The lion's share of these were brought under the Civil Rights Act of 1871's sweeping cause of action for the violation of any federal right by a state actor. By 1975, as we have seen, there were about *ten times* that number (4,002) of job discrimination suits alone. Title VII's private enforcement regime had succeeded in generating levels of private civil rights enforcement unprecedented in American history. The genesis and growth of the private civil rights bar, in addition to creating demand to expand fee shifting across the entire field of civil rights, also stood as evidence, weighing against initial skepticism among civil rights advocates as to the efficacy of fee shifting as a mechanism for generating a significant volume of private enforcement.

Legislators, like the civil rights activists and commentators discussed above, after witnessing the historically unprecedented levels of private civil rights enforcement under Title VII of the CRA of 1964, concluded that fee shifting had proven decisive in mobilizing the private civil rights enforcers. According to the Senate Report for the CRAFAA of 1976: "In 1964, seeking to assure full compliance with the Civil Rights Act of that year, we authorized fee shifting for private suits establishing violations of the public accommodations and equal employment provisions ... [and] [t]hese fee shifting provisions have been successful in enabling vigorous enforcement of modern civil rights legislation."<sup>272</sup> This policy-learning account was repeated time and again in floor statements. Senate Republican minority leader Hugh Scott (R-PA) stated that, based upon experience with Title VII, "[a]ttorney's fees have proven to be a singularly effective and flexible way to encourage private enforcement of public rights."<sup>273</sup> Democratic Senator John Tunney (D-CA),

who sponsored the bill, remarked that "[a]ttorneys' fees have proved one extremely effective way to provide ... equal legal resources" in civil rights cases.<sup>274</sup> Democratic Senator James Abourezk (D-SD) observed that "[t]he fee-shifting mechanism has proved a particularly equitable and efficient means of enforcing the [civil rights] laws by enlisting private citizens as law enforcement officials."<sup>275</sup>

The characterizations of fee shifting as "singularly flexible" and "particularly efficient" are meant in comparison to bureaucracy, a comparison that was an important theme in the debate. There was widespread agreement that the state lacked the capacity to adequately enforce the civil rights laws in question. According to the Senate Report, private enforcement of these laws was necessary, because "[a]lthough some agencies of the United States have civil rights responsibilities, their authority and resources are limited."<sup>276</sup> "Long experience has demonstrated," Senator Edward Kennedy (D-MA) counseled, "that government enforcement alone cannot accomplish ... enforcement goals,"<sup>277</sup> a view echoed by sponsor Tunney, who observed that "[a]lthough some of these laws can be enforced by the Justice Department or other Federal agencies, most of the responsibility for enforcement has to rest upon private citizens."<sup>278</sup> The reason was simple: money. "The Justice Department does not have the resources to bring suit for every civil rights violation," explained Representative Elizabeth Holtzman (D-NY).<sup>279</sup> "The Government obviously does not have the resources to investigate all possible violations of the Constitution," concurred Representative John Seiberling (D-OH), "so a great burden falls directly on the victims to enforce their own rights."<sup>280</sup> Although it may have been obvious, as Seiberling suggests, that the government had not dedicated significant resources to enforcing the civil rights laws in question, it was actually not at all obvious that it was *incapable* of extracting and deploying those resources, particularly if one considered the possibility of far less costly administrative implementation.

Rather, legislators found fee shifting to be a more attractive alternative. Fee shifting represented a way of overcoming weak state capacity without engaging in conventional forms of state building. As the

Alexander, member and former chairman of the EEOC), 66 (statement of Clarence Mitchell, director of the Washington Bureau of the NAACP).

271. Annual Report of the Administrative Office of the United States Courts, Table C-2.

272. Senate Report No. 1011, 4.

273. *Congressional Record*, 94<sup>th</sup> Cong., 2<sup>nd</sup> sess., 21 September 1976, 31471.

274. *Congressional Record*, 94<sup>th</sup> Cong., 2<sup>nd</sup> sess., 29 September 1976, 33313.

275. *Congressional Record*, 94<sup>th</sup> Cong., 2<sup>nd</sup> sess., 29 September 1976, 33314.

276. House Report No. 1558, 94<sup>th</sup> Cong., 2<sup>nd</sup> sess., 15 September 1976 (hereinafter House Report No. 1558), 1.

277. *Congressional Record*, 94<sup>th</sup> Cong., 2<sup>nd</sup> sess., 21 September 1976, 31472.

278. *Congressional Record*, 94<sup>th</sup> Cong., 2<sup>nd</sup> sess., 29 September 1976, 33313.

279. *Congressional Record*, 94<sup>th</sup> Cong., 2<sup>nd</sup> sess., 1 October 1976, 35127.

280. *Congressional Record*, 94<sup>th</sup> Cong., 2<sup>nd</sup> sess., 1 October 1976, 35128.

Senate Report put it, fee shifting provided for enforcement “while at the same time limiting the growth of the enforcement bureaucracy.”<sup>281</sup> This had been a key part of Dirksen’s motivation, and it continued to appeal to many Republicans. Successfully mobilizing private litigants, explained Hugh Scott, who succeeded Dirksen as Senate minority leader, “would make the civil rights laws almost self-enforcing, . . . would cost the government nothing,” and would advance civil rights enforcement “without an increase . . . in the bureaucracy.”<sup>282</sup> In the same vein, Senator Charles McCurdy Mathias (R-MD), speaking in favor of passing the act, cited a Congressional Budget Office finding that the law would produce “no additional costs to the government.”<sup>283</sup> In viewing fee shifting as a source of costless and bureaucracy-free enforcement, Democrats joined Republicans. “Fee shifting provides a mechanism which can give full effect to our civil rights laws,” explained Senator Kennedy, “at no added cost to Government.”<sup>284</sup> “The fee-shifting mechanism,” agreed Senator Abourezk, “increases law enforcement without increasing the Federal budget or bureaucracy.”<sup>285</sup> Although there is no evidence that budget concerns were an important cause of the private enforcement settlement of 1964, it emerged as a justification for spreading fee shifting across the field of civil rights by the mid 1970s—a justification that braided naturally with antibureaucracy sentiments.

### Voting Alignments and Rollcalls on Private Enforcement

The only dissenting voices among those who spoke on the floor of Congress were a few southerners. Senator James Allen (D-AL) led a seven-day filibuster. His principle argument against the bill was that it was “stirring up litigation” and was a “bonanza for the legal profession . . . [that has] grown fat on litigation of this sort.”<sup>286</sup> Senator Jesse Helms (R-NC) also urged his colleagues to vote against the bill. Relying upon statistical data from the federal court system, he complained that civil rights litigation in general, and job discrimination litigation in particular, had swelled to comprise an excessively large share of the federal court caseload, which he urged should not be increased even further with the proposed CRAFAA of 1976.<sup>287</sup>

Notwithstanding Allen’s and Helms’ objections, partisan and sectional divisions over the CRAFAA of 1976, which actually commanded a majority of southern votes, were muted relative to the partisan rancor that would infuse debates over civil rights litigation in the 1980s. The voting alignments looked much like they had in the roll calls on the private enforcement provisions in the CRA of 1964, with the exception that southern opposition was greatly mitigated. In addition to the House and Senate rollcalls on passage of the CRAFAA of 1976,<sup>288</sup> there were seven rollcalls on amendments offered to reduce the private litigant-mobilizing effects of the law (all of which were offered by southerners);<sup>289</sup> three to retrospectively reduce the litigant-mobilizing effects of existing civil rights laws (all offered by southerners);<sup>290</sup> and one to expand the scope of the CRAFAA’s application (offered by Senator Edward Kennedy).<sup>291</sup> All proposed amendments to reduce

288. *Congressional Record*, 94<sup>th</sup> Cong., 2<sup>nd</sup> sess., 1 October 1976, 35130 (ICPSR House Roll Call No. 1280); *Congressional Record*, 94<sup>th</sup> Cong., 2<sup>nd</sup> sess., 29 September 1976, 33315 (ICPSR Senate Roll Call No. 1298).

289. *Congressional Record*, 94<sup>th</sup> Cong., 2<sup>nd</sup> sess., 22 September 1976, 31835 (ICPSR Senate Roll Call No. 1248) (Helms [R-NC] amendment to exempt state and local governments from the bill); *Congressional Record*, 94<sup>th</sup> Cong., 2<sup>nd</sup> sess., 22 September 1976, 31858 (ICPSR Senate Roll Call No. 1251) (Thurmond [R-SC] amendment to prohibit application of the Act to busing cases); *Congressional Record*, 94<sup>th</sup> Cong., 2<sup>nd</sup> sess., 27 September 1976, 32388 (ICPSR Senate Roll Call No. 1270) (Allen [D-AL] amendment to restrict fee awards to circumstances in which opposing party acted in a “contumacious or vexatious manner”); *Congressional Record*, 94<sup>th</sup> Cong., 2<sup>nd</sup> sess., 27 September 1976, 32394 (ICPSR Senate Roll Call No. 1271) (Thurmond [R-SC] amendment to provide for payment of attorney’s fees by plaintiffs to defendants if the court finds the action to be frivolous); *Congressional Record*, 94<sup>th</sup> Cong., 2<sup>nd</sup> sess., 24 September 1976, 32396 (ICPSR Senate Roll Call No. 1273) (Helms [R-NC] amendment to provide that attorney’s fees could only be awarded against a party that behaved with bad faith); *Congressional Record*, 94<sup>th</sup> Cong., 2<sup>nd</sup> sess., 28 September 1976, 32927 (ICPSR Senate Roll Call No. 1282) (Allen [D-AL] amendment to eliminate the Civil Rights Act of 1866 from coverage by the bill); *Congressional Record*, 94<sup>th</sup> Cong., 2<sup>nd</sup> sess., 28 September 1976, 32934 (ICPSR Senate Roll Call No. 1289) (Helms [R-NC] amendment to eliminate the Civil Rights Act of 1866 from coverage by the bill).

290. *Congressional Record*, 94<sup>th</sup> Cong., 2<sup>nd</sup> sess., 27 September 1976, 32397-98 (ICPSR Senate Roll Call No. 1274) (Allen [D-AL] amendment to bar the award of attorney’s fees under the Equal Employment Opportunity Act of 1972); *Congressional Record*, 94<sup>th</sup> Cong., 2<sup>nd</sup> sess., 28 September 1976, 32391 (ICPSR Senate Roll Call No. 1285) (Scott [R-VA] amendment to bar the award of attorney’s fees against federal or state governments under Titles II or VII of the CRA of 1964, or the CRA of 1965, as amended in 1975); *Congressional Record*, 94<sup>th</sup> Cong., 2<sup>nd</sup> sess., 28 September 1976, 32933 (ICPSR Senate Roll Call No. 1287) (Helms [R-NC] amendment to create a mandatory award of attorney’s fees to prevailing defendants under Titles II and VII of the CRA of 1964, the CRA of 1965, and the Reconstruction civil rights laws).

291. *Congressional Record*, 94<sup>th</sup> Cong., 2<sup>nd</sup> sess., 21 September 1976, 31476 (ICPSR Senate Roll Call No. 1236) (Kennedy [D-MA] amendment to expand application of the act to sex or blindness discrimination in educational institutions receiving federal funds).

281. Senate Report No. 1011, 94<sup>th</sup> Cong., 2<sup>nd</sup> sess., 29 June 1976 (hereinafter Senate Report No. 1011), 4.

282. *Congressional Record*, 94<sup>th</sup> Cong., 2<sup>nd</sup> sess., 21 September 1976, 31471.

283. *Congressional Record*, 94<sup>th</sup> Cong., 2<sup>nd</sup> sess., 21 September 1976, 31479.

284. *Congressional Record*, 94<sup>th</sup> Cong., 2<sup>nd</sup> sess., 21 September 1976, 31472.

285. *Congressional Record*, 94<sup>th</sup> Cong., 2<sup>nd</sup> sess., 29 September 1976, 33314.

286. *Congressional Record*, 94<sup>th</sup> Cong., 2<sup>nd</sup> sess., 21 September 1976, 31473-74.

287. *Congressional Record*, 94<sup>th</sup> Cong., 2<sup>nd</sup> sess., 28 September 1976, 32933-34.

litigant mobilization under the CRAFAA of 1976 were defeated. The roll calls—many quite similar to ones unsuccessfully offered by southerners in the Senate in 1964—show that, as with debates over enforcement of the CRA of 1964, the FHA of 1968, and proposed amendments to Title VII leading to the EEOA of 1972, the use of statutory provisions calculated to mobilize private enforcement litigation was neither unreflectively routine nor uncontested. It was a self-conscious choice, motivated by policy goals and subjected to intense scrutiny and contestation in the legislative process.

Aggregating together all votes cast on the CRAFAA of 1976 and proposed amendments to it across both chambers, non-southern Democrats voted in a direction favorable to mobilizing private litigants at a rate of 97 percent, non-southern Republicans did so at a rate of 68 percent, and representatives from the former confederacy did so at a rate of 40 percent. On passage of the CRAFAA of 1976, non-southern Democrats voted in favor at a rate of 96 percent, non-southern Republicans did so at a rate of 73 percent, and legislators from the former confederacy did so at a rate of 54 percent (a majority of southerners in both chambers). In the 1976 legislative proceedings in the Senate, southerners offered two amendments to the CRAFAA of 1976 to retrospectively amend Titles II and VII of the CRA of 1964 to limit plaintiffs' ability to recover attorney's fees and to provide for mandatory fee awards for winning defendants, giving legislators an opportunity to revisit some dimensions of the 1964 fee-shifting provisions to make them less favorable to plaintiffs. Southerners voted in favor of these changes to the CRA of 1964 at a rate of 60 percent, whereas non-southern Democrats voted against them at a rate of 100 percent, and non-southern Republicans voted against them at a rate of 72 percent.<sup>292</sup> The CRAFAA of 1976, extending the CRA of 1964's fee-shifting language to all other existing civil rights law that allowed private enforcement but lacked a fee-shifting provision, passed overwhelmingly, by a vote of 306 to 68 in the House and 57 to 15 in the Senate.<sup>293</sup> Although civil rights groups and liberal Democrats in Congress were unquestionably the impetus behind getting the

bill on the agenda, it encountered little opposition outside the South and passed easily.

### Interest Groups on the Scene

There was a marked shift in the composition of witness profiles in committee hearings seeking to influence the civil rights attorney fee legislation as compared to those in the hearings held on the CRA of 1964. Although legal advocacy groups and lawyers' associations were a trivially small number of witnesses in the 1964 hearings, in the hearings that led to passage of the CRAFAA of 1976 they were by far the largest presence. In the 1973 and 1975 Senate hearings combined, of forty non-governmental witnesses to appear, eleven represented legal advocacy groups (e.g. the Lawyers' Committee for Civil Rights Under Law), seven represented lawyers' associations (e.g. the American Bar Association and state bar associations), ten testified as practicing attorneys with expert knowledge, one was a law professor, and two were law students.<sup>294</sup> Seventy-seven percent of the non-governmental witnesses represented legal advocacy groups, lawyers' associations, the legal profession, and the legal academy.

It is abundantly clear that the CRA of 1964 had feedback effects by creating resources and incentives that influenced the formation and activity of social groups and motivated their mobilization to maintain and expand the benefits. Although legal advocacy organizations and lawyers' associations were not key sources of demand for a modern civil rights enforcement regime founded upon private litigation in 1964, once catalyzed by the creation of that regime, they clearly sought to entrench and extend it. In contrast with the rent-seeking lawyer hypothesis as applied to the 1964 Act, to the extent that rent-seeking lawyers have mobilized around fee shifting in the area of civil rights, this was an effect of the CRA of 1964, not its cause. Moreover, it should be emphasized in connection with this observation that with regard to demand for the statutory extension of the CRA of 1964's fee-shifting approach across the entire field of civil rights, it is absolutely clear that non-profit civil rights groups, such as the NAACP, the LDF, and the Lawyers' Committee, motivated by policy goals rather than personal enrichment, led the charge.<sup>295</sup>

292. *Congressional Record*, 94<sup>th</sup> Cong., 2<sup>nd</sup> sess., 28 September 1976, 32931 (ICPSR Senate Roll Call No. 1285) (Scott [R-VA] amendment to bar the award of attorney's fees against federal or state governments under Titles II or VII of the CRA of 1964, or the CRA of 1965, as amended in 1975); *Congressional Record*, 94<sup>th</sup> Cong., 2<sup>nd</sup> sess., 28 September 1976, 32933 (ICPSR Senate Roll Call No. 1287) (Helms [R-NC] amendment to create a mandatory award of attorney's fees to prevailing defendants under Titles II and VII of the CRA of 1964, the CRA of 1965, and the Reconstruction civil rights laws).

293. *Congressional Record*, 94<sup>th</sup> Cong., 2<sup>nd</sup> sess., 1 October 1976, 35130 (ICPSR House Roll Call No. 1280); *Congressional Record*, 94<sup>th</sup> Cong., 2<sup>nd</sup> sess., 29 September 1976, 33315 (ICPSR Senate Roll Call No. 1298).

294. *Hearings on Legal Fees Before the Subcommittee on the Representation of Citizen Interests of the Senate Judiciary Committee*, 93<sup>rd</sup> Cong., 1<sup>st</sup> sess., 1973; *Hearings on Awarding of Attorneys' Fees Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Committee*, 94<sup>th</sup> Cong., 1<sup>st</sup> sess., 1975. Although the hearings considered plaintiffs ability to recover attorney's fees in a number of different policy areas, civil rights was included among them, and the Senate Report on the CRAFAA of 1976 states explicitly that it relied upon these hearings. Senate Report No. 1011, 94<sup>th</sup> Cong., 2<sup>nd</sup> sess., 29 June 1976, 2.

295. The NAACP's lead lobbyist Clarence Mitchell called a meeting of leaders of civil rights groups after the *Alyeska* decision,

To the extent that the growing for-profit civil rights bar contributed to the statutory expansion of attorney fee shifting in civil rights cases, it was by lending weight to the demand for a policy program orchestrated by civil rights groups.

The CRAFAA of 1976 resulted directly from the 1964 enforcement compromise. The 1964 Act's central reliance upon private enforcement, with fee shifting for successful plaintiffs, was critical in fostering the growth of civil rights legal advocacy groups and spawning a for-profit civil rights bar, which together increased demand for civil rights fee shifting. By the early to mid-1970s, the successful mobilization of considerable levels of private enforcement activity had dispelled skepticism among civil rights advocates about the capacity of fee shifting to overcome the multiple obstacles faced by private enforcers in the job discrimination context. With the NAACP leading the way in the lobbying effort, civil rights groups succeeded in securing legislative extension of Title VII's fee-shifting language, verbatim, to other civil rights laws prohibiting job discrimination and across the whole field of civil rights more broadly. To justify passage, a broad and bipartisan coalition of legislators pointed both to the success of fee shifting in mobilizing robust private enforcement under Title VII of the CRA of 1964 and to its ability to do so without increasing budgets or bureaucracy. This largely completed the modern approach to civil rights enforcement.

## CONCLUSION

Self-conscious political conflict by ideologically antagonistic interests, critically shaped by the institutional terrain of America's fragmented state structures, was decisive in producing an enforcement framework for federal job discrimination laws dominated by private litigation. The Senate filibuster, in conjunction with a divided Democratic Party, made conservative Republicans pivotal in 1963–64. Within the American separation of powers framework, their exercise of those pivotal powers was infused with and guided by not just distaste for bureaucratic regulation of business, but also deep suspicion and apprehension about an overzealous and excessively liberal NLRB for civil rights whose leadership would be appointed by Kennedy or Johnson. If they consented

to its creation, there was really no doubt at all that it would be extremely difficult for them to control.

The momentous CRA of 1964 changed a great deal, including the preferences of civil rights groups. They learned in the mid to late 1960s of their capacity to act as potent enforcers in ideologically hospitable courts; they learned during the same period that enforcement vigor could not be expected from the executive branch, at least not to the extent that they hoped, for reasons both fiscal and political; and they learned in the early to mid-1970s, contrary to their firm expectations, of the ability of Title VII's fee-shifting provision to overcome many of the historic obstacles to achieving high levels of enforcement by a private, for-profit civil rights bar. In addition to these learning effects, self-reinforcing policy feedback from the 1964 Act also flowed from a transformed interest group environment. Legal advocacy groups' enforcement capacity was substantially enhanced by the availability of fees, and the private civil rights bar that formed in response to the 1964 Act depended upon fee recovery for their very livelihood. Civil rights lawyers, both non-profit and for-profit, successfully mobilized to entrench and extend this form of implementation across the entire field of civil rights.

The evidence presented also offers significant lessons about the relationship between private litigation and American regulatory state capacity. Many scholars examining the origins of the Title VII enforcement framework—created by Republicans—elaborate an elegiac trope. They offer narratives of evisceration, privation, emasculation, and enfeeblement of state capacity, with little or no regard for the powerful army of private litigants and lawyers that the enforcement compromise ultimately mobilized.<sup>296</sup> These narratives imagine the administrative enforcement power that Republicans took away in 1963–64 as substantial and muscular and treat the private enforcement powers that they gave in return as meager, ineffectual, or scarcely worthy of mention.

This slant in historical analyses of Title VII's enforcement provisions, and efforts to amend them between 1965 and 1972, arises from two sources, one historical and the other conceptual. The historical source, as detailed above, is that narratives stressing the weakening of Title VII's enforcement regime, at the hands of its Republican amenders, comports with the contemporaneous understandings of both those Republican amenders and their liberal critics. All parties with a stake in the legislative transaction understood the metamorphosis from H.R. 405 into the version of Title VII proposed by

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and at the meeting civil rights groups agreed to place the goal of obtaining a statutory fee provision to govern all civil rights laws at the top of their legislative agenda. Carrying out this agenda, lobbyist Mitchell approached congressional Democrats and got the bill introduced that led to the CRAFAA of 1976. Derfner, "Background and Origin of the Civil Rights Attorney's Fee Awards Act of 1976," 653–58; Armand Derfner, correspondence with the author, 19 September 2007.

296. See, e.g., Stein, *Running Steel, Running America*, 84–85; Chen, *The Fifth Freedom*, ch. 5; Rodriguez and Weingast, "The Positive Political Theory of Legislative History," 1489–96; Skrentny, *The Ironies of Affirmative Action*, 120–25; but also see Lieberman, *Shaping Race Policy*; Frymer, *Black and Blue*, ch. 4.

Dirksen to entail a weakening of the enforcement regime. Not a contrary word was uttered. An important value of viewing policy choices within a broader sweep of time, however, is that it provides more information than a snapshot at the moment when key decisions were made. The significance of the Dirksen compromise on enforcement appears different in 1976 than it did in 1964.

If we are going to take civil rights groups' preferences regarding enforcement arrangements as at least some evidence of the strength of a civil rights enforcement regime, then we must pay attention to how those preferences changed over time in response to policy learning. As we have seen, over the course of time civil rights groups lost confidence in executive implementation and grew increasingly committed to the efficacy of private litigation. After observing a budget-strapped and overwhelmed agency, and an executive branch that they regarded as lacking the political will and commitment to enforce the law aggressively, they shifted to advocating for a hybrid private litigation/cease-and-desist framework in the late 1960s and refused to give up private litigation for a purely administrative framework. Alongside civil rights groups' waning belief in administrative enforcement, they became increasingly confident in the efficacy of private litigation, with fee shifting, based both on gratifying results achieved in courts and the observed high levels of private enforcement that ensued once the for-profit civil rights bar began to grow exponentially in the first half of the 1970s. Looking back, from the standpoint of civil rights groups—in stark contrast with that of many civil rights scholars—the Republican-orchestrated substitution of private enforcement litigation for administrative state powers represented a potent *strengthening* of Title VII's enforcement framework, though clearly this was not their intention.

A second source of scholars' mistaking strength for weakness in the Republican-imposed Title VII enforcement provisions is conceptual. Students of state capacity among political scientists and political sociologists largely operate within a narrow, bureaucracy-centered conception of what the state is, treating state capacity as a function of instrumental resources wielded by administrative state actors. This approach to thinking about state capacity largely ignores private lawsuits and neglects their significance as a form of state intervention. The political development of federal job discrimination laws, and civil rights laws more broadly, powerfully illustrates why this conceptual approach toward the state is so limiting. The extraordinary extent of private job discrimination lawsuits in the United States flowed from decisions self-consciously made in Congress between 1963 and 1976 by legislators who acted in pursuit of state objectives and who recognized private litigation largely as a substitute for administrative power. It proved a potent substitute, far more so

than anticipated by Title VII's initial architects in 1963–64.

This last point raises a question. If Republicans got more civil rights litigation than they bargained for, does this mean that they made a mistake, from the antiregulatory point of view of pivotal Republicans, in substituting private lawsuits for administrative power in Title VII? Did pivotal Republicans end up worse off than if they had accepted the liberals' cease-and-desist administrative framework in 1963–64? If they knew then what we know now, would they do it again? Considering this question entails contemplating some pretty speculative historical counterfactuals. I briefly weigh it from the vantage point of the full transformation from H.R. 405 to the substitute bill offered by Dirksen that ultimately passed, as opposed to trying to parse more finely the effects of particular Republican changes along the way.<sup>297</sup>

Any answer, I believe, would turn in significant measure on whether the EEOC created by H.R. 405 was adequately funded and politically supported. We know, of course, that the actual EEOC was not; however, the question arises whether, in the absence of the private lawsuit alternative, there would have been more broad-based pressure to fund and politically support an adjudicatory agency with cease-and-desist powers that was the exclusive source of enforcement. A strong agency would have been able to administratively adjudicate, at the state's expense, a much larger number of complaints as compared to the number of full-blown federal lawsuits that have actually been filed. With the administrative model proposed in H.R. 405, an individual employee, without legal representation, could file a complaint and the Office of the Administrator would conduct an investigation. If the Office of the Administrator regarded the complaint as meritorious and could not achieve voluntary settlement, the Administrator could then prosecute the complaint

297. As I suggested in the discussion of the changes made in the Senate, if one were to look only at those Republican amendments, the case is stronger that Republicans created a much more interventionist enforcement framework than would have occurred if the Senate had just accepted the House-passed version of Title VII. This is because cease-and-desist was already gone by the time the bill reached the Senate, and all Dirksen extracted in exchange for the private enforcement regime that he gave was to move the governmental right to sue from the EEOC to the Justice Department, and to limit the right to initiate suit to pattern or practice claims. This governmental right to sue, in both individual and pattern or practice claims, was restored to the EEOC in the EEOA of 1972, so antiregulatory Republicans were unable to retain the regulation-weakening benefits that they had received in exchange for the private enforcement regime that Dirksen created. However, it must be acknowledged as well that the move for cease-and-desist between 1965 and 1972, which nearly succeeded, may well have been stronger in the absence of private litigation to shoulder the enforcement burden. Thus, assessing the ultimate effects of Dirksen's enforcement bargain is a quite speculative endeavor.

before the board. In the private litigation-centered alternative actually adopted in Title VII, the investigative and prosecutorial responsibilities were transferred to the employee. To have any meaningful chance of success, the employee has to retain counsel to carry out these functions in the much more procedurally complex, and costly, arena of federal litigation. Under this framework, even with the costs of investigation and prosecution being recoverable by winning plaintiffs, only a small fraction of total complaints initiated with the EEOC actually end up being prosecuted in court.<sup>298</sup> A generously funded and aggressively mobilized agency with cease-and-desist powers could, in theory, have posed a greater enforcement threat than private lawsuits.

It is, however, also possible—and I believe more probable—that even in the absence of private lawsuits to carry the enforcement burden, the EEOC would not (or at least not consistently) have been given the ample fiscal and political support necessary to undertake the gargantuan task of seriously investigating and adjudicating the job discrimination claims arising out of the entire American workforce. In a historical counterfactual H.R. 405 scenario with a feeble agency, the agency would represent a much less forcefully interventionist implementation scheme than the private litigation alternative actually enacted. Therefore, one's conjecture about what congressional and executive support would have been for an NLRB for civil rights, without lawsuits, must necessarily inform one's assessment of whether pivotal Republicans made a mistake, from an antiregulatory point of view. History most definitely does tell us what civil rights liberals believed about which historical counterfactual was more probable. Their fierce defense of Title VII's private enforcement regime beginning in the late 1960s, even at the expense of an NLRB for civil rights, was clearly predicated in part on a palpable loss of faith in the administrative state.

It is tempting to infer from civil rights liberals' strong embrace of Title VII's private enforcement regime that this enforcement approach redounded to the detriment of antiregulatory Republicans and business interests. It must be kept in mind, however, that in 1976 non-southern Republicans voted to

ratify and extend the private enforcement bargain struck by their party brethren in 1963–64. As discussed in the last section, they voted against southerners' proposed retrospective amendments to the CRA of 1964 to limit plaintiffs' ability to recover attorney's fees, and to provide for mandatory fee awards for winning defendants, at a rate of 72 percent, and they voted to pass the CRAFAA of 1976 at a rate of 73 percent. In the 1964 roll call votes on southern amendments offered to cut back the private enforcement provisions of Titles II and VII, non-southern Republicans had voted to sustain the private enforcement provisions at a rate of 79 percent. Unlike civil rights groups, Republican preferences, it appears, had changed only modestly between 1964 and 1976.

As traced in this paper, by 1976 a fairly clear picture had emerged, from civil rights liberals' point of view, of the relative efficacy of Title VII's private enforcement regime. Private lawsuits under Title VII had increased about tenfold in the first half of the 1970s. The targets of Title VII were beginning to feel the negative effects, from their standpoint, of private lawsuits. By the late 1960s, some labor unions were seeking to terminate Title VII's private right of action. In 1972, House Republicans sought unsuccessfully to eliminate class actions under Title VII so as to curtail what they regarded as excessive back-pay exposure for employers. In the floor debates on the CRAFAA of 1976, southerners not only complained of excessive civil rights litigation but also cited hard statistics demonstrating its steep pattern of growth on the federal civil docket. This mobilization of civil rights enforcers, and the pain they were causing civil rights defendants, of course, was an important motivation behind civil rights groups' decision to lobby for the CRAFAA of 1976.

Despite all this, nearly three quarters of non-southern Republicans voted to protect the CRA of 1964's private enforcement provisions, and to extend them to other civil rights laws, echoing Dirksen's preference for private lawsuits over administrative state building. Ironically, on this point liberal and conservative preferences had converged, each side deeply distrustful of administrative power, though for very different reasons.

298. The fraction was between 3 and 6 percent between 1970 and 1975. See Annual Reports of the Equal Employment Opportunity Commission, 1970–1975, and *Federal Court Cases: Integrated Data Base, 1970–2000*, maintained by the Inter-University Consortium for Political and Social Research. Whereas the fraction grew in later years, it has remained the case that a very large majority of EEOC charges are not prosecuted in federal court.