PRIVATE POWER AND AMERICAN BUREAUCRACY:

THE EEOC AND CIVIL RIGHTS ENFORCEMENT

Robert C. Lieberman
Columbia University

[Revised March 2007]

Department of Political Science
Columbia University
420 West 118th Street
New York, NY 10027
(212) 854-4725
Fax: (212) 854-4782
RCL15@COLUMBIA.EDU

PRIVATE POWER AND AMERICAN BUREAUCRACY:

THE EEOC AND CIVIL RIGHTS ENFORCEMENT*

The Civil Rights Act of 1964 is rightly regarded as pivotal, if not revolutionary, moment in American political history. Finally, a century after emancipation, the United States committed itself fully not just to the absence of slavery but also to the legal equality of the races. The act prohibited discrimination in employment, education at all levels, and public accommodations and empowered the federal government to enforce these prohibitions through a variety of administrative, judicial, and fiscal means. Together with the Voting Rights and Immigration Acts of 1965 and the Open Housing Act of 1968, the Civil Rights Act substantially and fundamentally democratized American institutions and profoundly altered American life (King 2000, 243-44).

But for all its transformative power, the Civil Rights Act was the product of a compromise induced by the fractured structure of American political institutions. That compromise, which was necessary particularly to break a Senate filibuster that famously lasted three months and filled more than sixty thousand pages of the *Congressional Record,* was principally aimed not at limiting the act's bold assertion of equal rights but at restricting the mobilization of state power to enforce those rights (Lieberman 2002b; Rodriguez and Weingast 2003; Berg 1964). Title VII of the act, which outlaws employment discrimination, created the Equal Employment Opportunity Commission (EEOC) as the principal agency to enforce this prohibition. As originally conceived by civil rights advocates, the EEOC was to have full regulatory powers, particularly the power to issue binding cease-and-desist orders to employers. By final passage, however, the EEOC had neither cease-and-desist authority nor the intermediate level of authority that the House of Representatives had favored, the power to file lawsuits in federal court against offending employers. Instead, the commission could only receive and investigate individual complaints of discrimination and, upon finding that there was

---

* Research for this project was supported by a grant from the Institute for Social and Economic Research and Policy, Columbia University. Earlier versions of this paper were presented at the 2006 annual meeting of the American Political Science Association and at seminars at the Miller Center for Public Affairs of the University of Virginia and the University of Göteborg. Thanks to Sean Farhang for research assistance and to Adam Sheingate and Kathleen Thelen for helpful comments and advice.

probable cause to believe that discrimination had in fact taken place, attempt to mediate a settlement between the parties. Coercive enforcement was left to individual plaintiffs, who could sue employers once the EEOC procedure had run its course. This was not a recipe for strong and effective enforcement; indeed, it is a plausible reading of the historical record that limiting the effectiveness of enforcement (especially in the North) was precisely the purpose of the compromise over Title VII (Selmi 1996, 5-9; Graham 1990, 129-32).[1] As one leading practitioner of employment discrimination law put it, "the prevailing attitude toward Title VII, as finally enacted, was that the civil rights movement had suffered a defeat" (Belton 1978, 907).

Despite these limitations, however, Title VII soon became the basis for a strong, arguably effective, state-initiated program of antidiscrimination enforcement — the cluster of mandates and practices known collectively as affirmative action. This development, which took place in the short span of ten years or so following the passage of the Civil Rights Act, poses a double paradox. First, affirmative action, which relies on race-conscious and group-based means to remedy the effects of discrimination, seems to contradict the clear color-blind orientation of the Civil Rights Act, which appears to prohibit the consideration of race or other group characteristics in employment. Second, the enfeebled EEOC was one of the principal driving forces behind the evolution of affirmative action. Bereft of power to carry out its enforcement responsibilities, it nevertheless managed to create a strong enforcement regime that came to be backed by federal courts (including the Supreme Court), widely adopted and internalized by corporations, and broadly supported by many public institutions in American life (Skrentny 1996; Dobbin and Sutton 1998; *Griggs v. Duke Power Co.* 1971; *Regents of the University of California v. Bakke* 1978).[2]

How was the EEOC able to be effective in an institutional environment that was quite hostile to its success in both material and cultural terms (Lieberman 2002a; see also Hall and Taylor 1996; Immergut 1998;

---

[1] In the original enforcement scheme set forth in the 1964 act, the Department of Justice was empowered to bring suits in federal court alleging a "pattern or practice" of discriminatory behavior. In 1972, the act was amended to allow the EEOC to sue employers.

[2] In the recent University of Michigan affirmative action cases [*Gratz* v. *Bollinger* (2003) and *Grutter* v. *Bollinger* (2003)], sixty-eight *amicus curiae* briefs in support of the university's admissions policies were filed with the Supreme Court as of 17 March 2003. Represented among the filers were nearly ninety major private and public universities and law schools, sixty-eight major corporations, twenty-two state governments, 118 members of the House of Representatives, fourteen U.S. senators, and fourteen current and retired military leaders (including several former

Campbell and Pedersen 2001)? The commission, that is, lacked both the coercive tools of administrative power and a clear legal mandate to violate the color-blind framework that underlay American civil rights policy and practice. What, then, enabled the EEOC to act effectively? More generally, how can an agency embedded in the famously weak, fragmented, and highly constrained American national state develop and deploy this kind of effective capacity to achieve a set of goals through autonomous action (see Skocpol 1985)? Finally, how was the EEOC able to challenge and reinterpret its own mandate, even in the absence of explicit change from above, in a way that constituted real political development, as defined by Karen Orren and Stephen Skowronek (2004, 123) — "a durable shift in governing authority" (see Streeck and Thelen 2005)?

In this essay I explore these questions — both the particular puzzle of the EEOC and the more general one about the roots of bureaucratic authority in American governance. I begin by examining theories of bureaucratic power, particularly capture theory and other approaches that emphasize the means of gaining control over the formal powers of the administrative state. I then develop an alternative theoretical approach that emphasizes the mobilization of private power in bureaucratic processes on behalf of public regulatory goals as a source of endogenous institutional change. Through a case study of the EEOC and its role in the rise of affirmative action, I examine the implications of these theories and conclude that the private-public approach best accounts for the EEOC conundrum and offers a fruitful approach for further research on bureaucracy, state building, and American political development more generally.

BEYOND PUBLIC POWER

Standard theories of bureaucracy and bureaucratic effectiveness and output in American politics consider the executive agencies of the government as purely public entities, part of the state, clearly demarcated from the "private" realm of society. Consequently, accounts of bureaucratic politics have focused primarily on agencies' position in the American system of separated powers and their connections to

---

secretaries of defense and members of the Joint Chiefs of Staff). [Compiled from material posted by the University of

other institutional actors within that system — Congress and congressional committees, presidents, courts — in which bureaucratic institutions react more or less deterministically to system characteristics (Weingast and Moran 1983; McCubbins and Schwartz 1984; Moe 1985; McCubbins, Noll, and Weingast 1987; Wilson 1989; Epstein and O'Halloran 1999). Similarly, accounts of American state building focus on the development of autonomous, coercive administrative capacity, which tends to be understood as a function of the formal organizational structure of government agencies (Skowronek 1982; Bensel 1990; Skocpol 1992; Sanders 1999). In these accounts, policy change generally results from authoritative formal changes, such as statutory reform or bureaucratic reorganization (Hacker 2004). The problem is that affirmative action evolved *without* such formal reform, and none of these state-centered accounts of state building or bureaucratic capacity can explain the EEOC's success in fostering this sharp policy change (Skrentny 1996). The EEOC had none of the institutional resources that conventional institutional theories of bureaucratic effectiveness suggest are necessary for such success.

The story of the EEOC and the rise of affirmative action, however, suggest that an alternative approach might be fruitful in explaining patterns of bureaucratic performance and state building, an approach that takes into account the links between private actors (both individuals and groups) and the public structures of the state and can potentially account for the transformation of policy in the absence of formal policy reform (Streeck and Thelen 2005). This public-private nexus is one that we take for granted with regard to the so-called "political" branches of government — legislatures and executives whose policymaking behavior is governed chiefly by an electoral connection with the private citizens who constitute the (terminologically confusing) "public" (Mayhew 1974; Arnold 1990; Jacobs and Shapiro 2000). By the same token, this view of bureaucracy as a site where private action and public authority mingle seems a peculiar one, given the conventional view of bureaucracy as operating at some remove from the realm of private, non-governmental behavior.

It is a large part of my purpose in this essay to suggest that this conventional understanding of bureaucracy in American politics is misguided precisely because it relies too heavily on a mechanistic

---

Michigan at http://www.umich.edu/~urel/admissions/legal/amicus.html, accessed on 17 March 2003.]

understanding of the sources of bureaucratic power and ignores the central role of private power as a common vehicle for policy change. In *Private Power and American Democracy* (one of the more under-appreciated classics of American political science), Grant McConnell (1966, 5) reminds us that "deference of government to private groups does not eliminate the phenomenon of power. Power exists in the hands of these groups." When the government makes policy yet fails to empower itself clearly directly to implement the policy — a common phenomenon that is endemic to American politics and arguably inherent in the separation of powers — it is false to say that power does not exist simply because it is not constituted in clear lines of traditional administrative "state" authority.[3] Power is merely displaced from the public to the private realm, through the reliance on means of policy implementation and enforcement that depend on private action. "It is noteworthy," McConnell (1966, 6-7) writes,

> that [the] predilection of interest groups for economic action does not preclude the use of public authority, where that authority can be successfully isolated from influences other than those of the group in question. Thus, governmental action by an administrative agency is to be preferred to legislation, group action is to be preferred to party action, and local and state government action is preferred to federal action.

Private action in the public realm, McConnell suggests, often hides behind the illusion that it is in fact truly private and thus of minimal concern either to observers of politics or to citizens at large. And yet, his analysis powerfully reveals, private power — or rather public power deployed through private action — is a central recurring phenomenon in American politics.

Recent works in American politics have taken up this theme in a variety of areas. One prominent arena in which private behavior cumulates to produce policy-relevant public outcomes is the courts. Conventionally regarded as disputes between private parties, lawsuits and court judgments are clearly central to policymaking and implementation in a range of policy areas; employment discrimination, environmental regulation, and welfare and health policy, among others, are all increasingly policed through the courts (Horowitz 1977; Melnick 1983, 1994; Derthick 2002; Kagan 2001; Burke 2002). As Sean Farhang (2006) has shown, however, private litigation is not merely autonomous private behavior but is part of a carefully calibrated, politically driven system of regulation created by Congress as a means of regulatory enforcement.

[3] On the characteristic dissipation of authority in American politics, see Lowi 1979 and Moe 1989.

Corporate organization is another mechanism through which private and public power are connected. Frank Dobbin, Lauren Edelman, and colleagues have shown, for example, how corporations have internalized a variety of regulatory norms and practices concerning equal employment opportunity, workplace health and safety, and employee benefits as a response to the changing and uncertain legal and policy environment (Dobbin and Sutton 1998; Dobbin et al. 1993; Edelman 1990, 1992). And finally, political scientists and historians have increasingly focused on the ways in which public policies and state institutions both rely on and construct public-private linkages — Brian Balogh (1991) on nuclear power, Christopher Howard (1997) on tax expenditures, Aaron Friedberg (2000) on the national security state, Jacob Hacker (2002) on the welfare state, Robert Lieberman (2005) on employment discrimination, and most comprehensively Daniel Carpenter (2001, 2002) on bureaucratic autonomy (or its absence) in the Post Office, agriculture and forestry, land reclamation, and food and drug regulation (see also Jacobs, Novak and Zelizer 2003).

The pertinent questions that emerge from this rather diverse and unfocused collection of works concern the mechanisms by which arms of the state, in particular bureaucratic agencies, can harness private activity in order to fulfill policy aims and the conditions under which this is likely to occur. These questions, in turn, parallel the central concerns of a literature on regulation and bureaucratic politics, particularly capture theory (which dates back at least half a century) and its more recent challengers. While more recent theoretical approaches to bureaucratic politics have focused on the problem of delegation of public authority from elective institutions to bureaucratic agencies, this older theoretical tradition more directly addresses the links between bureaucratic agencies and private interests.[4]

THEORIES OF REGULATION AND BUREAUCRACY

The principal justification for the development of regulation and the administrative state was that by removing public authority from the clutches of corrupt and amateurish political parties, bureaucratic agencies

[4] Theories of delegation, which among other things help explain patterns of bureaucratic autonomy and discretion, are far from irrelevant to the subject at hand and will certainly play a role in a more fully specified theoretical

could better manage the challenges of the emerging industrial political economy of the late nineteenth and early twentieth centuries (for a classic and influential statement of this view, see Wilson 1887; see also Wiebe 1967; Skowronek 1982). But beginning in the post-World War II era, as American social scientists began to look beyond formal institutions to the behavioral and structural underpinnings of political power, analysts of regulation and bureaucratic politics began to develop the argument that regulation served not the public interest but rather the interests of concentrated groups, often the very groups whose behavior was supposed to be regulated (Huntington 1952; Bernstein 1955; McConnell 1966; Stigler 1971). According to capture theory, regulation arises and agencies are created at the behest of the regulated interest in order to stabilize market conditions, impose barriers to entry, and limit competition. Agencies then operate in cooperation with, or at least on behalf of, these interests.

More recently, alternative theories of regulation have challenged capture theory. One challenger holds that a wide range of interest groups, and not just the businesses to be regulated, drives bureaucratic politics, either because politicians want to maximize their electoral support or because they need to craft winning policy coalitions from diverse elements (Peltzman 1976; Moe 1987; Sanders 1999; James 2000). Interest-group theory implies that regulation reflects a range of interests, and particularly diverges from capture theory in predicting that regulatory policies and agencies will not always favor regulated interests.

Finally, a second challenger to capture theory has begun to emerge, particularly in sociology but with some analogues in political science, that emphasizes the connections between bureaucratic forms of public regulation and associational patterns of societal organization. This view encompasses an expanded view of regulation and public power to include forms of ostensibly private activity and organization that serves public regulatory functions. It is concerned, write sociologists Marc Schneiberg and Tim Bartley (2001, 103), "with the relationship between the state and private governance — with regulation as a mechanism for channeling private economic organization and for instituting regulated private governance as a 'third way' between markets or statist regimes." According to such institutional, associational approaches, regulation is a response to political demands generated by a crisis of legitimacy in some realm of economic or social activity. The

---

approach to the private-public nexus of bureaucratic power. For my present purposes, however, I leave them to one

particular forms that state regulatory and administrative power takes depend both on the available cultural and organizational models and on the capacity of the state to adopt and manage regulatory policy. In this view, the state's administrative power will often depend on the linked activity of both "public" and "private" actors — bureaucrats, organized interest groups, networks, and private citizens (DiMaggio and Powell 1983; Dobbin 1994; Clemens 1997; Schneiberg 1999; Skocpol and Finegold 1982; Skowronek 1982; Carpenter 2001).

This approach to understanding bureaucracy is usefully clarified by Wolfgang Streeck and Kathleen Thelen's (2005) recent theoretical account of the sources of institutional change in the absence of formal, authoritative policy revision (see also Thelen 2004). Streeck and Thelen portray policy actors as embedded in institutional regimes that construct legitimate and authoritative rules. They make two important and useful distinctions that help explicate the associational approach to bureaucratic power. One is between "rule makers and rule takers, the former setting and modifying, often in conflict and competition, the rules with which the latter are expected to comply." The other is between the formal rules themselves and their implementation. In capture and interest-group approaches, the distinction between "rule makers" and "rule takers" is clear: agencies and bureaucrats make rule as authoritative agents of the state, and citizens must comply (Streeck and Thelen 2005, 12-14). Policy implementation, then, is the consequence of this operation. But the associational approach suggests that under some conditions, the distinction between "making" and "taking" rules may be less clear cut, whether because of ambiguity in the rules themselves, the balance of power among actors, or changes within the institutional field. In such cases, where space is opened up between the making and implementing of rules, both government agencies and civil-society groups can engage strategically in both ends of the process, with the result that incremental policy change in the absence of authoritative reform from above is possible.

Each of these approaches to regulation and bureaucratic power generates different empirical predictions about 1) outcomes, or the consequences of regulation, and 2) the administrative and organizational mechanisms by which those outcomes are produced. Capture theory predicts, first, that

---

side. See Epstein and O'Halloran 1999; Huber and Shipan 2002.

administrative outcomes will be consistently favorable to regulated interests, as in the perpetuation of railroad cartels and monopoly shipping prices in the wake of the Interstate Commerce Act of 1887, which was supposed to regulate collusion and predatory pricing in the railroad industry (MacAvoy 1965). Capture theory also predicts that representatives of the regulated interest will dominate administrative decision-making processes, whether through appointments to agency positions or other kinds of formal participation in bureaucratic processes. This kind of control should persist regardless of other factors in the political environment, such as partisan control of Congress or the executive branch. In the case of the EEOC and employment discrimination regulation, there is, as I will show, some evidence for capture in outcomes, particularly in the commission's very sluggish and troubled record in dealing with individual complaints. There is, however, little evidence of capture in the agency's administrative operations or in its relations with Congress and the president.

Interest-group perspectives on regulation and bureaucratic power suggest that regulatory outcomes will be relatively less favorable to regulated interests, reflecting the broader range of groups whose power is reflected in the agency's makeup. An example of such a pattern is Terry Moe's (1985) account of the National Labor Relations Board's operations, which reflect a careful and shifting balance between the interests of labor and employers. Similarly, the interest-group approach suggests that participation in agency operations will be balanced among competing interest groups, again through formal institutional channels such as appointments, rulemaking, and congressional oversight. Moreover, agency behavior should be more sensitive than under capture theory to political changes that might affect the balance of power among groups. Like capture theory, interest-group theory seems only weakly connected with the history of the EEOC. The commission's aggregate record of handling discrimination complaints could certainly not be said to favor the protected interests in the domain of antidiscrimination law (particularly African-Americans), except in the South, where there is some evidence that federal protection substantially and immediately improved black wages and prospects for advancement in the labor market. From the beginning of its operation, the EEOC developed a close relationship with organized civil rights groups that persisted through other political changes. At the same time, however, EEOC practices and procedures did tend to change in response to

political shifts, particular partisan changes in presidential administration (U.S. Commission on Civil Rights 2000, 4-8).

The institutional, associational approach to regulation and bureaucratic power suggests that both regulatory outcomes and administrative processes will reflect strategic alliances or symbioses, whether formal or informal, between agencies and interest groups, networks, or private individual actors. Thus regulatory outcomes might not follow from the formal powers granted to an agency by statute and bureaucratic activity will likely depart from standard administrative procedures as bureaucrats try both to exploit organizational slack in the executive branch and to accomplish goals through alternative means. Moreover, in this view the lines of influence between public bureaucracies and private actors flow both ways, in contrast to both the capture and interest-group approaches, in which groups are presumed to exert influence over agencies but not the other way round. Carpenter's (2001) richly drawn portraits of the Post Office and the Department of Agriculture during the Progressive era fit this picture of bureaucratic politics, and I will show that it is this approach that most accurately accounts for the EEOC's surprising success in the face of long institutional odds. Although charged with the enforcement of the antidiscrimination rules promulgated by the Civil Rights Act, the EEOC had none of resources conventionally associated with administrative power. Nevertheless, by forging a strategic alliance with civil rights organizations, the EEOC was able to exploit the ambiguities inherent in the Civil Rights Act and convert the unfavorable institutional structure of Title VII to a new set of purposes. The result was a process of transformative policy change from within that occurred without further legislative change and that transformed the American state and its role in civil rights policy.

It is important to note that I pose these three approaches not necessarily as competing or mutually exclusive theories of bureaucratic power. To some degree, they each accurately describe certain forms of regulation and bureaucratic power at particular moments in American history (see Katznelson 1997). For now, my purpose is to demonstrate the utility of the associational perspective alongside other theories of bureaucratic power, particularly by showing that it can explain one particularly puzzling and tremendously important episode of policy development and state-building in the United States. A more integrated

approach, which asks when and under what conditions different patterns of bureaucratic power appear, will have to await further work.

PRIVATE POWER, PUBLIC POWER, AND THE EEOC

Capture and interest-group approaches to bureaucratic performance focus particularly on groups' ability to influence an agency's formal administrative operations. Thus the outcomes of those operations are a good place to start in assessing the applicability of these theories to the EEOC. As a consequence of the congressional compromise over Title VII in 1964, the commission's formal enforcement power was limited to the receipt, investigation, and mediation of individual claims of discrimination. Thus I begin the empirical examination of the EEOC with some data on this process.

Even within its own limited horizons, the EEOC very quickly showed its limitations. Figure 1 shows the commission's caseload of individual discrimination complaints over its first thirty-three years of operation. The data reported on EEOC caseloads were calculated from figures reported in the EEOC's annual reports. The annual number of charges received is reported each (fiscal) year. The annual number of charges resolved includes all cases on which the commission finished its work, either by completing an investigation and issuing a determination of probable cause or no cause, finishing a conciliation process, transferring or deferring the case to a state EEO agency, or otherwise closing a case administratively. The cumulative backlog is simply the running total of the difference between these two figures. It is important to note that these figures include complaints about all forms of discrimination that fall under the commission's jurisdiction, including race, sex, religion, national origin, and more recently disability status. (The large and sudden increase in complaints in the early 1990s, for example, mostly reflects filings under the Americans with Disabilities Act of 1990). Thus, although the data do not distinguish patterns of race discrimination claims, they do show the general limitations on the commission's administrative capacity.

In its first year of operation, the commission received nearly 9,000 discrimination complaints and resolved almost three-fourths of them, by completing an investigation and brokering a settlement between

the parties or issuing a ruling (either that there was sufficient cause for the complainant to file a federal lawsuit or that there was not) or by referring cases to a state agency where appropriate. The first year's work thus left a backlog of nearly 2,500 cases unresolved, and complaints were typically met with long delays in coming to a resolution (in violation of the sixty-day time limit specified in the law for resolving cases). Even when cases did move forward, the resolution was often less than fully satisfactory for the complainant because the commission lacked the power to impose a remedy even when it found evidence of discrimination (Nathan 1969, 49-50). Things only got worse from there as the EEOC entered a period of Malthusian challenges. Over the next several years the number of cases filed grew exponentially, doubling ever three or four years through the mid-1970s.

[Figure 1 about here]

At the same time, the growth of the number of cases resolved every year was linear, so that by the early 1970s the commission was resolving fewer than half the number of cases it received each year. The consequence was an exploding backlog of unresolved cases that reached 10,000 in 1969, 20,000 the next year, 50,000 in 1972, and 100,000 in 1975. Not until the Carter administration was the EEOC able to begin to make up some of its lost ground; under the chairmanship of Eleanor Holmes Norton, whom President Carter appointed to lead the commission in 1977, the backlog was reduced from 145,000 to 106,000 even as the commission was fielding an average of 75,000 new complaints each year. But under the chairmanship of Clarence Thomas, appointed by President Ronald Reagan to succeed Norton in 1982, the commission fell behind again, largely because complaints rose to more than 100,000 per year but also because Thomas instituted several procedural and policy changes that limited the commission's ability to resolve charges in house (Selmi 1996, 14-15). By the mid-1990s, the EEOC's cumulative backlog of cases was nearly a quarter of a million.

On the surface, these figures appear to lend some plausibility to a picture of the EEOC as captive of employer interests. Plaintiffs in antidiscrimination actions would seem to have an interest in the reasonably swift resolution of their complaints, not only because they of the damages they might recover if they win but also because the EEOC is a gatekeeper for the filing of lawsuits; plaintiffs cannot file suits in court until the

EEOC resolves the case one way or another. To the degree, then, that the EEOC systematically delays case resolutions, its operations then might seem to favor employers. When the EEOC does resolve cases, moreover, those resolutions tend to favor employers. In cases where the commission's investigation process goes far enough to result in a cause finding (approximately half the cases filed; the other half are either settled or closed administratively without reaching the finding stage), fewer than ten percent generally result in a finding of probable cause favoring the plaintiff (Selmi 1996, 12-14; Payne et al. 1992).

This is certainly not a picture of an agency that seems, on its face, concerned to balance the demands of competing constituencies, at least in the early years when conciliation was essentially the commission's only formal regulatory function. There is some evidence in the backlog time series of policy shifts in response to partisan changes in the government, consistent with interest-group theory — the only significant periods of declining backlogs were during Democratic administrations (Carter and Clinton). These patterns seem to have resulted in part from policy changes adopted by Democrat-appointed commission chairs aimed at streamlining the administrative process for complaints (U.S. Civil Rights Commission 2000, 5-7; Wood 1990). At the same time, other EEOC functions that might be vulnerable to political swings, such as the agency's budget, seem relatively impervious (Cancellieri 1999). Neither capture theory nor interest-group theory seems to provide a clear account of the EEOC's performance of its most basic regulatory function. More puzzling still is that neither theoretical approach seems consistent with the EEOC's role in the major turn in equal employment opportunity policy in the decade after the Civil Rights Act: the rise of affirmative action in employment.

To the extent the EEOC was successful as an enforcer of civil rights laws in the late 1960s and early 1970s, it was so *despite* and not because of its administrative capabilities. In order to understand how the EEOC, laboring under the institutional and political constraints imposed on it, managed to oversee the birth of affirmative action, it is necessary to look beyond its regulatory outcomes and the regular administrative processes associated with them. Overcoming these constraints required working in partnership with other institutions, both private and public, whose aims overlapped with and whose capacities complemented those of the EEOC and its staff. Two links in particular — with civil rights groups such as the National

Association for the Advancement of Color People (NAACP) and with the federal courts, through the agency of individual plaintiffs — proved especially fruitful for the EEOC in its quest to establish its own legitimacy as a civil rights enforcer and in so doing to construct a strong and resilient enforcement regime. That this very fruitful nexus of connectedness between the EEOC and organized private interests was a key motor of policy development suggests that an associational approach to bureaucratic power may hold the key to explaining the EEOC's overall pattern of activity and policy impact.

The Mixed Economy of Affirmative Action

The EEOC's operational and institutional limitations proved a double-edged sword. On one hand, the commission's relative weakness and political vulnerability reflected the general limits on administrative power in American government. On the other hand, these very same institutional constraints created a great deal of slack in the commission's political and administrative environment. Limits on its power forced it to seek other means of influence, particularly by collaborating with other institutions, both inside and outside the state. This imperative drove the problem of antidiscrimination enforcement into the same fragmented and decentralized political arena that had produced the EEOC's incapacity in the first place. The struggle for enforcement would be fought out not in terms of administrative power emanating from Washington but in multiple arenas and jurisdictions around the country, and in this political context federalism, usually seen as a constraint on civil rights enforcement and protection, was actually empowering (Young and Burstein 1995). In this context, the EEOC sought to play what role and forge what alliances it could as it sought pragmatic rather than ideological or coercive solutions to the problem of fulfilling its mandate in constrained environment.

Among the EEOC's key partners in this endeavor were African-Americans themselves, who were organized in a powerful national social movement that remained deeply rooted and active in local political and economic arenas through local organizations. The flourishing of local political organization among African-Americans, in fact, was one of the important enduring consequences of the civil rights movement

and these organizations gave African-Americans enhanced political leverage in many parts of the country (Greenstone and Peterson 1973; Morone 1990, chap. 6; Button 1989). In particular, federated organizations such as the NAACP and its Legal Defense Fund (LDF) could collaborate with the EEOC in pursuing race-conscious remedies for employment discrimination in a variety of local-level forums. The principal arenas for these activities were individual investigations of employers' practices and lawsuits in the federal courts; both of these arenas allowed the EEOC to get around its lack of coercive authority. In particular, the EEOC's relationship with the federal courts (especially after the 1972 amendments) proved empowering, because it gave the commission access to a politically and organizationally independent means of deciding discrimination cases and enforcing remedies. But beyond this structurally determined opportunity, the more historically contingent relationship that the EEOC was driven to forge with certain elements of the waning civil rights movement in the late 1960s and 1970s helped it to have an impact beyond its apparent institutional means. These elements of the EEOC's universe — also consistent with the characteristic shape of American administrative institutions — enabled it to participate in the development of policies that transformed American antidiscrimination policy beyond its color-blind legislative origins.

Hamstrung by its limited coercive power and its restricted institutional position, inundated in short order with an overwhelming caseload, and limited by the legal requirement of proving discriminatory intent in individual cases, the EEOC turned to a variety of tactics to pursue its aims. It was able to exert entrepreneurial influence through several channels, ranging from very informal to more formal, precisely because it could exploit the organizational slack in the federal government, because its precise role in the pantheon of enforcement agencies was so ill defined, and because it was able to find outside partners and allies. In this sense, the mixed economy is an apt metaphor for the political roots of affirmative action — neither wholly public nor wholly private, the policy emerged from a hybrid realm (see Katz 1986; Katz and Sachße 1996; Belton 1978).

From the beginning of the commission's operation, EEOC commissioners and staff realized that the commission's formal authority would not be sufficient to tackle the enforcement challenge it faced. At the same time, leaders of the NAACP, the LDF, and other civil rights organizations saw in the EEOC an

opportunity to advance their own emerging interests in capitalizing on Title VII to attack employment discrimination (which was to become the LDF's principal focus in the coming decade) (Rabin 1976, 217). Within days after the EEOC began its operations, NAACP General Counsel Robert L. Carter wrote to EEOC Chairman Franklin D. Roosevelt Jr. expressing the desire to cooperate with the commission in the enforcement of Title VII and requesting a meeting to discuss "ways and means that we in the Association may best work with you in the ordinary processing of complaints and in their submission and disposition by the Commission."[5] Within several months, Roosevelt convened a meeting of civil rights leaders to discuss the commission's enforcement plans, at which the representatives of the NAACP and other organizations urged cooperation on the filing and handling of discrimination complaints.[6]

The commission's initial focus was on the use of its limited formal powers to address individual allegations of employment discrimination. When an employee filed a discrimination case with the EEOC, the commission was supposed to investigate the merits of the claim and rule within sixty days whether there was sufficient evidence of discrimination to warrant a lawsuit in federal court (which could then be filed by the plaintiff) (Sovern 1966, 73-75; Blumrosen 1971, 83-89, 149-55). Thus the EEOC did have the power either to advance or stymie actions against alleged discriminators, but it could call attention to discriminatory practices and put pressure on employers by issuing "probable cause" findings that provided an evidentiary record that supported conciliation proceedings and, in many cases, subsequent lawsuits. Much of the commission's work in its initial scramble to get up and running involved assembling and training its team of investigators and conciliators so that they would be ready to tackle charges as they came in (Blumrosen 1970, 724, 733-39).

---

[5] Robert L. Carter (General Counsel, NAACP) to Franklin D. Roosevelt Jr., 9 July 1965, EEOC Records, Record Group 403 (hereafter RG 403), Office of the Chairman, Records of Chairman Stephen Shulman 1966-1968, Box 2, Correspondence: Civil Rights Leaders

[6] Telegrams, Roosevelt to James Farmer, Martin Luther King Jr., Clarence Mitchell, A. Philip Randolph, Whitney M. Young Jr., 13 September 1965, RG 403, Office of the Chairman, Records of Chairman Stephen Shulman, 1966-1968, Box 2, Correspondence: Civil Rights Leaders; Memorandum, Samuel C. Jackson to Roosevelt and EEOC commissioners, RG 403, Office of the Chairman, Records of Chairman Stephen Shulman 1966-1968, Box 2, Correspondence: Civil Rights Leaders; Roosevelt to Rep. Adam C. Powell, 17 September 1965, RG 403, Office of the Chairman, Records of Chairman Stephen Shulman 1966-1968, Box 2, Correspondence: Civil Rights Leaders. Attending the meeting were Marion Barry (Student Nonviolent Coordinating Council), James Farmer (Congress of Racial Equality), Walter Fauntroy (Southern Christian Leadership Conference), Clarence Mitchell (NAACP), Bayard Rustin (representing Martin Luther King Jr. and A. Philip Randolph), and Whitney Young (National Urban League).

The EEOC was not alone in turning its attention to the formal complaint and conciliation process. Led by the LDF, civil rights organizations made this new process the centerpiece of their activity as well. On the first day of commission operations, the LDF announced a program to help African-Americans — particularly in the South, where African-Americans were understandably reluctant to challenge authority — understand their new rights under Title VII and file charges with the commission. The LDF sponsored a summer program in 1965 in which law students spent time in many Southern communities helping to publicize Title VII, train local community workers to assist in filing complaints, and develop community relations among local employers, churches, and civil right groups. Other civil rights groups, too, participated in this effort (Belton 1978, 924-26; Nathan 1969, 47-48).

Much as they had in earlier decades, the LDF and the state worked interactively to define and shape the emerging frontier of civil rights law and policy (Goluboff 2007). This activity — some parallel and some cooperative — on the part of the EEOC and the LDF had several consequences. One was simply a surge of claims that exceeded the commission's expectations. The commission's first-year budget and staffing levels were based on the assumption that it would process approximately 2,000 individual charges. Instead, it received nearly 9,000 complaints in its first year (Belton 1978, 921-926; Peck 1976, 848). Many of these complaints arrived not from individuals acting on their own but came about with the participation of civil rights groups. The LDF alone shepherded approximately 1,800 of these cases toward the commission in the first eighteen months of operation (Nathan 1969, 45-47, 49).

The LDF was only one of at least eight national civil rights organizations that participated in the process of helping plaintiffs file claims with the EEOC. The correspondence files of the commission's Compliance Division reveal dozens of letters about particular allegations of discrimination between 1965 and 1967 from a range of national organizations, including the American Civil Liberties Union, the American Negro Labor Council, the Congress of Racial Equality (CORE), the Council of Federated Organizations, the Lawyers' Committee for Civil Rights Under Law (LCRUL), the Student Nonviolent Coordinating Committee, and seventeen different state and local chapters of the NAACP itself, as well as from smaller local

community-based organizations.[7] This correspondence came from sixteen states, mostly Southern (all the former Confederate states but Florida are represented) but also including major Northern industrial states such as Ohio and Michigan.[8] The range of economic sectors represented in these exchanges was quite broad, encompassing steel, shipbuilding, aerospace, manufacturing, railroads, textiles, tobacco, retail, road construction, and building trades.

This was not entirely one-way communication. The EEOC not only responded but also encouraged civil-society organizations to participate in the enforcement process. One of the first items on the commission's agenda on its very first day in business was a discussion of how to deal with cases that came in through organizations and not simply from individual complainants, suggesting that such cases warranted special attention.[9] The EEOC compliance staff also sent claim forms in bulk to organizations that requested them.[10]

Most important, the EEOC also responded with special alacrity and attentiveness to charges that came to it via civil rights organizations, especially when they shed light cases of discrimination that went beyond individual instances but rather indicated broader patterns of discriminatory behavior in firms or even in entire industries that required active investigation on the part of the EEOC. One such instance was a series of charges that were filed by African-American workers in Birmingham, Alabama. Alfred Blumrosen, the commission's chief of conciliations, had chosen Birmingham as the site of the EEOC's first conciliation effort because, as a highly visible focal point of the civil rights movement and a major industrial center, Birmingham was "symbolic of all the problems of discrimination in the South" (Blumrosen 1970, 741).

This was not simply one-sided activity, in which nongovernmental organizations took it upon

---

[7] The data in this paragraph were compiled from the EEOC records in the National Archives. RG 403, Compliance Division, Compliance Correspondence.

[8] The states represented in the sample, in descending order of frequency, are Alabama, Ohio, Georgia, Mississippi, Missouri, Virginia, California, Kansas, Louisiana, Tennessee, Arkansas, Michigan, North Carolina, South Carolina, Texas, and Washington.

[9] List of Resolutions and Items of Consensus, RG 403, Office of the Chairman, Records of Chairman Stephen Shulman 1966-1968, Box 1, Policy Statements.

[10] George L. Holland (Director of Compliance) to Alice Stovall (LDF, New York City), 22 September 1965, RG 403, Compliance Division, Compliance Correspondence, 1968, Box 2, Compliance EXSEC Controlled; Holland to Arthur W. Stanley (NAACP, Darlington, S.C.), RG 403, Compliance Division, Compliance Correspondence, 1968, Box 2, Compliance Cases Pending/Processing.

themselves to channels claims toward the state. The EEOC worked actively with the NAACP and other organizations, helping them to identify fruitful opportunities for the filing of claims and, in some cases, to make those claims in a way that would be most likely to succeed (Greenberg 1994, 414-15). In September of 1965, for example, the EEOC's director of compliance, George Holland, promised Dr. John W. Nixon, president of the Birmingham chapter of the NAACP, that the EEOC would send a field representative to Birmingham to help the NAACP "perfect" the complaints it was developing in that important city.[11] This was just the beginning of a long series of contacts in which the EEOC and the NAACP shared information and collaborated on a sequence of cases in Birmingham, especially those involving U.S. Steel, which had several major plants there and was one of Birmingham's largest employers (and one of the largest industrial employers in the South).[12] Nor was this trivial activity for the EEOC and its field staff, who risked violent reprisals in Birmingham and elsewhere in the South. The commission had arranged with the Justice Department for its field agents to receive protection from the U.S. Marshals Service and the FBI when working in the South, although reports from the field suggested that the level of protection did not always meet the EEOC's expectation.[13]

The EEOC was not thus merely a passive receptor of claims generated entirely by "private" or civil-society actors, but rather seems to have engineered a symbiotic relationship with private organizations. From this relationship, the NAACP and other organizations got access to important information and assistance

[11] Holland to John W. Nixon, 21 September 1965, RG 403, Compliance Division, Compliance Correspondence, 1968, Box 2, Compliance EXSEC Controlled.

[12] Alfred W. Blumrosen (EEOC Chief of Conciliations) to Alfred Feinberg (LDF), 10 March 1966, RG 403, Compliance Division, Compliance Correspondence, 1968, Box 2, Compliance: Conciliations; Nixon to Holland, 14 March 1966, RG 403, Compliance Division, Compliance Correspondence, 1968, Box 2, Folder, Compliance EXSEC Controlled; Holland to Nixon, 28 April 1966, RG 403, Compliance Division, Compliance Correspondence, 1968, Box 2, Folder, Compliance EXSEC Controlled; Memorandum, Samuel C. Jackson (commissioner) to Holland, 2 May 1966, RG 403, Office of the Chairman, Records of Chairman Stephen Shulman 1966-1968, Box 6, Comm. Jackson; Blumrosen to Robert Belton (LDF), 6 October 1966, RG 403, Compliance Division, Compliance Correspondence, 1968, Box 1, Conciliation; Summary of U.S. Steel and Steelworkers Charges, RG 403, Office of the Chairman, Records of Chairman Stephen Shulman 1966-1968, Box 1, Steel Cases; Report on Charges against U.S. Steel and Steelworkers at Fairfield, Ala., RG 403, Office of the Chairman, Records of Chairman Stephen Shulman 1966-1968, Box 1, Steel Cases; Final Investigation Report, RG 403, Office of the Chairman, Records of Chairman Stephen Shulman 1966-1968, Box 1, Steel Cases; Stein 1998, 113. See also Belz 1991, 29.

[13] Roosevelt to N. Thompson Powers (Executive Director, EEOC), 24 September 1965, RG 403, Office of the Chairman, Records of Chairman Franklin Roosevelt 1965-1966, Box 1, Power, N. Thompson, Executive Director; Telegram, P. H. Vogler Jr. to Samuel Jackson, RG 403, Office of the Chairman, Records of Chairman Stephen Shulman 1966-1968, Box 6, Comm. Jackson.

process that helped them to negotiate the EEOC's conciliation process. This access was important to civil rights groups partly because it helped them put pressure on employers, especially in the South, where Title VII enforcement would have its most significant impact on the employment prospects and wages of African-Americans (Heckman and Payner 1989; Heckman 1990; Donohue and Heckman 1991; Burstein 1985, chap. 6).

But it was important also because the EEOC was the gatekeeper to the federal courts — plaintiffs could file suits only once the EEOC's investigative process had run its course — which was where groups such as the LDF, the LCRUL, and the American Civil Liberties Union had their greatest impact (Belton 1978; O'Connor and Epstein 1982). For the EEOC, this emerging relationship also conferred advantages. For an agency that was perennially underfunded and understaffed, the LDF and other organizations provided the commission with an additional set of eyes and ears in the field, using its deep local knowledge of conditions in minority communities around the country to bring particularly egregious cases of employment discrimination to the commission's attention. This knowledge, in turn, helped the EEOC get some leverage on its own enforcement problem by helping it to focus high-profile, high-impact cases, which it did by using probable cause finding strategically and "bundling" together investigations of particular places, industries, or firms, as it did in Birmingham (a practice to which business strenuously objected).[14]

An important element of this public-private cooperation was the EEOC's collection of information from employers on the racial composition of the work force. Under statutory authority granted to it by Title VII (as liberally interpreted by the commission's staff), the EEOC developed form EEO-1, on which it required employers covered by Title VII to report data on their employees by race, ethnicity, and sex. This requirement gave the commission what Alfred Blumrosen called a fairly acute "sociological radar" trained on the American labor market that allowed it to discover patterns of discriminatory practices in particular regions, sectors, industries, and even individual firms (Blumrosen 1970, 711-20). Over time, the data that the

[14] Alfred W. Blumrosen, Issues and Positions and Prospects in Cases in Which Reasonable Cause Has Been Found Involving U.S. Steel and Steelworkers, RG 403, Office of the Chairman, Records of Chairman Stephen Shulman 1966-1968, Box 1, Steel Cases; Memorandum, Kenneth F. Holbert (Acting Director of Compliance) to Roger Lewis (Executive Assistant to the Chairman), 21 November 1966, RG 403, Office of the Chairman, Records of Chairman Stephen Shulman 1966-1968, Box 1, Memo – Compliance.

EEOC compiled from this form would prove a key weapon in the shift toward race-conscious enforcement (Graham 1990, 193-97, 239-43). As early as October 1966, EEOC officials recognized that EEO-1 data could "serve as fertile areas for affirmative action," and a staff research report in 1967 outlined an ambitious plan for expanding enforcement efforts based on EEO-1 data. These reports and the data they generated, the commission contemplated, could be powerful weapons in the investigation and conciliation process. Not only could they lead to the filing of so-called "commissioner charges," charges initiated by the commission itself against an employer without a specific plaintiff's coming forward, but they could also form the basis for "technical assistance" programs, in which specific employers identified as regionally deviant in their hiring practices could be targeted for the negotiation of affirmative action agreements (with the threat of commission investigations, or even lawsuits, looming). Furthermore, the 1967 report noted, "this information adds a new dimension to the investigator's view of the case and a powerful weapon in the conciliator's armory."[15]

The EEOC's collaboration with civil rights organizations also extended well beyond the realm of the commission's formal regulatory powers, particularly to the realm of the courts. Although Title VII had denied the EEOC direct access to the courts, its staff saw the courts as an essential part of their overall mission to attack employment discrimination. The federal courts, in fact, had taken something of a lead in promoting racial equality in the workplace during the decades before the Civil Rights Act, although without the statutory backing of Title VII their efforts were limited (Frymer 2005; Peck 1976, 832-33). The commission designed its investigation and conciliation process in part to generate probable cause findings that would prove useful in subsequent court proceedings. This meant treating EEOC investigations and conciliations as case law and trying to develop a consistent set of standards and definitions that could be applied in an increasingly standardized way to different kinds of discriminatory practices and situations. The commission began publishing some of its formal decisions in individual cases, much as courts publish

---

[15] Memorandum, Frank S. Caracciolo (Director, Education Programs) to Stephen Shulman via Herman Edelsberg (Executive Director), 11 October 1966, Re: Affirmative Action, RG 403, Office of the Chairman, Records of Chairman Stephen Shulman 1966-1968, Box 10, Office of Technical Assistance; Office of Research, "The Role of the EEO-1 Reporting System in Commission Operations," 27 May 1967, RG 403, Reports and Publicity Records, Box 1, Research Reports (2 of 2), esp. pp. 8-12. See also Nathan 1969, 27-28.

selected opinions when their decisions establish new legal principles that are potentially applicable to some class of future cases (Peck 1976, 849-50; Blumrosen 1970, 733-35).

The commission used these conciliation decisions as a basis for developing and publishing a series of legal guidelines to codify its interpretations of Title VII and serve as guides for employers and employees about what practices the commission would find acceptable and unacceptable in probable cause determinations. These guidelines were, in the first instance, administrative in nature, designed to clarify the EEOC's own procedures (Peck 1976, 844, 850). As a result of the U.S. Steel discrimination cases in Alabama, for example, the commission formulated guidelines on seniority, which was a particularly sticky question in declining industries such as steel where shrinking employment meant layoffs, which usually meant that African-Americans, who had been hired more recently and were lower down on job ladders than white workers, would be the first to be let go (Stein 1998, 111-13). It also published guidelines on matters such as the use of occupational tests as a qualification for hiring and promotion, which often worked against black workers and job applicants. Within months of beginning its operations the commission began producing digests of the guidelines that it produced, and updated these lists regularly. Guidelines deemed particularly important, such as the occupational testing guidelines, were published as pamphlets that could be made easily available to employers, and beginning in late 1965 the commission produced quarterly compilations of its legal interpretations covering numerous categories and dozens of topics. [16]

But these guidelines were legal as well as administrative documents, and they were critical in the development of legal arguments that were made in the courts by LDF lawyers, among others, in discrimination cases. The EEOC staff, moreover, consulted regularly with LDF attorneys in developing the legal rationales behind these guidelines, as the EEOC and the LDF discovered that they had overlapping interests in finding enforcement mechanisms that would transcend the limitations of the case-by-case

[16] Guidelines on Employment Testing Procedures, RG 403, Office of the Chairman, Records of Chairman Stephen Shulman 1966-1968, Box 10, Research: Testing; Blumrosen 1972, 60; Graham 1990, 251-54; Digest of Legal Interpretations Issued or Adopted by the Commission, July 2, 1965 to October 8, 1968, RG 403, Office of the Chairman, Records of Chairman Stephen Shulman 1966-1968, Box 3, Rules and Regulations – EEOC; Digest of Legal Interpretations Issued or Adopted by the Commission, October 9, 1965 trough December 31, 1965, RG 403, Office of the Chairman, Records of Chairman Stephen Shulman 1966-1968, Box 3, Rules and Regulations – EEOC; Digest of

conciliation power that Title VII granted to the commission. As LDF Director Jack Greenberg reminded EEOC Chairman Roosevelt in March 1966, "from time to time our representatives have conferred with individual commissioners and staff members of EEOC not only about specific complaints filed pursuant to your regulations but about our mutual concern to develop affirmative action programs to attack patterns of discrimination." The occupational testing guidelines were the most important product of this collaboration, but it extended to other areas as well, including seniority, job ladders, and merit systems for promotion (Blumrosen 1972, 60, 73-74; Graham 1990, 250-53; Skrentny 1996, 140).

These legal guidelines formed the basis for a legal strategy, hatched jointly by the EEOC and the LDF, to attack discrimination through the courts. This strategy emerged partly from rules created by Congress that provided incentives for private litigants file suits as a way of enforcing the law, as Farhang (2006) has shown, but also from the direct intervention of state actors. The EEOC, of course, could not file lawsuits on its own under Title VII, but the Justice Department could. Despite extensive prodding from the EEOC, however, the Justice Department's Civil Rights Division filed very few such suits — only ten by the end of 1967 — leaving the field open for the LDF, the ACLU, and other groups who could represent private litigants in filing lawsuits in federal court (Nathan 1969, 76). LDF lawyers were the principal actors in this strategy, filing dozens of Title VII lawsuits in the 1965 and 1966 alone, and over time the lawsuits became increasingly important as Title VII enforcement mechanism. By the early 1970s the number of Title VII suits filed annually in federal courts numbered into the thousands, and it increased through the decade even as the number of EEOC complaints began to fall, and Title VII suits came to account for nearly four percent of all civil actions filed in federal courts (Greenberg 1994, 305, 413-16; Belton 1978, 926-31; Burstein and Monaghan 1986, 361-62).

But as with other enforcement activities, this legal approach was deeply collaborative, involving both the LDF and the EEOC. The commission participated in several significant ways. Frustrated both by its own inability to file lawsuits on its own behalf and by the Justice Department's disinclination to file "pattern-or-practice" suits, commission staff consulted extensively with the LDF to develop legal strategies for

---

Legal Interpretations Issued or Adopted by the Commission, January 1, 1966 trough March 31, 1966, RG 403, Office of

attacking employment discrimination in the courts. In frequent strategy meetings, EEOC staff members and LDF attorneys shared information, devised legal arguments and doctrines, worked to coordinate the various administrative and legal enforcement avenues, and argued about strategy (about which they did not always agree) (Belton 1978, 930-31; Stein 1998, 102-5, 112; Belz 1991, 28-29; Graham 1990, 250-54).[17]

The EEOC was not just a background and sideline player in this legal strategy, but an active participant, particularly through the filing of *amicus curiae* briefs. Through its briefs, the EEOC was able to present its interpretations of Title VII to the federal courts, usually to bolster plaintiffs' cases as presented by the LDF and its cooperating attorneys. Within a few years of its creation, the EEOC was filing dozens of *amicus* briefs annually, and the agency's participation seems to have at least modestly improved the chances for the plaintiff's success (Peck 1976, 858; Burstein and Monaghan 1986, 375-76). The EEOC's legal guidelines also played a significant role in the courts. Because they were produced by the agency that had nominal administrative responsibility for enforcing Title VII, the commission's guidelines tended to receive deference from federal courts struggling to decide discrimination cases without a great deal of judicial precedent (Peck 1976, 843-44; Belton 1978, 944; *Albemarle Paper Co. v. Moody* 1975).

These factors came together most prominently and significantly in *Griggs v. Duke Power Co.,* the case in which the Supreme Court ultimately ruled that employers could not use even ostensibly race-neutral tests or other occupational qualifications that tend disproportionately to bar minority applicants from certain jobs unless the employer could show that they were a bona fide qualification for the job category in question. In *Griggs,* decided in 1972, the Court held that Title VII prohibited not only intentional acts of discrimination against individuals but also practices that seemed nondiscriminatory on their face that had the effect of preserving unequal racial imbalances. "The [Civil Rights] Act," wrote Chief Justice Warren Burger for a unanimous court, "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation" (*Griggs v. Duke Power Co.* 1971, 431).

Griggs had begun essentially as a joint product of the EEOC and the LDF. Discriminatory

---

the Chairman, Records of Chairman Stephen Shulman 1966-1968, Box 3, Rules and Regulations – EEOC.

[17] Jack Greenberg to Roosevelt, 22 March 1966, RG 403, Office of the Chairman, Records of Chairman Stephen Shulman 1966-1968, Box 2, Correspondence: Civil Rights Leaders.

occupational testing that had long been a target of the EEOC, and the original lawsuit, filed by fourteen black employees of the Duke Power Company in North Carolina, had emerged from an EEOC investigation that was undertaken as a result of charges filed through the LDF's summer 1965 Title VII project (Blumrosen 1972, 59-60; Belton 1978, 937). Over the course of the litigation, the EEOC and the LDF consulted regularly about the case, sharing information and conferring on legal strategy. In fact, after the Fourth Circuit Court of the Appeals ruled in Duke Power's favor, the EEOC's lawyers, particularly its deputy general counsel John Pemberton, advised the LDF not to appeal the case to the Supreme Court. The LDF's director, Jack Greenberg, rejected this advice (Belton 1978, 943; Graham 1990, 385).[18] The Commission filed an *amicus* brief in the case in support of the plaintiffs, presenting its interpretation of Title VII to the court. Both Simon Sobeloff, the dissenting judge on the Fourth Circuit appeals panel, and Chief Justice Burger cited the EEOC's brief and testing guidelines explicitly in their opinions. In his opinion, Burger wrote that "the administrative interpretation of the Act by the enforcing agency is entitled to great deference" (*Griggs v. Duke Power Co.* 1970, 1240-41; *Griggs v. Duke Power Co.* 1971, 433-34; Graham 1990, 385-86; Epstein 1992, 193-94; Belz 1991, 52-53; Kull 1992, 204-5).

The *Griggs* decision sanctioned a race-conscious interpretation of discrimination that gave the state broader power to attack discrimination, particularly through the EEOC's privileged status as an interpreter of the law. In so doing, the court established the legitimacy of the broader Title VII enforcement standards that both the EEOC and the civil rights community, led by the LDF, had long sought. But it also highlighted the maturation of the links between the EEOC and the organized civil rights community. These links, particularly with the NAACP and the LDF were the linchpin in advancing collective, race-conscious enforcement of Title VII. Neither bureaucrats nor courts, either by themselves or in combination only with one another, could have achieved this result. The EEOC certainly could not; it had the power neither to coerce nor sue. Nor could the courts; although they had the power to issue decisive and authoritative rulings in the cases that came before them, these cases had to come from somewhere. It was the linkages between the EEOC and the LDF that gave the courts both the cases and the principles that they ultimately used to

[18] Jules H. Gordon (Conciliator, EEOC) to Robert Belton (LDF), 8 December 1966, RG 403, Compliance

validate the practices and principles of affirmative action. It was the LDF, with the help and background advice of the EEOC, that brought cases strategically to present issues of discrimination in the most legally promising light hoping to make persuasive arguments and find receptive judges. And it was the EEOC that took the lead in developing the legal interpretations and doctrines that backed up those arguments and, ultimately, persuaded judges.

In addition to its multifaceted collaboration with civil rights groups, the EEOC used several other tactics to leverage its severely limited formal powers into effective enforcement. It used the power of publicity to expose discriminatory practices and induce employers to change their behavior. It held a series of high-profile hearings on employment practices in New York City, for example, that targeted prominent service industries such as banking and other white-collar industries that depended heavily on their civic reputations in the nation's most liberal city. Among other employers, these hearings shone a rather embarrassing spotlight on the *New York Times.*[19]

These well-publicized hearings contrasted sharply with similar hearings that had been held in 1935 by a city commission investigating the causes of a race riot that occurred in Harlem in March of that year. The 1935 commission similarly documented evidence of widespread racial discrimination in employment, focusing particularly on public utilities and transportation agencies, retail stores, and labor unions (*Complete Report* 1969, 31-43). The commission documented not only the wide disparities between black and white workers and the nearly complete absence of African-American workers from some of the city's most important economic sectors but also some of the bluntly discriminatory practices that kept African-Americans typically in the most menial, lowest-paying jobs, which were unabashedly described by their practitioners. One utility executive, for example, testified that he "did not regard the exclusion of Negroes from all positions, except a few jobs as laborers, as discrimination, but only as a customary practice" (*Complete Report* 1969, 33). Even the city-owned Independent Subway System, the report pointed out, had at one time refused to give African-American job seekers applications for any job other than porter (*Complete Report* 1969, 35). The commission concluded that

---

Division, Compliance Correspondence, 1968, Box 1, Conciliation.

economic inequality, perpetuated by discrimination, was at the root of the racial unrest in Harlem and recommended strong action by the city against job discrimination (*Complete Report* 1969, 122-29). Despite (or, perhaps, because of) the direct and damning nature of its findings, Mayor Fiorello H. La Guardia declined to release the commission's report to the public and it received very little public attention. It was published in July 1936 in the *Amsterdam News,* a major black newspaper, which alleged that the mayor had considered the original draft of the report "too hot, too caustic, too critical, too unfavorable" and had demanded that the official report's language be softened. The report's unofficial publication seems to have drawn no notice; the *New York Times* did not report on it, and the *Times*'s only mention of the commission's work came in a report about a meeting between the commission and the mayor, at which La Guardia defensively reported on progress made by the city in areas such as wages for African-American subway porters and playground construction in Harlem (*Complete Report* 1969, 1; Kessner 1989, 374-76; Capeci 1977, 4-7).[20]

In early 1969, another set of hearings, this time in Los Angeles looking into the motion picture industry, raised congressional hackles (particularly those of Senate minority leader Everett Dirksen, who threatened to oppose Nixon's appointment of William Brown as EEOC chair because of his participation). In early 1969, another set of hearings, this time in Houston, raised congressional hackles and hastened the end of Johnson appointee Clifford Alexander's chairmanship of the commission. Yet another round of hearings in Houston in the spring of 1970 brought a protest to the White House from the Republican candidate for Senate in Texas, Representative George Bush, who feared they might pose problems for his candidacy.[21] Such hearings had no legal force, but they did serve to increase public awareness about the extent and sometimes surprising venues of racial discrimination.

This overall pattern of policy and political development was dependent on the forging of relationships among not only bureaucrats and judges but also the collective action of African-Americans,

---

[19] Memorandum, Clifford L. Alexander Jr., to Loyd Hackler, 28 December 1967, FG, White House Central File (hereafter WHCF), Box 380, Lyndon B. Johnson Library (hereafter LBJL); Memorandum, Clifford L. Alexander Jr. to Henry Fowler, 12 April 1968, HU 2-1, WHCF, Box 44, LBJL; Stein 1998, 118; Nathan 1969, 28-31.

[20] "Mayor Reports on Aid to Harlem," *New York Times,* July 1, 1936, 2.

[21] Everett Dirksen to Bryce Harlow, 7 Apr. 1969, CF FG 109, WHSF/WHCF, Box 23, Nixon Presidential Materials, National Archives (hereafter NPM); Memorandum, Peter Flanigan to Kenneth Cole, 14 Apr. 1969, CF FG

organized into a movement that sought and exploited opportunities offered by the American political system. Although rooted in a national social movement, the NAACP was organized in a federated structure that mirrored the federal structure of the American state — with local, state, and national branches — and so was able to operate in multiple venues and with varied strategies at once (Skocpol, Ganz, and Munson 2000). For the NAACP and the LDF, the courts and the EEOC were not simply the upper reaches of a hierarchy whose dicta, pronounced from on high, were law. Rather, they were opportunities to be exploited, points of access to the structure of state power, openings that could be entered to try to pry policy loose and to advance an approach to anti-discrimination enforcement that some (although by no means all) African-American leaders and organizations and their allies in the worlds of law and government had spent a long time developing (Kryder 2000, chap. 4; King 1995, 208-9; Graham 1990, 110-13).

At least as much as the EEOC's other maneuvers, these links forged with the LDF were the key to the commission's role in nudging forward an interpretation of Title VII based on "disparate impact," collective employment patterns that were unfavorable to blacks. These informal links, the products partly of the commission staff's entrepreneurship but also of the organizational slack in the federal government that allowed them to be enterprising, meant that the development of affirmative action was not simply a top-down imposition by meddlesome and imperious bureaucrats and courts, contemptuous of legislative intent and public opinion, as some interpreters suggest (Kull 1992; Graham 1990; Thernstrom and Thernstrom 1997, 423-40). Rather, it was equally a bottom-up effort, facilitated by the configuration of actors, institutions, and ideas prevailing at the time. The flip side of institutional fragmentation has been a level of improvisatory suppleness that has made the EEOC and the rest of the American race relations establishment remarkably effective. These institutional opportunities, in turn, were the result not simply of the structure of American political institutions but of the way in which African-Americans had been incorporated in those institutions through the historical processes of political development.

109, WHSF/WHCF, Box 23, NPM; Memorandum, Leonard Garment to Flanigan, HU 2-2, WHCF, Box 17, NPM; Memorandum, Flanigan to Bill Timmons, 9 Apr. 1970, HU 2-2, Box 17, NPM.

This picture of the EEOC upends conventional views of civil rights enforcement on a number of dimensions. First, the EEOC, despite its lack of formal regulatory power, was not as anemic as it is often portrayed. It was able to marshal substantial resources that helped dramatically to shift the grounds of Title VII enforcement in a relatively short time. But it did not accomplish this through conventional command-and-control means of regulatory enforcement, using powers directly and explicitly delegated to it by Congress. Rather, it accomplished this by means of strategic alliances with private civil society groups who were, in effect, enlisted in a project of public regulatory activity.

Second, the centrality of the NAACP and the LDF to these enforcement efforts suggests strongly that the view of affirmative action as the product of a cabal of judges, bureaucrats, and civil rights lawyers to subvert the color-blind premises of the Civil Rights Act are mistaken. "Post-1968 civil rights law has notably been imposed on American democracy from the top down," writes legal scholar Andrew Kull (1992, 191). "Little disposed to reclaim the burden of self-government in an area offering only hard choices, the nation has largely acquiesced in policies chosen by administrators and judges." Not so. Administrators and judges indeed played critical roles in the evolution of antidiscrimination policy, but their actions were enabled and sustained by the wide-ranging democratic forces of the civil rights movement and its organizations. These organizations exploited opportunities posed by the structure of the American state to advance their cause; in so doing they enhanced the reach of the regulatory state.

This brief account of the EEOC's role in the development of affirmative action, moreover, suggests at least that an associational perspective on bureaucratic power holds promise as a theoretical approach to American political development and state building and holds one key to explaining this important episode of endogenous policy change, without formal reform or statutory reform. At the very least, it seems to provide a better explanation for the EEOC's activities and regulatory outcomes in the late 1960s and early 1970s than competing theories of bureaucratic power, particularly capture and interest-group approaches. The means to bureaucratic effectiveness for the EEOC involved the joining of public and private power in ways that these

alternative approaches do not contemplate, resulting not only in a surprising policy transformation that seemed to have no institutional substrate but also a set of agency activities not predicted by other theories.

The design of the research presented here — a case study of a single agency, without a direct test of competing causal claims against one another — is limited in its reach. A more complete analysis of the role of the private-public nexus in shaping administrative activity and fostering bureaucratic power will involve a number of elements. First, it will require a more extensive, narrative account of the role of public-private linkages in policy developments (see Skrentny 1996; Lieberman 2002b, 2005). Second, it would require more fully specified multivariate analysis that would attempt to isolate the causal priority of public-private connections while taking account of variations in capture and interest-group factors (Schneiberg and Bartley 2001; see also Schneiberg and Clemens forthcoming).[22] Finally, it will require a broader and more sweeping account of the role of private power in regulatory development and bureaucratic power across a long span of time and a wide range of policy areas, in order to explore the conditions under which private power is an important element of state building. When, we should ask, does bureaucracy have the tools and opportunities to operate in this way?[23] This outline, in fact, lays out an ambitious research program and stakes out important territory for future inquiry.

Nevertheless, setting these theoretical approaches side by side in exploring a paradoxical case of American policy development helps to clarify the mechanisms that underlie the development of government authority in the United States. For the most part, studies of American political development have equated "the state" with formal structures of administrative power and have defined "state building" in terms of the elaboration of those structures. In the 1960s, Samuel Huntington (1968, chap. 2) identified the American

[22] This is a reasonably well-developed research field in sociology, but less so in political science. Part of the research agenda that I am outlining must be to develop methods and models that focus explicitly on the political mechanisms and consequences of the public-private power nexus, rather than on the organizational and cultural fields that dominate sociological analysis.

[23] The choice between public and private regulatory and administrative mechanisms dates back at least to the origins of the modern American regulatory in the Interstate Commerce Act of 1887. In addition to the hypotheses about means and consequences discussed above, hypotheses about the origins and form of regulation and bureaucratic power can be derived from these theoretical approaches, although I do not do so here. See Fiorina 1982; Gilligan, Marshall, and Weingast 1989; James 1992. It may also be the case that civil rights is simply different from other kinds of state power — because it involved a broad social movement, because it challenges unique and deeply historically rooted patterns of inequality, or simply because it mobilizes different kinds of interests than other kinds of public policy. More

state as a peculiarity in comparative terms, an underdeveloped "Tudor state," stuck in a medieval institutional rut and lacking centralized coercive capacity while American society modernized around it (producing the incipient crisis of order and governability about which he was seized with anxiety). In his foundational work on American state building, Stephen Skowronek (1982) showed that the United States was not as stateless as Huntington feared, but rather that American national administrative capacities had developed out of America's own distinctive political patterns rather than on the European model of the progressive democratization of absolutism (see Moore 1966; Mann 1993; Shefter 1977). But still, for Skowronek, the sine qua non of state building was the construction of public administrative power as a *replacement* for the private power that characterized the nineteenth-century "state of courts and parties" — "reconstitution" replacing "patchwork" as the dominant image of state building. Legions of state building studies have followed Skowronek's lead, considering state authority as differentiated from and opposed to private power. This formalism in the understanding of the state, moreover, is paralleled by formalism in the understanding of policy and policy development, which is typically associated with formal authoritative action by state institutions: laws, regulations, and the like.

But as Ira Katznelson (2002) has recently reminded us, such an undifferentiated notion of "the state" has limited the conceptual apparatus available to students of the state in American political development. He suggests a return to J. P. Nettl's (1968) suppler, multidimensional notion of the state, which allows us to consider "stateness" in more varied, and hence more precise, terms than simply the strength of coercive administrative power. Complicating our account of the American state in this way, moreover, opens space for a more careful understanding of many of the peculiarities of policy development and change in the United States. Although the formal institutions of American governance famously constrain the prospects for policy reform through formal legislative and regulatory channels, policy change in the United States is less rare than this perspective suggests, and often arrives through unexpected means, as the affirmative action case demonstrates (see Hacker 2004). The theoretical juxtaposition presented here strongly suggests that such a more expansive view of state authority should include the mobilization of private power, not as an accident

---

generally, the deployment of private power may differ systematically across types of policies and arenas of power.

or a deviation but as a regular and enduring dimension of the American state. Integrating the notion of private power into the study of bureaucratic development and state building thus not only helps to explain the puzzling career of the EEOC and the rise of affirmative action but also points the way toward a broader perspective on the sources of bureaucratic power, policy change, and the contours of American state building.

Hence broader research is essential. See Lowi 1964; Wilson 1974, chap. 16.

References

Albemarle Paper Co. v. Moody. 1975. 422 U.S. 405.

Arnold, R. Douglas. 1990. *The Logic of Congressional Action*. New Haven: Yale University Press.

Balogh, Brian. 1991. *Chain Reaction: Expert Debate and Public Participation in American Commercial Nuclear Power, 1945-1975*. Cambridge: Cambridge University Press.

Belton, Robert. 1978. "A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964." *Vanderbilt Law Review* 31: 905-61.

Belz, Herman. 1991. *Equality Transformed: A Quarter-Century of Affirmative Action*. New Brunswick, N.J.: Transaction Publishers.

Bernstein, Marver H. 1955. *Regulating Business by Independent Commission*. Princeton: Princeton University Press.

Bensel, Richard Franklin. 1990. *Yankee Leviathan: The Origins of Central State Authority in America, 1859-1877*. Cambridge: Cambridge University Press.

Berg, Richard K. 1964. "Equal Employment Opportunity Under the Civil Rights Act." *Brooklyn Law Review* 31: 62-97.

Blumrosen, Alfred W. 1970. "Administrative Creativity: The First Year of the Equal Employment Opportunity Commission." *George Washington Law Review* 38: 694-751.

Blumrosen, Alfred W. 1971. *Black Employment and the Law*. New Brunswick, N.J.: Rutgers University Press.

Blumrosen, Alfred W. 1972. "Strangers in Paradise: *Griggs v. Duke Power Co.* and the Concept of Employment Discrimination." *Michigan Law Review* 71: 59-110.

Burke, Thomas F. 2002. *Lawyers, Lawsuits, and Legal Rights: The Battle over Litigation in American Society*. Berkeley: University of California Press.

Burstein, Paul. 1985. *Discrimination, Jobs, and Politics: The Struggle for Equal Employment Opportunity in the United States since the New Deal*. Chicago: University of Chicago Press.

Burstein, Paul, and Kathleen Monaghan. 1986. "Equal Employment Opportunity and the Mobilization of Law." *Law and Society Review* 20: 355-88.

Button, James W. 1989. *Blacks and Social Change: Impact of the Civil Rights Movement in Southern Communities.* Princeton: Princeton University Press.

Campbell, John L., and Ove K. Pedersen. 2001. "The Rise of Neoliberalism and Institutional Analysis." In *The Rise of Neoliberalism and Institutional Analysis,* edited by John L. Campbell and Ove K. Pedersen. Princeton University Press.

Cancellieri, Mark. 1999. "Budgeting for Civil Rights: The Case of the EEOC." M.A. thesis, University of New Orleans.

Capeci, Dominic J., Jr. 1977. *The Harlem Riot of 1943*. Philadelphia: Temple University Press.

Carpenter, Daniel P. 2001. *The Forging of Bureaucratic Autonomy: Reputations, Networks, and Policy Innovation in Executive Agencies, 1862-1928*. Princeton: Princeton University Press.

Carpenter, Daniel P. 2002. "Groups, the Media, and Agency Waiting Costs: The Political Economy of FDA Drug Approval." *American Journal of Political Science* 46: 490-505.

Clemens, Elisabeth S. 1997. *The People's Lobby: Organizational Innovation and the Rise of Interest Group Politics in the United States, 1890-1925*. Chicago: University of Chicago Press.

Complete Report of Mayor La Guardia's Commission on the Harlem Riot of March 19, 1935. 1969. New York: Arno Press.

Derthick, Martha. 2002. *Up in Smoke: From Legislation to Litigation in Tobacco Politics.* Washington: CQ Press.

DiMaggio, Paul J., and Walter W. Powell. 1983. "The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality." *American Sociological Review* 48: 147-60.

Dobbin, Frank. 1994. *Forging Industrial Policy: The United States, Britain, and France in the Railway Age.* Cambridge: Cambridge University Press.

Dobbin, Frank, and John R. Sutton. 1998. "The Strength of a Weak State: The Rights Revolution and the Rise of Human Resource Management Divisions." *American Journal of Sociology* 104: 441-76.

Dobbin, Frank, John R. Sutton, John W. Meyer, and W. Richard Scott. 1993. "Equal Opportunity Law and the Construction of Internal Labor Markets." *American Journal of Sociology* 99: 396-427.

Donohue, John J., III, and James Heckman. 1991. "Continuous Versus Episodic Change: The Impact of Civil Rights Policy on the Economic Status of Blacks." *Journal of Economic Literature* 29: 1603-43.

Edelman, Lauren B. 1990. "Legal Environments and Organizational Governance: The Expansion of Due Process in the American Workplace." *American Journal of Sociology* 95: 1401-40.

Edelman, Lauren B. 1992. "Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law." *American Journal of Sociology* 97: 1531-76.

Epstein, David, and Sharyn O'Halloran. 1999. *Delegating Powers: A Transaction Cost Approach to Policy Making Under Separated Powers.* Cambridge: Cambridge University Press.

Epstein, Richard. 1992. *Forbidden Ground: The Case Against Employment Discrimination Laws.* Cambridge: Harvard University Press.

Farhang, Sean. 2006. "The Litigation State: Public Regulation and Private Lawsuits in the American Separation of Powers System." Ph.D. diss, Columbia University.

Fiorina, Morris P. 1982. "Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?" *Public Choice* 39: 33-66.

Friedberg, Aaron. 2000. *In the Shadow of the Garrison State: America's Anti-Statism and Its Cold-War Strategy.* Princeton: Princeton University Press.

Frymer, Paul. 2005. "Racism Revised: Courts, Labor Law, and the Institutional Construction of Racial Animus." *American Political Science Review* 373-87.

Gilligan, Thomas W., William J. Marshall, and Barry R. Weingast. 1989. "Regulation and the Theory of Legislative Choice: The Interstate Commerce Act of 1887." *Journal of Law and Economics* 32: 35-61.

Goluboff, Risa L. 2007. *The Lost Promise of Civil Rights.* Cambridge: Harvard University Press.

Graham, Hugh Davis. 1990. *The Civil Rights Era: Origins and Development of National Policy, 1960-1972.* New York: Oxford University Press.

Gratz v. Bollinger. 2003. 539 U.S. 244.

Greenberg, Jack. 1994. *Crusaders in the Courts: How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution.* New York: Basic Books.

Greenstone, J. David, and Paul E. Peterson. 1973. *Race and Authority in Urban Politics: Community Participation and the War on Poverty*. New York: Russell Sage Foundation.

Griggs v. Duke Power Co. 1970. 420 F.2d. 1225 (4th Cir.).

Griggs v. Duke Power Co. 1971. 401 U.S. 424.

Grutter v. Bollinger. 2003. 539 U.S. 306.

Hacker, Jacob S. 2002. *The Divided Welfare State: The Battle over Public and Private Social Benefits in the United States*. Cambridge: Cambridge University Press.

Hacker, Jacob S. 2004. "Privatizing Risk Without Privatizing the Welfare State." *American Political Science Review* 98: 243-60.

Hall, Peter A., and Rosemary C. R. Taylor. 1996. "Political Science and the Three New Institutionalisms." *Political Studies* 44: 936-57.

Heckman, James J. 1990. "The Central Role of the South in Accounting for the Economic Progress of Black Americans." *American Economic Review* 80: 242-46.

Heckman, James J., and Brook S. Payner. 1989. "Determining the Impact of Federal Antidiscrimination Policy on the Economic Status of Blacks: A Study of South Carolina." *American Economic Review* 79: 138-77.

Horowitz, Donald L. 1977. *The Courts and Social Policy*. Washington: Brookings Institution.

Howard, Christopher. 1997. *The Hidden Welfare State: Tax Expenditures and Social Policy in the United States*. Princeton: Princeton University Press.

Huber, John D., and Charles R. Shipan. *Deliberate Discretion?: The Institutional Foundations of Bureaucratic Autonomy*. Cambridge: Cambridge University Press.

Huntington, Samuel P. 1952. "The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest." *Yale Law Journal* 61: 467-509.

Huntington, Samuel P. 1968. *Political Order in Changing Societies*. New Haven: Yale University Press.

Immergut, Ellen M. 1998. "The Theoretical Core of the New Institutionalism." *Politics and Society* 26: 5-34.

Jacobs, Lawrence R., and Robert Y. Shapiro. 2000. *Politicians Don't Pander: Political Manipulation and the Loss of Democratic Responsiveness.* Chicago: University of Chicago Press.

Jacobs, Meg, William J. Novak, and Julian E. Zelizer, eds. 2003. *The Democratic Experiment: New Directions in American Political History.* Princeton: Princeton University Press.

James, Scott C. 1992. "A Party System Perspective on the Interstate Commerce Act of 1887: The Democracy, Electoral College Competition, and the Politics of Coalition Maintenance." *Studies in American Political Development* 6: 163-2000.

James, Scott C. 2000. *Presidents, Parties, and the State: A Party System Perspective on Democratic Regulatory Choice, 1884-1936.* Cambridge: Cambridge University Press.

Kagan, Robert A. 2001. *Adversarial Legalism: The American Way of Law.* Cambridge: Harvard University Press.

Katz, Michael B. 1986. *In the Shadow of the Poorhouse: A Social History of Welfare in America.* New York: Basic Books.

Katz, Michael B., and Christoph Sachße. 1996. *The Mixed Economy of Social Welfare: Public/Private Relations in England, Germany, and the United States, the 1870s to the 1930s.* Baden-Baden: Nomos.

Katznelson, Ira. 1997. "Structure and Configuration in Comparative Politics." In *Comparative Politics: Rationality, Culture, and Structure,* edited by Mark Irving Lichbach and Alan S. Zuckerman. Cambridge: Cambridge University Press.

Katznelson, Ira. 2002. "Rewriting the Epic of America." In *Shaped by War and Trade: International Influences on American Political Development,* edited by Ira Katznelson and Martin Shefter. Princeton: Princeton University Press.

Kessner, Thomas. 1989. *Fiorello H. La Guardia and the Making of Modern New York.* New York: McGraw-Hill.

King, Desmond. 1995. *Separate and Unequal: Black Americans and the U.S. Federal Government.* Oxford: Oxford University Press.

King, Desmond. 2000. *Making Americans: Immigration, Race, and the Origins of the Diverse Democracy.* Cambridge: Harvard University Press.

Kryder, Daniel. 2000. *Divided Arsenal: Race and the American State During World War II.* Cambridge: Cambridge University Press.

Kull, Andrew. 1992. *The Color-Blind Constitution.* Cambridge: Harvard University Press.

Lieberman, Robert C. 2002a. "Ideas, Institutions, and Political Order: Explaining Political Change." *American Political Science Review* 96: 697-712.

Lieberman, Robert C. 2002b. "Weak State, Strong Policy: Paradoxes of Race Policy in the United States, Great Britain, and France." *Studies in American Political Development* 16: 138-61.

Lieberman, Robert C. 2005. *Shaping Race Policy: The United States in Comparative Perspective.* Princeton: Princeton University Press.

Lowi, Theodore J. 1964. "American Business, Public Policy, Case-Studies, and Political Theory." *World Politics* 16: 677-715.

Lowi, Theodore J. 1979. *The End of Liberalism: The Second Republic of the United States,* 2d ed. New York: W. W. Norton.

MacAvoy, Paul W. 1965. *The Economic Effects of Regulation: The Trunk-Line Railroad Cartels and the Interstate Commerce Commission Before 1900.* Cambridge: MIT Press.

Mann, Michael. 1993. *The Sources of Social Power, Volume 2: The Rise of Classes and Nation States, 1760-1914.* Cambridge: Cambridge University Press.

Mayhew, David R. 1974. *Congress: The Electoral Connection.* New Haven: Yale University Press.

McConnell, Grant. 1966. *Private Power and American Democracy.* New York: Alfred A. Knopf.

McCubbins, Mathew D., Roger G. Noll, and Barry R. Weingast. 1987. "Administrative Procedures as Instruments of Political Control." *Journal of Law, Economics, and Organization* 3: 243-77.

McCubbins, Mathew D., and Thomas Schwartz. 1984. "Congressional Oversight Overlooked: Police Patrols versus Fire Alarms." *American Journal of Political Science* 28: 165-79.

Melnick, R. Shep. 1983. *Regulation and the Courts: The Case of Clean Air Policy.* Washington: Brookings Institution.

Melnick, R. Shep. 1994. *Between the Lines: Interpreting Welfare Rights.* Washington: Brookings Institution.

Moe, Terry M. 1985. "Control and Feedback in Economic Regulation: The Case of the NLRB." *American Political Science Review* 79: 1094-1116.

Moe, Terry M. 1987. "Interests, Institutions, and Positive Theory: The Politics of the NLRB." *Studies in American Political Development* 2: 236-99.

Moe, Terry M. 1989. "The Politics of Bureaucratic Structure." In *Can the Government Govern?,* edited by John E. Chubb and Paul E. Peterson. Washington: Brookings Institution.

Moore, Barrington, Jr. 1966. *Social Origins of Dictatorship and Democracy: Lord and Peasant in the Making of the Modern World.* Boston: Beacon Press.

Morone, James A. 1990. *The Democratic Wish: Popular Participation and the Limits of American Government.* New York: Basic Books.

Nathan, Richard P. 1969. *Jobs and Civil Rights.* Washington: Government Printing Office.

Nettl, J. P. 1968. "The State as a Conceptual Variable." *World Politics* 20: 559-92.

O'Connor, Karen, and Lee Epstein. 1982. "The Importance of Interest Group Involvement in Employment Discrimination Litigation." *Howard Law Review* 25: 709-29.

Orren, Karen, and Stephen Skowronek. 2004. *The Search for American Political Development.* Cambridge: Cambridge University Press.

Payne, Dinah, Sandra J. Hartman, Maurice F. Villere, Beverly H. Nelson, and Gregory Baxter. 1992. "Is Big Brother Watching?: Perceptions and Research on the Effectiveness of the EEOC." *Labor Law Journal* 43: 249-56.

Peck, Cornelius J. 1976. "The Equal Employment Opportunity Commission: Developments in the Administrative Process." *Washington Law Review* 51: 831-65.

Pelzman, Sam. 1976. "Toward a More General Theory of Regulation." *Journal of Law and Economics* 19: 211-40.

Rabin, Robert L. 1976. "Lawyers for Social Change: Perspectives on Public Interest Law." *Stanford Law Review* 28: 207-61.

Regents of the University of California v. Bakke. 1978. 438 U.S. 265.

Rodriguez, Daniel B., and Barry R. Weingast. 2003. "The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and its Interpretation." *University of Pennsylvania Law Review* 151: 1417-1542.

Sanders, Elizabeth. 1999. *Roots of Reform: Farmers, Workers, and the American State, 1877-1917*. Chicago: University of Chicago Press.

Schneiberg, Marc. 1999. "Political and Institutional Conditions for Governance by Association: Private Order and Price Controls in American Fire Insurance." *Politics and Society* 27: 67-103.

Schneiberg, Marc, and Tim Bartley. 2001. "Regulating American Industries: Markets, Politics, and the Institutional Determination of Fire Insurance Regulation." *American Journal of Sociology* 107: 101-46.

Schneiberg, Marc, and Elisabeth S. Clemens. Forthcoming. "The Typical Tools for the Job: Research Strategies in Institutional Analysis." In *How Institutions Change,* edited by Walter W. Powell and Dan L. Jones. Chicago: University of Chicago Press.

Selmi, Michael. 1996. "The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law." *Ohio State Law Journal* 57: 1-64.

Shefter, Martin. 1977. "Party and Patronage: Germany, England, and Italy." *Politics and Society* 7: 403-52.

Skocpol, Theda. 1985. "Bringing the State Back In: Strategies of Analysis in Current Research." In *Bringing the State Back In,* edited by Dietrich Rueschemeyer, Theda Skocpol, and Theda Skocpol. Cambridge: Cambridge University Press.

Skocpol, Theda. 1992. *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States.* Cambridge: Harvard University Press.

Skocpol, Theda, and Kenneth Finegold. 1982. "State Capacity and Economic Intervention in the Early New Deal." *Political Science Quarterly* 92: 255-78.

Skocpol, Theda, Marshall Ganz, and Ziad Munson. 2000. "A Nation of Organizers: The Institutional Origins of Civic Voluntarism in the United States." *American Political Science Review* 94: 527-46.

Skowronek, Stephen. 1982. *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920*. Cambridge: Cambridge University Press.

Skrentny, John David. 1996. *The Ironies of Affirmative Action: Politics, Culture, and Justice in America.* Chicago: University of Chicago Press.

Sovern, Michael I. 1966. *Legal Restraints on Racial Discrimination in Employment.* New York: Twentieth Century Fund.

Stein, Judith. 1998. *Running Steel, Running America: Race, Economic Policy, and the Decline of Liberalism.* Chapel Hill: University of North Carolina Press.

Stigler, George J. 1971. "The Theory of Economic Regulation." *Bell Journal of Economics and Management Science* 2: 3-21.

Streeck, Wolfgang, and Kathleen Thelen. 2005. "Introduction: Institutional Change in Advanced Political Economies." In *Beyond Continuity: Institutional Change in Advanced Political Economies,* edited by Wolfgang Streeck and Kathleen Thelen. Oxford: Oxford University Press.

Thelen, Kathleen. 2004. *How Institutions Evolve: The Political Economy of Skills in Germany, Britain, the United States, and Japan.* Cambridge: Cambridge University Press.

Thernstrom, Stephan, and Abigail Thernstrom. 1997. *American in Black and White: One Nation, Indivisible.* New York: Simon and Schuster.

U.S. Commission on Civil Rights. 2000. *Overcoming the Past, Focusing on the Future: An Assessment of the U.S. Equal Employment Opportunity Commission's Enforcement Efforts.* Washington.

Weingast, Barry R., and Mark J. Moran. 1983. "Bureaucratic Discretion or Congressional Control?: Regulatory Policymaking by the Federal Trade Commission." *Journal of Political Economy* 91: 765-800.

Wiebe, Robert H. 1967. *The Search for Order, 1877-1920.* New York: Hill and Wang.

Wilson, James Q. 1974. *Political Organizations.* New York: Basic Books.

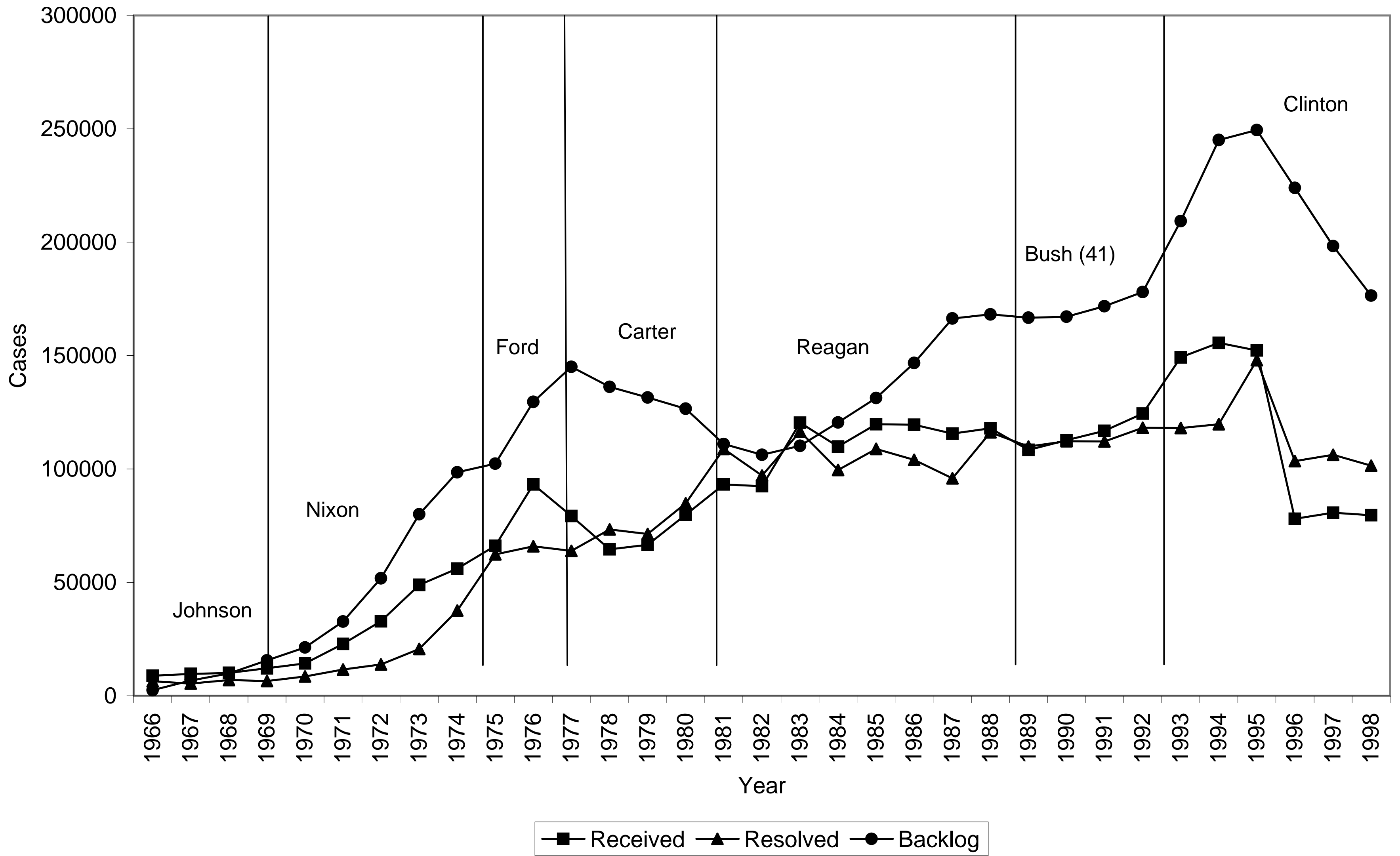
Wilson, James Q. 1989. *Bureaucracy: What Government Agencies Do and Why They Do It.* New York: Basic Books.

Wilson, Woodrow. 1887. "The Study of Administration." *Political Science Quarterly* 2: 197-222.

Wood, B. Dan. 1990. "Does Politics Make a Difference at the EEOC?" *American Journal of Political Science* 34: 503-30.

Young, Richard P., and Jerome S. Burstein. 1995. "Federalism and the Demise of Prescriptive Racism in the United States." *Studies in American Political Development* 9: 1-54.

Figure 1: EEOC Caseload, 1966-1998



Source: EEOC Annual Reports