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## BEYOND THE PRIVATE ATTORNEY GENERAL: EQUALITY DIRECTIVES IN AMERICAN LAW

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# BEYOND THE PRIVATE ATTORNEY GENERAL: EQUALITY DIRECTIVES IN AMERICAN LAW

OLATUNDE C.A. JOHNSON*

*NEW YORK UNIVERSITY LAW REVIEW*, VOL. 87, 2012

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

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## INTRODUCTION

States and localities receiving federal transportation funds must include minority groups in their planning, assess the racial impacts of their programs, and adopt nondiscriminatory alternatives.[1] State and local

[1] *See* 49 C.F.R. pt. 21 (2011) (imposing requirements of nondiscrimination and proactive

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governments that receive federal housing funds must promote integration on the basis of race, ethnicity, and disability in their programs by analyzing barriers to fair housing and removing those barriers.[2] Federal agencies administering programs related to food, nutrition, forestry, and agriculture must conduct a "civil rights impact analysis" to ensure that minorities and people with disabilities fairly benefit from federally funded programs.[3] Such agencies must also take steps to mitigate any adverse impacts on these groups.[4] Federal agencies must take affirmative steps to provide persons with limited English proficiency (LEP) "meaningful access" to federally funded programs.[5]

These statutes and regulations do not fit into the classic conception of modern American civil rights law. Commentators have come to understand

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inclusion on federal grantees); FED. TRANSIT ADMIN., U.S. DEP'T OF TRANSP., CIRCULAR FTA C 4702.1A, TITLE VI AND TITLE VI-DEPENDENT GUIDELINES FOR FEDERAL TRANSIT ADMINISTRATION RECIPIENTS II-1 (2007) [hereinafter FTA C 4702.1A], *available at* http://www.fta.dot.gov/documents/Title_VI_Circular_4702.1A.pdf (listing the following among the objectives of the regulation: (1) ensuring access to transportation by all groups, (2) preventing racial, ethnic, and class disparities in the environmental effects of transportation, (3) promoting full and fair participation in transportation decisionmaking by all affected populations, and (4) ensuring access to programs and activities by persons with limited English proficiency). These provisions, which apply to the Federal Department of Transportation (DOT) and its state and local grantees, implement Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (2006) (prohibiting discrimination on the basis of race, color, or national origin in federally funded programs).

2 *See* 24 C.F.R. § 570.487(b) (2012) (requiring, inter alia, that local governments receiving community development block grants certify that they will "affirmatively further fair housing," (AFFH) conduct an analysis of "impediments to fair housing choice within the State," and take "appropriate actions to overcome the effects of any impediments identified through that analysis"); *see also* 24 C.F.R. §§ 91.225(a), .325(a), .425(a) (2012) (imposing a duty on recipients of certain community planning and development grants to "affirmatively further fair housing," including requiring analysis of "impediments to fair housing choice"). Additional guidance from the Department of Housing and Urban Development (HUD) requires that jurisdictions participate with citizens to develop their plans to further fair housing, detail fair housing goals, and report on steps undertaken to meet those goals. *See* 1 OFFICE OF FAIR HOUS. & EQUAL OPPORTUNITY, U.S. DEP'T OF HOUS. AND URBAN DEV., FAIR HOUSING PLANNING GUIDE, at 2-5 to -7 (1996) [hereinafter FAIR HOUSING PLANNING GUIDE], *available at* http://www.hud.gov/offices/fheo/images/fhpg.pdf (providing an overview of fair housing planning requirements for state and local grantees). These directives implement section 3608 of the Fair Housing Act (FHA), which requires HUD to administer programs "in a manner affirmatively to further the policies of [the Fair Housing Act]." 42 U.S.C. § 3608(e)(5) (2006); *see also* § 3608(d) (requiring the same of all federal departments and agencies).

3 *See* OFFICE OF CIVIL RIGHTS, U.S. DEP'T OF AGRIC., DR 4300-4, CIVIL RIGHTS IMPACT ANALYSIS 1 (2003), *available at* http://www.ocio.usda.gov/directives/doc/DR4300-4.pdf (summarizing the purpose and requirements of a civil rights impact analysis).

4 *See id.*

5 Exec. Order No. 13,166, 65 Fed. Reg. 50,121 (Aug. 16, 2000); DOJ Policy Guidance, Enforcement of Title VI of the Civil Rights Act of 1964—National Origin Discrimination Against Persons with Limited English Proficiency, 65 Fed. Reg. 50,123 (Aug. 16, 2000).

American civil rights statutes as achieving their public ends (nondiscrimination, equity, and integration) by delegating private parties to serve as enforcers through individual litigation.[6] Political development scholars highlight American civil rights law's emphasis on private enforcement, contrasting it with European models of civil rights regulation that place greater reliance on the state's administrative apparatus to advance equity.[7] Unlike Europe or the United Kingdom, they claim, the American state does not impose positive duties on state actors to further equity goals.[8] For scholars of American political development, this facet of American civil rights law is consistent with the "weak" fragmented nature of the American state: In the formative period of civil rights regulation, the United States consciously rejected centralized, bureaucratic forms of civil rights governance and instead relied on a fragmented system of private enforcement through courts.[9]

This dominant narrative is not inaccurate—particularly as compared to European models of governance—but it is incomplete. This Article shows that American civil rights regulation also operates by placing a set of

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6 *See, e.g.*, Robert C. Lieberman, Private Power and American Bureaucracy: The EEOC and Civil Rights Enforcement (Jan. 2010) (unpublished manuscript) (on file with the *New York University Law Review*) (documenting this view); *see also* SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. 3–4 (2010) (describing civil rights statutes like Title VII as entailing a "*legislative choice* to rely upon private litigation in statutory implementation").

7 *See generally, e.g.*, Robert C. Lieberman, *Weak State, Strong Policy: Paradoxes of Race Policy in the United States, Great Britain, and France*, 16 STUD. AM. POL. DEV. 138 (2002) (contrasting American, British, and French approaches to civil rights law).

8 *See* Julie Chi-hye Suk, *Antidiscrimination Law in the Administrative State*, 2006 U. ILL. L. REV. 405, 438 (contrasting U.K. law to U.S. law, which "imposes no such [affirmative] duty on public authorities"); Leland Ware, *A Comparative Analysis of Unconscious and Institutional Discrimination in the United States and Britain*, 36 GA. J. INT'L & COMP. L. 89, 140, 146–48, 150–51 (2007) (describing the positive duties imposed on public authorities under U.K. law and contrasting these with the American emphasis on antidiscrimination and remedying harm). These comparisons arise from examinations of the United Kingdom's 2000 Amendments to the Race Relations Act of 1976, which impose a "general statutory duty" on public authorities to eliminate unlawful discrimination, promote equality of opportunity, and promote good relations between different racial groups. Race Relations (Amendment) Act, 2000, c. 34, § 2 (Eng.); *see also* Suk, *supra*, at 436–37 (describing the U.K. Amendments and similar European Union and Northern Ireland laws that rely on "mainstreaming," which "requires equality to be . . . 'taken into account in every policy and executive decision'" (quoting SANDRA FREDMAN, DISCRIMINATION LAW 176 (2002))).

9 *See* ROBERT C. LIEBERMAN, SHAPING RACE POLICY 149 (2005) (comparing employment discrimination policy in the United States to France and Great Britain, and finding that "[i]n the United States, fragmented and decentralized politics produced a fragmented and individualistic enforcement regime"). For a discussion of American reliance on adversarial rather than bureaucratic methods of policy implementation in civil rights and other areas, describing the rise of litigation and "private attorneys general" as responses to the fragmented American state, see ROBERT A. KAGAN, ADVERSARIAL LEGALISM 15–16, 46–47 (2001).

positive duties on state actors to promote equality and inclusion. I analyze statutes and regulations that I call equality directives. I show how these directives' goals and functions differ from those that emphasize individual enforcement or redress of private claims. Beyond completing our understanding of civil rights law, I argue that these equality directives deserve greater attention from academic commentators and advocates interested in promoting equity. For one, recent Supreme Court decisions have limited private enforcement of civil rights statutes and tightened the procedural rules for pursuing claims in federal court,[10] which strains the private attorney general model upon which civil rights advocates historically have depended. In addition, equality directives can serve as powerful tools for moving beyond a focus on courts and on the limited goal of antidiscrimination dominant in traditional civil rights law. To address inequality today, legal and regulatory interventions must address more than bias. These interventions should engage state regulatory and programmatic power, not just judicial power. Through the use of spending, policymaking, and oversight, a regime of equality directives can counter the limitations of adjudication-based civil rights regimes. States and local authorities are already implementing these directives by taking proactive, affirmative measures to redesign transit, housing, and other services in ways that allow greater participation of previously excluded groups and in ways that reshape the structural landscape that has previously sustained inequality.

This Article proceeds in four Parts. Part I argues that the standard conception of civil rights law ignores equality directives. The typical account of American civil rights law identifies two enforcement regimes: (1) a private attorney general model and (2) a public enforcement model understood as either prosecution by public agencies in court or claim resolution through administrative adjudication.[11] Part I argues that a third civil rights regulatory regime exists: one centered on advancing civil rights norms through formal and informal forms of administrative power. My prime examples are Title VI of the 1964 Civil Rights Act[12] and provisions

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10 For example, *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 556–57 (2007), moved away from the liberal federal pleading regime of *Conley v. Gibson*, 355 U.S. 41 (1957), and required that, to survive a motion to dismiss, plaintiffs plead enough "factual matter" to state a "plausible" claim for relief. Subsequently, *Ashcroft v. Iqbal*, 556 U.S. 662, 678–80 (2009), applied *Twombly*'s "plausibility" standard to constitutional claims under 42 U.S.C. § 1983 (2006).

11 *See, e.g.*, FARHANG, *supra* note 6, at 4–5, 21–22, 34 (discussing the congressional mobilization of private litigants to enforce Title VII of the Civil Rights Act of 1964 and the rejection of administrative adjudication models); Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401 (1998) (distinguishing between private enforcement by litigants in courts and government prosecution of claims).

12 *See* 42 U.S.C. § 2000d (2006) (forbidding discrimination by federal grantees on the basis

of the Fair Housing Act that require federal agencies and grantees to take affirmative steps to further fair housing goals.[13] As Part I shows, these statutes and regulations unleash a range of administrative tools, including conditioned spending and formal and informal forms of regulatory oversight and guidance, to promote equity and inclusion in federal-state programs. Largely because of the institutional choice these statutes present—a bureaucratic form of enforcement disfavored by most civil rights commentators[14]—these statutes and regulations are given scant attention in the civil rights literature and in the practice and development of civil rights law.[15] In the first Part, I introduce these statutes and related regulatory actions that impose positive and pervasive duties on state actors to promote equity.

Part II shows why this third model is particularly salient for promoting equity and substantive inclusion today. Much of what commentators find insufficient about the traditional civil rights regime—its limitations in addressing disparate impacts,[16] its fixation on formalized aspects of discrimination and bias,[17] its impotence in the face of embedded, institutionalized forms of racial exclusion[18]—can be addressed through equality directives. Equality directives do more than combat discrimination

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of race, color, or national origin).

13 *See* 42 U.S.C. § 3608(e)(5) (2006) (requiring HUD to administer its programs and activities "in a manner affirmatively to further the policies of [the Fair Housing Act]"); § 3608(d) (requiring the same of all federal departments and agencies).

14 *See infra* notes 106–114 and accompanying text (describing skepticism among civil rights commentators about agency capacity to enforce civil rights).

15 For instance, when Congress strengthened the severely flawed FHA in 1988, it strengthened the administrative enforcement apparatus (through agency prosecutions and adjudications) and the private enforcement apparatus. *See infra* text accompanying notes 92–96. But Congress failed even to discuss mechanisms for strengthening what I would suggest is another pillar of the Act—the duties it requires of federal, state, and local governments.

16 *See* Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 734, 738–43 (2006) (discussing the practical failures and limitations of Title VII's conception of discrimination after conducting empirical analysis); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1135–37 (1997) (discussing the limitations of the Constitution's construction of discrimination).

17 *See* R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 879–96 (2004) (proposing an emphasis on "racial stigma" to counter limitations of current equal protection jurisprudence); Glenn C. Loury, *Discrimination in the Post-Civil Rights Era: Beyond Market Interactions*, J. ECON. PERSP., Spring 1998, at 117, 118–19 (urging a move away from a focus on discrimination towards a focus on social capital and other mechanisms that lead to economic disparities).

18 *See* Ralph Richard Banks & Richard Thompson Ford, *(How) Does Unconscious Bias Matter? Law, Politics, and Racial Inequality*, 58 EMORY L.J. 1053, 1113–14 (2009) (doubting that racial bias "explains all or even most of the racial injustices that plague our society" and arguing that "many decisions and practices that adversely affect racial minorities do not fit neatly within the conventional antidiscrimination framework").

and bias: They also seek to promote economic and other opportunities, full participation in government-funded programs, and social inclusion for excluded groups.

Part III examines equality directives in two areas that are particularly central to promoting opportunity and inclusion today: housing and transportation. These case studies show how equality directives emerged at the federal level. Further, these case studies reveal equality directives in operation, showing how these directives allow underserved groups to participate in planning and policymaking, engage in front-end redesign of programs and practices, and spur the adoption of practices and policies that promote economic and social opportunity.

In Part IV, I examine the key challenges posed by equality directives, and the steps that government actors and private groups should undertake to more fully implement this emergent regime.

## I
## BEYOND ADJUDICATIVE ENFORCEMENT

Dominant accounts of civil rights statutes generally describe two types of civil rights enforcement, private and public, both of which center on the resolution of claims through adjudicative or quasi-adjudicative processes. The first—and the most discussed in the academic commentary—is the private attorney general model, which emphasizes enforcement by individuals in courts, via individual or class action litigation. The second is the public enforcement model, which involves the prosecution of claims in courts and administrative tribunals. Commentators have described American civil rights law as a struggle between the two, with private enforcement emerging as the dominant, favored model.[19] After presenting these models, this Part argues that these dominant narratives omit a third type of civil rights regulation: statutes and regulations that operate by imposing a set of proactive duties on public actors in the administrative state. Several civil rights statutes have included this form of regulation, but it remains largely overlooked by commentators. In recent years, a set of regulatory actions to enforce these statutes has instituted an American version of "equality directives"[20]—a regime that differs in form and operation from the dominant forms of civil rights regulation.

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[19] *See infra* notes 52–56 and accompanying text (detailing the emergence of a private enforcement model over a public one in American civil rights regulation).

[20] *See infra* notes 142–143 and accompanying text (discussing equality directives in the United Kingdom).

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

Commentators that discuss civil rights statutes and their implementation typically focus on the private attorney general model.[21] As I show in this section, the private attorney general model should continue to be recognized as a tool for promoting equity, given its capacity to address bias. However, recent Supreme Court cases have weakened the model. In addition, as I discuss below, the private attorney general model has other, more fundamental limitations as a mechanism for advancing equity and inclusion.

#### 1. *Supplementing State Capacity*

Congress enacts civil rights statutes to promote antidiscrimination and equity goals, and to empower private individuals to enforce those goals through private litigation. The prime example is Title VII of the 1964 Civil Rights Act, the fair employment provision that often serves as a shorthand for civil rights.[22] Title VII grants a private right of action to enforce its provisions forbidding employment discrimination, allowing individuals to litigate in court after exhausting administrative enforcement mechanisms.[23] Congress enacted the Civil Rights Act of 1991 to increase the incentives for bringing private litigation, specifically by allowing individuals to seek both compensatory and punitive damages.[24] Through litigation in individual and class actions, courts interpret the meaning of the substantive prohibitions of the statute. The idea is that once a sufficient number of cases are brought and high enough damages are awarded, employers—whether faced with actual suits or to avoid the expense and adverse publicity of future litigation—will alter their practices to comply with court-endorsed interpretations of the statute.[25]

This model is known as the "private" attorney general because it effectively delegates pursuit of the statute's public goals to private parties. As Pamela Karlan states, the "idea behind the 'private attorney general'" is

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[21] *See, e.g.*, Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 186 (arguing that "[v]irtually all modern civil rights statutes rely heavily on private attorneys general").

[22] 42 U.S.C. § 2000e to e-17 (2006).

[23] *See id.* § 2000e-5(f)(1) (2006) (granting individuals the right to bring suit after exhausting claims with the EEOC).

[24] *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, § 1977A, 105 Stat. 1071, 1072 (codified at 42 U.S.C. § 1981a (2006)).

[25] *See, e.g.*, Sean Farhang, Private Lawsuits, General Deterrence, and State Capacity: Evidence from Job Discrimination Litigation 4–7, 29 (Oct. 2010) (unpublished manuscript) (on file with the *New York University Law Review*) (summarizing commentary discussing the value of private litigation and its potential deterrent effects).

simple: "Congress can vindicate important public policy goals by empowering private individuals to bring suit."[26] The case for the private attorney general, then, is that it supplements what even an ideally constituted, well-funded, and vigorous public enforcement agency could do. Private litigation engages the resources of a multitude of private actors in rooting out discrimination.[27] Private litigators and their clients may bring greater passion, innovation, and effectiveness than public actors.[28]

For this reason, courts have explicitly acknowledged the role private enforcement plays in supplementing inadequate public enforcement. In *Newman v. Piggie Park Enterprises, Inc.*,[29] one of the first Supreme Court cases interpreting the Civil Rights Act of 1964's provision prohibiting discrimination in public accommodations, the Court noted the limits of the public attorney general—the Department of Justice (DOJ) could bring only pattern-or-practice cases to enforce the statute—and endorsed strong private enforcement to further the statute's broader public policy goals.[30] As the Court stated, a private civil rights plaintiff is no ordinary tort plaintiff: "If he obtains an injunction, he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority."[31]

The Court was similarly explicit in several interpretations of the Fair Housing Act (FHA) of 1968 in the initial decades after its enactment, before the 1988 amendments to the Act strengthened the FHA's weak public and private enforcement provisions.[32] With weak public enforcement

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26 Karlan, *supra* note 21, at 186.

27 *See* Caroline R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of* Buckhannon *for the Private Attorney General*, 54 UCLA L. REV. 1087, 1094 (2007) (noting that private enforcement eliminates the need for a "large governmental enforcement apparatus"); Margaret H. Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782, 788 (2011) (noting that private enforcement regimes can "supplement public efforts, picking up the slack where agency resources run out").

28 *See* Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1387 (2000) (arguing that a centralized regime of police misconduct prosecution lacks "the eyes, experiences, motivation, and resources of millions of Americans who bear witness to institutionalized wrongdoing and are willing to endure the expense of rooting it out"); Selmi, *supra* note 11, at 1404–05, 1444–47 (discussing reasons why government lawyers may drift towards less controversial, easier to win cases).

29 390 U.S. 400 (1968) (per curiam).

30 *Id.* at 401 & n.2 (noting that when the Civil Rights Act of 1964 was enacted, "it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law").

31 *Id.* at 402.

32 From its inception, the FHA included a private right of action, but the Act's private enforcement provisions were weak, providing plaintiffs a short statute of limitations and courts a limited ability to award damages and attorneys' fees. *See* 42 U.S.C. § 3610(b) (1970) (subjecting

capacity, the private enforcement that did occur was in large part enabled by Court-announced rules expanding standing and explicitly invoking the private attorney general function.[33]

Private enforcement also reflects deliberate congressional choices to enforce public norms through litigation and (though less explicitly) to cope with state incapacity. Encouraging private enforcement occurs through explicit grants of private rights to sue,[34] but it is also manifest in congressional provisions granting attorneys' fees to prevailing civil rights plaintiffs,[35] waiving sovereign immunity for damages actions,[36] and expanding damages for civil rights violations.[37] In the 1988 amendments to the FHA, key proponents recognized a need to strengthen the previously weak private enforcement provisions.[38] In the end, the amendments

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FHA claims to a 180-day statute of limitations); 42 U.S.C. § 3613(c)(1) (1970) (capping punitive damages at $1000). HUD, though charged with enforcing the statute, had no power to bring enforcement actions, or even to hold hearings; rather, it had the power only to conciliate claims it found meritorious, or seek civil penalties, which were set at low rates. Fair Housing Act, Pub. L. No. 90-284, § 810(a), 82 Stat. 73, 85 (1968) (setting out the 1968 FHA's administrative enforcement regime). The weak enforcement provisions would hamper the Act's effectiveness at least until the 1988 Amendments. *See* GEORGE R. METCALF, FAIR HOUSING COMES OF AGE 4–5 (1988) (explaining that limitations on attorneys' fees in the original FHA reduced the number of attorneys willing to take cases). In addition, the original FHA allowed HUD to refer only a limited set of cases to the DOJ for litigation—pattern-or-practice cases, or cases that raised an issue of "general public importance." 42 U.S.C. § 3613(a) (1970).

[33] *See* Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 208, 211 (1972) (noting that weak public enforcement capacity rendered private suits the "main generating force" in the FHA); *see also* Havens Realty Corp. v. Coleman, 455 U.S. 363, 373–74 (1982) (finding standing under the FHA for fair housing testers—minorities and Whites who "pose as renters or purchasers for the purpose of" determining whether housing providers and realtors are violating fair housing laws). Gladstone, Realtors v. Vill. of Bellwood, 441 U.S. 91, 109–15 (1979) (holding that a municipality and four of its residents had standing to bring a claim against realtors illegally steering Blacks and Whites seeking homes to different neighborhoods).

[34] *See, e.g.*, Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(i) (2006) (authorizing private lawsuits after exhaustion of claims with the EEOC); Title VIII, Fair Housing Act, 42 U.S.C. § 3613 (2006) (authorizing persons to bring suit in federal or state court without filing an administrative complaint); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12117(a), 12188(a)(1) (2006) (detailing procedures for private enforcement in court).

[35] *See, e.g.*, Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988(b)–(c) (2006) (allowing prevailing plaintiffs in certain civil rights actions to recover attorneys' fees); *see also* Lemos, *supra* note 27, at 790–91 (describing congressional statutes that incentivize private litigation through fee recovery).

[36] *See, e.g.*, 42 U.S.C. § 2000d-7(a) (2006) (abrogating a state's sovereign immunity in damages actions to enforce Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to d-7, section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–88, and the Age Discrimination Act of 1975, 42 U.S.C. §§ 6101–07).

[37] *See* 42 U.S.C. § 1981a (2006) (allowing prevailing plaintiffs the right to recover compensatory and punitive damages not to exceed from $50,000 to $300,000, depending on employer size).

[38] *See, e.g.*, *Fair Housing Amendments Act of 1987: Hearing on S. 558 Before the Subcomm.*

lengthened the statute of limitations and expanded plaintiffs' ability to recover attorneys' fees and punitive damages.[39] Similarly, the Civil Rights Act of 1991 authorized compensatory and punitive damages to enforce certain provisions of Title VII and the Americans with Disabilities Act (ADA).[40] Key drafters in committee reports recognized the damages provisions as necessary to encourage victims to seek redress for discrimination and to deter future acts of discrimination.[41] These new incentives likely explain the profound increase in the amount of private litigation brought to enforce Title VII.[42]

More recently, members of Congress have invoked the private attorney general as they craft responses to the Supreme Court's recent decisions in *Bell Atlantic Corp. v. Twombly*[43] and in *Ashcroft v. Iqbal*.[44] These decisions moved away from the liberal pleading regime of *Conley v. Gibson*[45] by requiring that plaintiffs in federal courts plead their claims with "plausibility."[46] This standard may have increased the pleading burden on plaintiffs and made it more difficult to survive a motion to dismiss and proceed to discovery, with potentially grave effects for the survival of many civil rights claims.[47] Some commentators argue that the cases' impact

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*on the Constitution of the S. Comm. on the Judiciary*, 100th Cong. 64, 66 (1987) (statement of Benjamin L. Hooks, Chief Executive Officer/Executive Director, NAACP) ("The chief defect in the existing fair housing law is its lack of an adequate enforcement mechanism."); METCALF, *supra* note 32, at 21–23 (detailing advocacy and legislative efforts beginning in the mid-1970s to strengthen the FHA).

[39] *See* Fair Housing Amendments Act of 1988 (FHAA), Pub. L. No. 100-430, § 813(a), (c), 102 Stat. 1619, 1633 (codified at 42 U.S.C. § 3613 (2006)).

[40] *See* Civil Rights Act of 1991, Pub. L. No. 102-166, §§ 102, 1977A, 105 Stat. 1071, 1072 (codified at 42 U.S.C. § 1981a).

[41] *See* H.R. REP. NO. 101-644, pt. 1, at 39–42, 44–45 (1990) (explaining the committee's view on the importance of ensuring that plaintiffs could recover damages, attorneys' fees, and expert fees); S. REP. NO. 101-315, at 32 (1990) ("The failure to provide compensatory and punitive damages in Title VII leaves the statute without a meaningful deterrent for intentional discrimination on the job.").

[42] In the six years following the passage of the 1991 Act, job discrimination lawsuits in federal court increased by 211%. FARHANG, *supra* note 6, at 200. The newly enacted Title I of the ADA partially accounts for this growth via increases in disability claims. But analyses of EEOC filings suggest that increases in Title VII claims after the passage of the Civil Rights Act of 1991 were also responsible for much of this growth. *Id.* at 200–01.

[43] 550 U.S. 554 (2007).

[44] 556 U.S. 662 (2009).

[45] 355 U.S. 41 (1957).

[46] *Twombly*, 550 U.S. at 556–57; *see also Iqbal*, 556 U.S. at 678–80 (applying *Twombly*'s plausibility standard to a civil rights claim).

[47] *See, e.g.*, Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?*, 59 AM. U. L. REV. 553, 624 (2010) (finding a significantly higher rate of complaint dismissals after *Iqbal* and *Twombly* than under the previous pleading regime and concluding that "*Twombly* and *Iqbal* are poised to have their greatest impact on civil rights cases, simply because those cases are by far the most likely type of case to be attacked by a 12(b)(6) motion"); Joseph

is vastly overstated.[48] But at the very least the decisions increase the discretion judges have to dismiss civil rights claims, potentially operating as a kind of heightened pleading standard.[49]

The rules governing pleading, discovery, and access to courts—rules created by Congress, administrative actors, and the judiciary—are important planks in the foundation that enables the private attorney general. In considering legislation to overturn *Twombly* and *Iqbal*, many members of Congress explicitly invoked private enforcement as a key to vindicating statutory and constitutional goals of equality.[50] The implicit assumption is that public enforcement is inadequate. Indeed, congressional responses feature neither expansions of administrative capacity nor mechanisms to prosecute civil rights claims.

### 2. *The Favored Model*

The primacy of the private attorney general model was not inevitable, but it has become the central conception of civil rights enforcement for good reason: In the end, it was the best deal that civil rights advocates could get from Congress. When Congress debated the fair employment provisions of the 1964 Civil Rights Act, civil rights supporters initially

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A. Seiner, *The Trouble with* Twombly*: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1029–31 (finding a higher rate of dismissal in Title VII opinions issued after *Twombly*).

48 *See* Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1298–99 (2010) (arguing that *Twombly* and *Iqbal* can be read consistently with the case law on pleading that preceded them); *see also* JOE S. CECIL ET AL., FED. JUDICIAL CTR., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL*: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 28 (2011), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf (reporting to the Federal Judicial Center a finding of no statistically significant increase in the number of motions to dismiss granted in most types of civil cases after *Iqbal* and *Twombly*).

49 *See* Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-dismissal Discovery Can Address the Detrimental Effect of* Iqbal *on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65, 65 (2010) (arguing that *Twombly* and *Iqbal* have a distinct "detrimental effect" on "potentially meritorious civil rights cases alleging intentional discrimination"); Suja A. Thomas, *Oddball* Iqbal *and* Twombly *and Employment Discrimination*, 2011 U. ILL. L. REV. 215, 225–26 (arguing that *Twombly* and *Iqbal* are likely to result in increased dismissal of employment discrimination cases by importing a summary judgment standard of plausibility into the motion to dismiss, and citing provisional data consistent with that conclusion); *see also* Lonny Hoffman, Twombly *and* Iqbal*'s Measure: An Assessment of the Federal Judicial Center's Study of Motions to Dismiss*, 6 FED. CTS. L. REV. 1, 7–8, 21–22, 28–31 (2012) (arguing that the FJC study's data was incomplete in significant respects, that the study set too high a threshold for statistical significance, and that the study likely underestimates the cases' effects on complaint filing and dismissals).

50 *See*, *e.g.*, *Has the Supreme Court Limited Americans' Access to Courts?: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 1–3 (2009) (statement of Sen. Patrick J. Leahy, Chairman, S. Comm. on the Judiciary) (discussing the importance of pleading standards in allowing victims to enforce laws prohibiting discrimination).

pursued a bureaucratic enforcement regime of resolving complaints, modeled on the National Labor Relations Act and state fair employment practices commissions.[51] The administrative agency would investigate charges, determine if probable cause existed, conciliate claims, and if conciliation failed, prosecute claims before the agency's quasi-judicial board.[52] This initial model made administrative enforcement exclusive, with no private right to sue in court.[53] For civil rights proponents, the administrative process was superior to the judicial process: cheaper, quicker, less complex, more flexible, and more predictable and coherent than private litigation.[54] After opponents resisted the creation of powerful federal administrative agencies with the authority to resolve civil rights claims,[55] private enforcement emerged as the compromise.[56]

So, while civil rights proponents might not have initially supported the private attorney general model, by the time of the Civil Rights Act of 1991, private enforcement had emerged as the favored model. The Act provided new compensatory and punitive damages for Title VII claims to enhance

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51 *See* FARHANG, *supra* note 6, at 98–99 (describing early visions of the EEOC).

52 Under initial proposals, the EEOC would have consisted of an Office of the Administrator and a five-member board. Proponents envisioned the board as a quasi-judicial body appointed by the President, confirmed by the Senate, and serving staggered seven-year terms. *Id.*

53 *See id.* at 99 (detailing the advantages civil rights advocates perceived in administrative enforcement).

54 *Id.* at 99. Political scientist Sean Farhang documents the faith advocates placed in administrative enforcement of individual claims and recounts their belief that administrative agencies would be more expert, consistent, and "proactive[]" than courts. *Id.* at 100.

55 Opponents (and some supporters) of civil rights resisted these proposals for a range of reasons, but most prominently because it would vest too much power in the federal government—particularly in a single-mission federal agency like the EEOC. *See* HUGH DAVIS GRAHAM, THE CIVIL RIGHTS ERA 146 (1990) (describing the original vision of the EEOC). Four years later, opponents similarly resisted fair housing legislation that empowered HUD to investigate complaints, hold evidentiary hearings, and issue enforcement orders. *See* METCALF, *supra* note 32, at 18 (recounting legislative moves stripping HUD of its authority to enforce housing claims).

56 *See* FARHANG, *supra* note 6, at 98–109 (detailing Title VII's legislative history). Private enforcement proposals emerged first, in a limited way, in House Republican amendments to Title VII. *See id.* at 105 (documenting an initial amendment that would have granted a private cause of action with Commission authorization and without attorneys' fees). Civil rights proponents successfully pushed Congress to enact a fee-shifting provision in Title VII. *See* ALFRED W. BLUMROSEN, MODERN LAW: THE LAW TRANSMISSION SYSTEM AND EQUAL EMPLOYMENT OPPORTUNITY 48 (1993) (arguing that advocates saw fees as necessary to ensure that claimants could obtain counsel); FARHANG, *supra* note 6, at 111 (relaying the recollection of Jack Greenberg, the former head of the NAACP Legal Defense Fund (LDF), that civil rights advocates "supported counsel fees for prevailing plaintiffs as the only way to make private enforcement feasible"). Similarly, private enforcement emerged as a compromise in housing discrimination, though the FHA's private enforcement mechanism was weaker than those in employment discrimination. *See* Olatunde Johnson, *The Last Plank: Rethinking Public and Private Power to Advance Fair Housing*, 13 U. PA. J. CONST. L. 1191, 1205–07 (2011) (describing the FHA's initially weak private enforcement regime).

private enforcement.[57] A recent study by political scientist Sean Farhang rethinks congressional moves to enhance private enforcement not simply as the abdication of strong state enforcement of civil rights but as harnessing private litigation to enhance state capacity.[58] The damages provision of the 1991 Act, attorneys' fees provisions, and Congress's initial enactments of private enforcement regimes thus can all be viewed as congressional moves to harness courts to supplement government regulation.[59] According to this interpretation of civil rights enforcement, Congressional hearings and proposed legislation in response to *Iqbal* and *Twombly* become part of the same phenomenon—seeking to remove constraints on private court enforcement rather than enhancing additional administrative enforcement of Title VII or other civil rights statutes.

The private attorney general model also pervades scholarly reactions to other civil rights statutes. For example, the Supreme Court has limited the enforcement of another key provision of the 1964 Civil Rights Act: Title VI, which prohibits discrimination by entities that receive federal funding.[60] In *Alexander v. Sandoval*,[61] the Court declined to imply a private right of action to enforce the disparate impact regulations of Title VI of the Civil Rights Act of 1964. From the perspective of civil rights advocates, the decision was nothing less than a tragedy. *Sandoval* ended a nascent litigation strategy that invoked Title VI's disparate impact regulations to address contemporary racial disparities in the use of federal and state transportation resources, health care access, and environmental quality.[62] Professor Pamela Karlan grouped *Sandoval* with a series of cases that made it difficult or impossible to bring private enforcement actions. She argued that the case was part of a trend of Supreme Court jurisprudence "disarming the private attorney general."[63]

Yet describing Title VI as a "private attorney general statute" is awkward—not because *Sandoval* was correct in holding that no private

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57 Civil Rights Act of 1991, Pub. L. 102-166, §§ 102, 1977A(a)–(b), 105 Stat. 1071, 1072–73 (codified at 42 U.S.C. § 1981a (2006)).

58 *See* FARHANG, *supra* note 6, at 3–4 (arguing that Congress makes a "*legislative choice*" in relying on private litigation in statutory implementation).

59 *See id.* at 190–92 (providing an account of congressional intent to shore up private enforcement of Title VII through creation of a damages remedy).

60 *See* 42 U.S.C. § 2000d (2006) (forbidding programs and activities receiving federal funds from discriminating on the basis of race, color, or national origin).

61 532 U.S. 275 (2001).

62 *See* Philip Tegeler, *Title VI Enforcement in the Post-*Sandoval *Era*, POVERTY & RACE (Poverty & Race Research Action Council, D.C.), Sept./Oct. 2010, at 5 ("The scope of what civil rights advocates and their clients lost in *Sandoval* is staggering . . . .").

63 Karlan, *supra* note 21, at 183, 187.

remedy existed to enforce Title VI's disparate impact regulations,[64] but because Title VI is not written as a classic private attorney general statute. Rather, Title VI primarily uses bureaucratic power to promote racial equity goals and to cleanse federal funds of discrimination.[65] For that reason, Title VI is more accurately seen not just as a source of individual rights in federally funded programs,[66] but also as imposing a set of duties on federally funded recipients: duties to not discriminate and broader duties to promote equity.[67] Despite this structure, Title VI has come to be seen primarily as just another statute in the private attorney general arsenal. This suggests the dominance of the private attorney general model in our conception of civil rights law and the perceived lack of value associated with public enforcement. Even more, it reveals implicit skepticism about an alternative that Title VI would seem to allow: relying on the state to promote equity norms through regulatory and programmatic means.

### 3. *Limitations*

Given the potential power of private litigation and the longstanding

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64 Section 601 of Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. Despite the lack of an explicit private right of action in the statute, Court decisions prior to *Sandoval* had endorsed the view that the statute created a private remedy for violations of section 601. *See* Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 593–95 (1983) (White, J.) (holding that legislative history and the Court's prior decisions supported such a holding). *Sandoval* is consistent with the Supreme Court's recent aversion to implied private rights of action. *See, e.g.*, Gonzaga Univ. v. Doe, 536 U.S. 273, 276 (2002) (finding that the Federal Family Educational Rights and Privacy Act could not be privately enforced using 42 U.S.C. § 1983 (1984 & Supp. V 2000)).

65 *See infra* notes 131–136 and accompanying text (recounting the emergence of Title VI).

66 42 U.S.C. § 2000d ("No person . . . shall . . . be subjected to discrimination under any program or activity receiving Federal financial assistance.").

67 *See infra* text accompanying notes 137–141 (describing the agency equality directives promulgated to enforce Title VI and Title VIII). Karlan recognizes this when she notes that the *Sandoval* Court should have asked whether section 602 of the statute, codified at 42 U.S.C. § 2000d-1, "contemplates allowing private parties to enforce the obligations that regulations impose on the recipients of federal funds," and not simply whether it was a source of individual rights. Karlan, *supra* note 21, at 198. Under this conception, private attorneys general are not simply delegated to vindicate congressional policy. *See* Newman v. Piggie Park Enters., 390 U.S. 400, 401–02 (1968) (describing the private attorney general's function). They are akin to *qui tam* litigants—private persons who use statutory and common law mechanisms to sue on behalf of the government for legal violations and earn a portion of the recovery—enforcing a duty that is owed to the government but improperly enforced by the government. *See* Karlan, *supra* note 21, at 198–99 (comparing the private attorney general and *qui tam* models). This latter analogy is particularly apt in describing the relationship between private parties and public authorities in Title VI and Title VIII. *See infra* Part IV.C.1.a (describing the role of litigation in helping to enforce and strengthen fair housing equality directives).

and deep American attachment to courts as a forum for vindicating rights,[68] the dominant view risks obscuring the downsides of the private attorney general model. For example, the success of private enforcement depends heavily on the judicial embrace of rules governing pleading, summary judgment, standing, and fee recovery that make private enforcement possible.[69] As noted above, some of the Supreme Court's recent decisions have interpreted procedural and litigation-enabling rules in ways that hinder private enforcement.[70] Similarly, the Supreme Court's recent decision in *Wal-Mart Stores, Inc. v. Dukes*—involving claims of systemic gender discrimination in pay and promotion practices—tightened the requirements for class actions in cases seeking monetary damages[71] for discriminatory employment practices.[72] *Wal-Mart* powerfully illustrates the tensions involved in the private attorney general model. Class actions provide a potential way to surmount some of the problems of pursuing discrimination claims through individualized action. For instance, they allow for the aggregation of smaller claims and provide an avenue for structural and injunctive relief that is often elusive or unsought in individual claims. The Supreme Court in the past has recognized employment discrimination cases as paradigmatic class actions, noting that "suits alleging racial or ethnic discrimination are often by their very nature class suits, involving class-wide wrongs."[73] But, while the damages provisions of the 1991 Civil Rights Act incentivize attorneys to bring

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[68] *See* KAGAN, *supra* note 9, at 14–16 (describing America's historic reliance on private litigation as an alternative to bureaucratic regulation and government authority).

[69] *See* Lemos, *supra* note 27, at 823–30 (detailing how judges respond to perceptions of excessive litigation by narrowing their interpretations of fee-shifting, standing, pleading, and other statutes that create litigation incentives).

[70] *See supra* notes 46–50 and accompanying text (describing the impact of the Supreme Court's decisions in *Twombly* and *Iqbal*).

[71] *See* 131 S. Ct. 2541, 2557–61 (2011). In *Wal-Mart*, the Supreme Court unanimously ruled that the plaintiffs' backpay claims could not be certified as a class action under Federal Rule of Civil Procedure 23(b)(2), because their monetary relief claims required individualized calculation of damages and thus were not incidental to the injunctive or declaratory relief sought. *Id.* at 2557.

[72] The Court held 5-4 that the plaintiffs failed to satisfy Rule 23(a)'s commonality requirement because they lacked "significant proof" that Wal-Mart "operat[ed] under a general policy of discrimination." *Id.* at 2554 (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 159 n.15 (1982)). In so holding, the majority discounted the plaintiffs' expert, as well as statistical and anecdotal evidence that Wal-Mart's corporate culture and systems for determining pay and advancement pervasively discriminated against women throughout the company's stores. *Wal-Mart*, 131 S. Ct. at 2553–56; *see also id.* at 2563–64 (Ginsburg, J., dissenting) (summarizing plaintiffs' evidence of systemic and nationwide discrimination).

[73] E. Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 405 (1977). For a discussion of the pre-*Wal-Mart* approach to class actions, see Melissa Hart, *Will Employment Discrimination Class Actions Survive*, 37 AKRON L. REV. 813 (2004). Hart notes that "employment discrimination cases have typified the sort of civil rights action that courts and commentators describe as uniquely suited to resolution by class action litigation." *Id.* at 813.

employment discrimination cases, including class actions, the recent *Wal-Mart* decision creates significant barriers to pursuing monetary damages cases as nationwide class actions.[74]

In addition to recently created judicial barriers to private enforcement, reliance on litigation has longstanding and well-documented costs and challenges. Litigation can be time-consuming, protracted, and inefficient, exacting great financial and emotional costs on litigants.[75] When Congress incentivizes litigation, it increases the workload for federal (and often state) courts.[76] The volume of fair employment litigation is a particular focal point for debates about the costs and value of litigation; courts and commentators often frame judicial rules tightening pleading and summary judgment as a response to such cases.[77] Normative views aside, employment cases are often perceived as flooding courts and thus dismissed as frivolous.[78] As a result, as Professor Margaret Lemos argues, efforts to enhance litigation through fee-shifting and damages enhancements may have the perverse effect of leading to increased hostility to plaintiffs' claims, whether they actually increase litigation or not.[79]

Moreover, even if one rejects the claim that there is too much litigation compared to the number of actual civil rights injuries, overreliance on private litigation may skew the nature of civil rights enforcement. Attorneys have an incentive to pursue primarily cases with high damages or easily identifiable injuries. For instance, researchers have documented a shift in Title VII employment cases away from cases focused

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[74] However, the Court left open the possibility that some claims for monetary relief might still be certified under Rule 23(b)(2). *See Wal-Mart*, 131 S. Ct. at 2557 (declining to reach the "broader" question of whether Rule 23(b)(2) "applies *only* to requests for such injunctive or declaratory relief and does not authorize the class certification of monetary claims at all").

[75] *See* Lemos, *supra* note 27, at 789–90 (noting that the expense of litigation is often not worth the cost); *see also* KAGAN, *supra* note 9, at 104–25 (detailing some of the pitfalls of America's civil justice system, including the high costs, inefficiencies, and injustice generated by redundancy, complexity, and adversarialism).

[76] For instance, Professor Farhang has found a rise in federal court litigation immediately following the Civil Rights Act of 1991, which enhanced private enforcement capacity. *See* FARHANG, *supra* note 6, at 200–01 (documenting the "abrupt and steep increase in job discrimination lawsuits" in federal courts following enactment of the 1991 Act and contending that much of this increase is attributable to the Act's changes to Title VII).

[77] *See, e.g.*, Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 564–66 (2010) (describing the possible connection between judicial skepticism about the merit of employment discrimination cases and the rise in summary judgments and Federal Rule 12(b)(6) dismissals).

[78] *See* Lemos, *supra* note 27, at 826–27 (documenting judicial and scholarly concern about "frivolous" litigation).

[79] *See id.* at 784–85 (arguing that litigation incentives may trigger judicial backlash).

on hiring and toward those focused on firing and promotion.[80] This may, of course, reflect a decrease in actual incidents of hiring discrimination—but more likely it suggests that hiring discrimination is harder to identify and, when litigated, generates fewer damages.[81] This shift away from hiring discrimination and toward high-damage cases likely makes Title VII litigation less effective for addressing the problems of low-income individuals and those seeking to enter the job market.

Additionally, by placing the burden on the individual to complain, entire areas of civil rights may go underenforced. For instance, despite the pervasiveness of housing discrimination and the incentives created by the FHA, relatively few housing discrimination cases are brought, particularly when compared to documented incidents of discrimination.[82] The 1988 amendments to the FHA made private enforcement easier, but led to only a modest upswing in litigation.[83] In part, this may be because—like discrimination in hiring—many aspects of housing discrimination are hard to identify. In failure-to-rent and in steering cases (directing housing seekers to particular neighborhoods and away from others on the basis of race or ethnicity), victims are often unaware and fail to come forward.[84]

I do not mean to downplay the importance of the private attorney general. As noted above, its centrality to conceptions of civil rights enforcement is well earned. Such litigation can prompt real change.[85] But it

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[80] *See* John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1015–17 (1991) (explaining an empirical analysis showing that, while hiring cases dominated EEOC and court dockets in 1966, by 1985 wrongful termination charges significantly outnumbered hiring cases).

[81] *See id.* at 1017 & n.107 (arguing that it is unlikely that hiring discrimination has decreased given the persistence of discrimination in termination and noting that hiring cases are likely to generate fewer monetary damages than termination cases).

[82] *See* MARGERY AUSTIN TURNER ET AL., URBAN INST., DISCRIMINATION IN METROPOLITAN HOUSING MARKETS: NATIONAL RESULTS FROM PHASE I HDS 2000, at iii-v (2002), *available at* http://www.huduser.org/portal/Publications/pdf/Phase1_Report.pdf (showing the prevalence of contemporary discrimination in metropolitan housing); Johnson, *supra* note 56, at 1201–04 (detailing the challenges of individual enforcement in housing).

[83] *See* Robert G. Schwemm, *Why Do Landlords Still Discriminate (and What Can Be Done About It)?*, 40 J. MARSHALL L. REV. 455, 465–67 (2007) (providing evidence that the 1988 amendments have done little to spur litigation or to significantly diminish housing discrimination).

[84] *See* John Goering, *An Overview of Key Issues in the Field of Fair Housing Research*, *in* FRAGILE RIGHTS WITHIN CITIES: GOVERNMENT, HOUSING, AND FAIRNESS 19, 28 (John Goering ed., 2007) (explaining that only a fraction of actual victims of housing discrimination make use of the enforcement system).

[85] *See, e.g.*, Farhang, *supra* note 25, at 29–31 (concluding from empirical evidence that the threat of private enforcement litigation led employers to adopt equal opportunity practices that improved employment outcomes for women and minorities, but noting that the data failed to establish that private enforcement regimes were more effective than administrative enforcement regimes).

is crucial to understand the limitations as well as the value of the regime in addressing civil rights problems today.

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

Critics typically measure the limitations of the private enforcement model against public enforcement, which has become the less desirable alternative. In the civil rights context, public enforcement generally means one of two things. The first is public enforcement of claims through litigation in court, such as claims of discrimination brought by the DOJ or by other federal agencies with standing, including the EEOC. The second is the administrative adjudication of federal civil rights claims.[86] As I discuss next, these forms of public enforcement can serve as an important complement to private enforcement by bringing public attention and resources to civil rights cases, particularly those cases unlikely to receive adequate attention from the private bar. But the structural and practical weaknesses of agencies tasked with enforcing civil rights has limited their public enforcement capacity.

#### *1. The Potential of Public Enforcement*

Federal agencies have public enforcement capacities that complement the private attorney general models prevalent in housing and employment. In the context of employment, the EEOC has investigative and prosecutorial authority to enforce a range of federal employment laws, including Title VII, the ADA, and the Age Discrimination in Employment Act (ADEA).[87] Under Title VII, for instance, individuals must first file a charge of discrimination with the EEOC, and the EEOC then has 180 days after filing to investigate the claim.[88] After 180 days an individual may request that the EEOC issue a "Notice of Right to Sue," which allows the

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[86] These two functions can also operate as a hybrid, as in the case of HUD. *See infra* notes 92–95 and accompanying text (describing HUD's powers under the Fair Housing Act).

[87] Congress amended Title VII in 1972, vesting the EEOC with authority to bring suits in court. *See* Equal Employment Opportunity Act (EEOA), Pub. L. No. 92-261, § 4, 86 Stat. 103, 104 (1972) (codified as amended at 42 U.S.C. § 2000e-5(f)(2) (2006)) ("[T]he Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge.").

[88] *See* Title VII, 42 U.S.C. § 2000e-5(b), (e), (f) (2006) (detailing the procedures for filing a Title VII charge with the EEOC and for bringing claims in court); *see also* Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 626 (2006) (providing that plaintiffs may pursue a civil action sixty days after filing a charge with the EEOC); Americans with Disabilities Act of 1990, 42 U.S.C. § 12117(a) (2006) (adopting the filing and exhaustion requirements of Title VII). Administrative exhaustion is not required for employment discrimination claims filed pursuant to 42 U.S.C. § 1981 (2006) or under the Equal Pay Act, 29 U.S.C. § 206(d) (2006).

claimant to proceed with a complaint in federal or state court.[89] If the EEOC finds merit in a charge of discrimination, the agency lacks power to adjudicate the claim, but the parties may enter into conciliation procedures with the EEOC to resolve the claim. If the conciliation is unsuccessful, the EEOC may file suit on behalf of the claimant or itself in court.[90] The Attorney General can also bring "pattern or practice" cases.[91]

In the context of housing, the FHA grants HUD authority to investigate claims of discrimination while simultaneously seeking to conciliate the claim.[92] Additionally, the 1988 Amendments to the FHA created a new administrative enforcement scheme that allows victims to pursue claims before administrative law judges (ALJs).[93] If HUD determines that reasonable cause exists for the discrimination claim, it files a charge with the ALJ. At that point either party may elect to proceed in federal district court. If neither party does so, the case is heard by an ALJ, who has the power to issue a ruling and grant compensatory damages, injunctive relief, and civil penalties up to $50,000.[94] All parties may be represented by counsel in proceedings before HUD ALJs.[95]

The benefits of public enforcement by the Attorney General can be significant. Public agencies bring substantial litigation and investigative resources to tackle civil rights problems. The DOJ in particular may have a greater capacity to bring systemic claims than individuals. Moreover, fear of unleashing the state's investigative and enforcement apparatus may prompt defendants to settle their claims and may curb discriminatory behavior by others. Cases brought by federal agencies may garner greater press and public attention and thus serve as a powerful mechanism for remedying discrimination. Furthermore, in some areas, the federal government has practical tools for enforcement unavailable to private litigants. For instance, HUD has the power to conduct housing tests[96] and

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89 *See* 42 U.S.C. § 2000e-5(b), (f)(1) (detailing administrative exhaustion requirements).

90 *See* 42 U.S.C. § 2000e-5(f)(1) (describing procedures for bringing suit).

91 42 U.S.C. § 2000e-6(a) (2006) (authorizing the Attorney General to enforce employment laws when he or she "has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by [the] subchapter . . .").

92 *See* 42 U.S.C. § 3610(a)–(b) (2006) (authorizing aggrieved persons to file a complaint with HUD and describing the investigative and conciliation processes). If the complaint comes from a state or locality with "substantially equivalent" fair housing laws, the complaint is referred to that state's civil rights agency. *Id.* § 3610(f).

93 *See* Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 812, 102 Stat. 1619, 1629–33 (codified at 42 U.S.C. § 3612(b) (2006)).

94 *Id.* § 812(g)(3), 102 Stat. at 1629–30.

95 *Id.* § 812(c), 102 Stat. at 1629.

96 In fair housing tests, minorities and Whites are sent to seek housing from real estate agents or landlords to detect discrimination against minorities. The minorities and Whites are presented

can bring claims based on the results of tests and other investigations, even without the presence of an actual victim.[97]

In the second conception of public enforcement, agencies provide catalyzation for the resolution of antidiscrimination claims. The EEOC lacks adjudicative capacity, but does have the ability to investigate claims and seek conciliation agreements between parties. The strongest civil rights administrative enforcement scheme, at least on paper, now belongs to HUD.[98] The potential advantages of the HUD system are numerous. Given the expense and time of litigation, proponents of the 1988 amendments bolstered administrative enforcement to serve as a cheaper, less burdensome way of securing compliance with the FHA.[99]

### 2. *The Less Favored Alternative*

As noted above, proponents initially desired strong administrative enforcement of the federal civil rights laws. The reality of enforcement has often proved less palatable. In terms of prosecutorial and adjudicative effectiveness, the empirical analyses of agency enforcement are sobering. The EEOC is consistently plagued with backlogs and long delays in investigating and processing claims.[100] Meanwhile, staffing and other administrative problems have historically hampered HUD's ability to investigate discrimination claims.[101] Empirical studies also show low rates of usage of the ALJ process by HUD claimants as compared with federal courts.[102] When ALJs adjudicate cases, they tend to award much lower

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as comparable on all characteristics except minority status. *See* JOHN YINGER, CLOSED DOORS, OPPORTUNITIES LOST: THE CONTINUING COSTS OF HOUSING DISCRIMINATION 21–22 (1995) (describing fair housing audit and testing methodology).

[97] *See* 42 U.S.C. § 3614(a) (2006) (allowing HUD to initiate complaints).

[98] *See* Johnson, *supra* note 56, at 1191 (describing fair housing's formal enforcement regime—the result of congressional amendments in 1988 to strengthen its previously weak enforcement regime—as the "strongest of any civil rights statute").

[99] *See* H.R. REP. NO. 100-711, at 17 (1988) (describing the 1988 Amendments to the FHA as intended to strengthen private and administrative enforcement); Michael H. Schill, *Implementing the Federal Housing Act: The Adjudication of Complaints*, *in* FRAGILE RIGHTS WITHIN CITIES, *supra* note 84, at 143, 146–47 (describing the history of the FHA Amendments of 1988).

[100] *See, e.g.*, OFFICE OF FEDERAL OPERATIONS, EQUAL EMP'T OPP. COMM'N, ANNUAL REPORT ON THE FEDERAL WORK FORCE (2009) (finding that only 72.9% of EEOC complaints were investigated in a timely fashion in fiscal year 2009).

[101] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-463, FAIR HOUSING: OPPORTUNITIES TO IMPROVE HUD'S OVERSIGHT AND MANAGEMENT OF THE ENFORCEMENT PROCESS (2004), *available at* http://www.gao.gov/assets/250/242111.pdf (noting that staffing and training problems hampered HUD's ability to conduct investigations, despite finding an increase in timely completed investigations); U.S. COMM'N ON CIVIL RIGHTS, THE FAIR HOUSING AMENDMENTS OF 1988: THE ENFORCEMENT PROCESS 222 (1994) (analyzing four years of enforcement after the enactment of the FHAA and finding HUD complaint management procedures "deficient").

[102] Schill, *supra* note 99, at 143, 156–59.

penalties than those gained for similar cases in court proceedings.[103]

Administrative enforcement is also inconsistent for structural and political reasons. Some presidential administrations may fail to vigorously enforce civil rights laws or may change or alter priorities in particular areas.[104] Similarly, congressional oversight of agency action might be weak or nonexistent, depending on members' interests, politics, and competing priorities. In addition, the government's dual role as enforcer of civil rights and defendant in civil rights cases may lead it to adopt positions less favorable to civil rights claimants.[105]

Civil rights scholars are generally skeptical about the potential for enforcement through administrative adjudication or public attorneys general. Comparing the EEOC and HUD's enforcement record with those of private litigants, Professor Michael Selmi argues that a fundamental problem in government lawyering is that government lawyers are generally less vigorous, innovative, and passionate than private attorneys.[106] The statutory requirements for civil rights agencies are another obstacle. For example, Title VII requires individuals first to exhaust their claims with the EEOC. But the agency is crippled under the weight of processing

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[103] *See id.* at 167 (showing a discrepancy between the median monetary awards granted by HUD ALJs and in district court).

[104] For instance, civil rights advocates heavily criticized the DOJ civil rights division under President Reagan for failure to enforce voting rights laws and for its positions opposing affirmative action and busing. *See* Robert Pear, *Reagan Defends Justice Dept. Nominee as Opposition Rises*, N.Y. TIMES, June 16, 1985, at A25 (describing civil rights opposition to the promotion of civil rights division chief Bradford Reynolds to a higher position within the DOJ, based on his failure to enforce civil rights laws in education, voting, housing, and employment); *see also* Leadership Conference on Civil and Human Rights, *Why Reynolds Lost*, CIVIL RIGHTS MONITOR (Aug. 1985), http://www.civilrights.org/monitor/august1985/art2p1.html (arguing that the division under Reynolds had "the worst civil rights record of any administration in more than half a century—in education, housing, voting, employment, disability rights, and women's rights"). Similarly, civil rights advocates and some members of Congress criticized the administration of George W. Bush for failure to enforce civil rights laws. *See, e.g.*, Edward M. Kennedy, *Restoring the Civil Rights Division*, 2 HARV. L. & POL'Y REV. 211, 212–24 (2008) (arguing that the Bush Administration politicized hiring and other enforcement decisions in the civil rights division, failed to vigorously enforce the law in voting and employment, and severely decreased the number of disparate impact cases); Charlie Savage, *Report Examines Civil Rights Enforcement During Bush Years*, N.Y. TIMES, Dec. 2, 2009, at A26 (describing the results of a report by the General Accounting Office on the Bush Administration's civil rights failures, including the failure to investigate an allegation of voter intimidation against Black voters and general declines in the pursuit of employment discrimination cases involving race and gender).

[105] *See* Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CAL. L. REV. 255, 300–01 (1994) (describing the Reagan Administration's advancement of arguments at "odds with pro-plaintiff" EEOC positions in order to defend the government against employment discrimination suits); Selmi, *supra* note 11, at 1450–51 (arguing that the government's dual role as plaintiff and defendant creates conflicts).

[106] Selmi, *supra* note 11, at 1404–05, 1458 (arguing that it is time to "reconsider whether there is any proper role for the federal government in prosecuting civil rights actions").

individual claims, has the capacity to investigate only a few, and in the end determines that the vast majority of claims have no merit.[107] The agency appears to some commentators primarily as a hindrance to quick judicial resolution of plaintiffs' claims, superintending an administrative process that in the end is "strange and vacuous."[108] The shift to emphasizing private enforcement of Title VII and other federal employment discrimination claims in the 1991 Civil Rights Act represents the gradual culmination of a loss of faith in the use of executive power to implement Title VII.[109] Similarly, HUD by some accounts is a "weak institutional home" for civil rights enforcement—big and lumbering, serving multiple roles, and controlled by interests actively hostile to civil rights.[110] As a result, civil rights advocates have called for federal actors to move civil rights enforcement authority outside of HUD to a separate dedicated enforcement agency akin to the EEOC, or to an agency combined with the EEOC.[111]

In the end, researchers and civil rights commentators find little favorable to say about the enforcement efficacy of administrative agencies or, in the case of the EEOC, its formal statutory role.[112] To be sure, civil rights advocates continue to appeal for strengthened federal agency capacity, recognizing its potential value.[113] Academic commentators seem less hopeful: Attention in legal commentary to public enforcement often ends with a call for strengthening mechanisms for *private* enforcement.[114]

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[107] *See* Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 7–10, 21–22 (1996) (describing the EEOC filing process, reviewing data from fiscal year 1992, and concluding that the "agency receives approximately ninety thousand claims a year but only about fifteen percent of those claims obtain relief as a result of the EEOC's actions during the process").

[108] *Id.* at 10.

[109] *See* FARHANG, *supra* note 6, at 111–13 (explaining why civil rights advocates came to accept private enforcement).

[110] CHRISTOPHER BONASTIA, KNOCKING ON THE DOOR: THE FEDERAL GOVERNMENT'S ATTEMPT TO DESEGREGATE THE SUBURBS 139 (2006) (reviewing HUD's housing desegregation efforts during the Nixon Administration and arguing that HUD's multiple, divergent purposes hampered its capacity to enforce civil rights).

[111] *See* NAT'L COMM'N ON FAIR HOUS. & EQUAL OPPORTUNITY, THE FUTURE OF FAIR HOUSING 19 (2008) (recommending the creation of an independent fair housing enforcement agency).

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

[113] *See, e.g.*, NAT'L COMM'N ON FAIR HOUS. & EQUAL OPPORTUNITY, *supra* note 111 (recommending specific strategies to strengthen federal fair housing enforcement).

[114] *See, e.g.*, Selmi, *supra* note 11, at 1459; *see also* David L. Rose, *Twenty-five Years Later: Where Do We Stand on Equal Employment Opportunity Law Enforcement?*, 42 VAND. L. REV. 1121, 1172 (1989) ("The problems of the EEOC have become so pervasive and endemic that

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

Standard academic conceptions of civil rights implementation center on judicial and quasi-judicial models for resolving claims. The current account of institutional choice for civil rights enforcement involves debates over the best place for adjudication (court or agency) and who should prosecute (public or private actors).[115] Omitted from this account is the fact that the Civil Rights Act of 1964—which by these accounts ushered in an emphasis on private enforcement—also contained Title VI. Title VI targets bureaucratic enforcement. Standard conceptions of civil rights enforcement also fail to properly account for Title VIII of the Fair Housing Act of 1968, which requires federal agencies to "affirmatively" "further fair housing."[116] In effect, these narratives overlook another strand in the civil rights regulatory regime: statutes and implementing regulations that operate as directives to the administrative state.

I demonstrate below that statutes like Title VI and Title VIII are structured to engage federal administrative power not only by promoting compliance by public and private discriminators, but also by targeting the administrative state—the set of federal, state, and local programs enabled by federal funding—as the very object of the enforcement or rule-setting activity. Under these statutes, a set of regulatory requirements has emerged that places proactive and affirmative duties on federally funded actors. My aim is not to present these equality directives as a solution to all the limitations of traditional or public and private enforcement, or to argue that they should supplant those important models. Rather, it is to show that the exclusive focus on public and private enforcement ignores a form of regulatory intervention that can powerfully augment traditional forms of civil rights implementation. Equality directives harness agencies' regulatory capacity, not just their enforcement or claim-resolution capacity. And, because of a set of specific features that I describe below, these directives have the power to do more than combat discrimination or bias. Rather, equality directives aim at redesigning government programs and policies—in housing, transportation, agriculture, and other areas—to

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some former high-ranking officials of the Commission have expressed their doubts as to whether the continued existence of the Commission is in the public interest.").

115 *See, e.g.*, FARHANG, *supra* note 6, at 98–106 (discussing, in the context of the enactment of Title VII, the House of Representatives' choice between an NLRB-type model that focused on administrative adjudication with a "prosecutorial" model that enhanced private prosecutorial power); LIEBERMAN, *supra* note 9, at 149–50 (comparing America's decentralized, litigation-centered approach to civil rights enforcement to Great Britain's creation of a single agency to oversee antidiscrimination enforcement); Selmi, *supra* note 11, at 1416–22 (comparing agency and private enforcement of Title VII and Title VIII).

116 *See* 42 U.S.C. § 3608(d) (2006).

address the way inequality and exclusion operate in contemporary American society.

In the next section, I provide an overview of the statutes and regulations that create "equality directives." I discuss the key features of these statutes and regulations that both distinguish them from traditional civil rights enforcement regimes and give them a power that is particularly salient today. In Part III, I will build on this introduction to provide a more detailed elaboration of how this regulatory regime operates in the two key areas of transportation and housing.

### *1. Overview of Equality Directive Statutes and Regulations*

As my primary examples of equality directives, I use the regulatory regimes implementing Title VI of the 1964 Civil Rights Act and Title VIII of the Fair Housing Act.[117] Title VI prohibits racial and ethnic discrimination in federal spending, which covers federal programs and activities as well as state and local entities receiving federal funds.[118] A key provision in Title VIII requires that federal agencies and grant recipients affirmatively pursue fair housing.[119] By placing positive duties on state actors, these regimes build on the antidiscrimination base provided by these statutes.

These core civil rights statutes are long-standing, but the strengthening and specifying of affirmative duties under these statutes are relatively recent. For instance, a recent Department of Transportation (DOT) guidance implementing Title VI requires state and local actors receiving urban transit funds to assess whether their programs and activities have a deleterious impact on racial and ethnic groups, to include racial and ethnic minorities in their planning, and to consider less discriminatory alternatives.[120] Similarly, a 2003 guidance from the Department of Agriculture implementing Title VI requires federal agencies and their grantees to conduct a "civil rights impact analysis" that analyzes the

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117 Another example outside Title VI and Title VIII is the recently enacted statutory requirement that federal grantees address racial disparities in the juvenile justice system. *See* 42 U.S.C. § 5633(15) (2006). For a discussion, see Olatunde C.A. Johnson, *Disparity Rules*, 107 COLUM. L. REV. 374 (2007). The juvenile justice directives stem from a statute enacted in 1992, while here I focus on directives emerging from longstanding civil rights statutes.

118 Section 601 of Title VI provides that "no person . . . shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (2006).

119 *See* Fair Housing Act, 42 U.S.C. § 3608(d) (2006) (requiring the Secretary of HUD to administer their programs and activities to "affirmatively further the policies" of the Fair Housing Act); *see id.* § 5304(b)(2) (requiring the same of federal community development grantees).

120 FTA C 4702.1A, *supra* note 1, at IV-4, V-6 to -7.

proposed effect of their policies and actions on racial and ethnic minorities and persons with disabilities.[121] Regulations implementing Title VI also require the DOT to assess whether any negative environmental and health impacts fall disproportionately on particular racial and ethnic groups and on low-income populations, and to take steps to mitigate these concerns.[122]

Title VIII is explicitly affirmative in its statutory mandate, requiring that agencies and grantees take proactive steps to promote fair housing goals.[123] A range of regulations, executive orders, and agency guidance documents make this statutory mandate more specific. These rules require agencies and grantees to promote racial and economic integration in selecting sites for subsidized and public housing; to assess and remove barriers to integration and inclusion at the state and local levels; to collect data on the effects of federally funded housing programs on segregation and integration; and to structure housing vouchers and homeless assistance programs to allow recipients to live in low-poverty neighborhoods.[124] As is evident from the above account, these requirements range in kind. Some statutes and regulations place broad normative goals on state actors to promote equity, such as requiring federal agencies and grantees to take steps to "further fair housing" or to avoid "discrimination."[125] Others require states and localities to self-assess as to whether their actions are causing harm to particular groups and to take steps to remove that harm.[126] Some statutes require the inclusion of affected communities (including

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[121] *See* OFFICE OF CIVIL RIGHTS, *supra* note 3, at 1, 4.

[122] *See* FTA C 4702.1A, *supra* note 1, at II-1, IV-4 (explaining required environmental and health assessments for the Federal Transit Agency); U.S. DOT, Order on Environmental Justice to Address Environmental Justice in Minority Populations and Low-Income Populations, Ord. 5610.2, 62 Fed. Reg. 18,377 (Apr. 15, 1997).

[123] *See* 42 U.S.C. § 3608(e)(5) (2006) (requiring HUD to administer its programs and activities "in a manner affirmatively to further the policies of [the Fair Housing Act]"); 42 U.S.C. § 3608(d) ("All executive departments and agencies shall administer their programs and activities relating to housing and urban development . . . in a manner affirmatively to further the purposes of this subchapter and shall cooperate with the Secretary [of Housing] to further such purposes.").

[124] *See infra* notes 231–240 and accompanying text (describing HUD's *Fair Housing Planning Guide*, which provides civil rights guidance for certain recipients of federal housing funds).

[125] *See, e.g.*, Title VI, 42 U.S.C. § 2000d (2006) (forbidding discrimination by federal funding recipients); Title VIII, 42 U.S.C. § 3608(d) (2006) (imposing a duty on federal agencies to "further" fair housing and providing the same for federal grantees); 28 C.F.R. § 42.104(b)(2) (2010) (forbidding funding recipients from "utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin"); 49 C.F.R. § 21.5(b)(2) (2011) (forbidding discrimination by those receiving funds from the DOT).

[126] *See, e.g.*, 24 C.F.R. § 570.487(b)(1)–(4) (2012) (requiring an impediments analysis by community development grantees); FTA C 4702.1A, *supra* note 1, at V-5 to V-7 (requiring impact analysis for certain service and fare changes).

underrepresented communities) in their planning.[127] Yet all require front-end planning with the goal of equity and inclusion. As a result, this regulatory framework has provided the impetus for changes in policies and programs that alter the very landscape that allows inequality. For instance, this framework has led decisionmakers to change who benefits from public transit and housing programs, to determine where public transit and subsidized housing are located, and to lift zoning and other barriers to housing integration.[128] This regulatory approach does more than require that governments address bias against minority or other groups.[129] It requires entities to rethink and redesign government-supported structures to proactively promote the inclusion of groups that, whether through discrimination, historic exclusion, or structural difference, are disadvantaged socially and economically.

### 2. *Essential Features*

These directives take a different approach to achieving racial and other forms of inclusion than do the standard public and private enforcement models. Their essential attributes are that (1) they are regulatory in their approach; (2) they are affirmative and not just prohibitory; and (3) they impose a set of pervasive duties for federal-state programs.

#### a. Regulatory Directives to the Administrative State

The first way in which these statutes differ from the standard private attorney general or public enforcement model is that they are centered on regulatory, not adjudicative power. Title VI engages the various levels of the administrative state—federal agencies and state and local governments who receive federal funds—to adopt rules and policies to promote statutory goals of antidiscrimination, inclusion, and equity.[130] Title VIII's "affirmatively furthering" provision is similarly directed at federal agencies

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[127] *See, e.g.*, FTA C 4702.1A, *supra* note 1, at IV-4 (requiring grantees to conduct outreach to minority, low-income, and limited English proficient (LEP) populations and include these groups in their planning); OFFICE OF CIVIL RIGHTS, *supra* note 3, at 5 (requiring as part of the civil rights impact analysis that agencies "[c]onsult with stakeholders, advisory committees, and customers, as appropriate, to obtain input prior to decision-making").

[128] *See infra* notes 206–215 and accompanying text (providing examples of state and local implementation of transit equality directives); notes 249–252 and accompanying text (discussing state implementation of housing equality directives).

[129] *See infra* Part II.C (arguing that civil rights interventions need to move beyond their current focus on remedying bias).

[130] Title VI also applies to private actors who receive federal funds, but my focus here is on how it regulates public actors.

and grantees; key drafters of the provision announced it as a mechanism to engage the federal government's programmatic, enforcement, and spending leverage to promote integration and counter its past history of segregation.

If Title VII of the 1964 Civil Rights Act mainly creates a private mechanism to enforce civil rights, then Title VI, the 1964 Civil Rights Act's other major provision, engages bureaucratic mechanisms for the same purpose. Title VI has two obvious strands. First, it provides an individual right to be free from discrimination in federally funded programs.[131] Second, it provides a bureaucratic, non-adjudicative mechanism that the federal government can use to enforce antidiscrimination norms on subnational levels of government.[132] This is the carrot-and-stick element of Title VI that commentators acknowledge played an instrumental role in integrating southern school districts.[133]

Title VI can also be understood in a third way: as a statute focused on state power itself. The statute announces an antidiscrimination norm for federal funds and it aims to purge states of their complicity in discrimination and segregation.[134] With the expansion of federal grant-in-aid programs, federal funds became a new extension of the state, and purging these federal funds of discrimination was a key goal for civil rights proponents.[135] When President Kennedy celebrated the enactment of Title

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[131] *See* 42 U.S.C. § 2000d (2006) (declaring that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

[132] *See id.* § 2000d-1 (empowering agencies to enforce their regulations by terminating funding or "by any other means authorized by law"). More specifically, proponents of Title VI aimed to make *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), a reality in the face of noncompliance by Southern school districts. As a White House Report stated in 1966 after Congress enacted Title VI, the statute aimed to "remove school desegregation efforts from the courts, where they had been bogged down for more than a decade." WHITE HOUSE TASK FORCE ON CIVIL RIGHTS, TO FULFILL THESE RIGHTS 41 (1966).

[133] *See* JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE 114–15 (1978) (arguing that federal executive enforcement of Title VI of the 1964 Civil Rights Act helped quicken the pace of school integration, even though overall progress remained slow).

[134] Title VI's predecessors are the New Deal Executive Orders forbidding employment discrimination by federal agencies and by government contractors. *See* HAVARD SITKOFF, A NEW DEAL FOR BLACKS: THE EMERGENCE OF CIVIL RIGHTS AS A NATIONAL ISSUE 321 (1978) (discussing Executive Order 8802, 6 Fed. Reg. 3109 (June 25, 1941), which established a Committee on Fair Employment Practices in the Office of Personnel Management). In 1951, President Eisenhower extended prohibitions on employment discrimination to recipients of federal contracts. *See* Exec. Order No. 10,479, 18 Fed. Reg. 4899 (1953) (banning discrimination by contractors on federally financed construction sites).

[135] President Eisenhower stated as early as 1953 that "wherever Federal funds are expended for anything, I do not see how any American can justify—legally, or logically, or morally—a discrimination in expenditure of those funds as among our citizens." Dwight D. Eisenhower, The

VI, he spoke of a responsibility inherent in federal funding and programs. "Simple justice," Kennedy said, "requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination."[136]

Title VIII's affirmatively furthering fair housing (AFFH) provision[137] is even more explicitly directed at the administrative state—not only purging the federal government of its past complicity in segregating and subverting fair housing, but also placing on it the affirmative duties to reverse course. Key proponents pushed for the provision, building on executive orders abolishing discrimination in government run and subsidized housing programs, because they saw Title VI (which applied to housing programs) as insufficient in failing to place an affirmative duty on government.[138]

In short, Title VI and Title VIII use administrative, programmatic, and regulatory power to promote civil rights. Implementing these statutes, agencies can place conditions on federal spending, issue rules and guidance, provide technical assistance, and require reporting and self-evaluation by government grantees. As detailed in Part IV, courts also catalyze regulatory implementation and provide a mechanism for enforcement of regulations. But what distinguishes these statutory and regulatory provisions from the standard models is the breadth of administrative tools they employ to promote nondiscrimination, equity, and inclusion. While this may be an unremarkable feature of many administrative regimes, it has not been a part of standard American civil rights statutes.

b. Positive Directives

Second, these statutes require state actors to take affirmative steps to promote equity or inclusion. Grantees must do more than refrain from discrimination or avoid disparate impacts, as required by the central provisions of federal fair employment and housing law. Rather, these statutes and implementing measures are "directive" in that they require state actors to take a series of proactive measures to achieve inclusionary goals. Under these specific affirmative directives, state and local actors are required to engage in front-end planning to promote equality and inclusion.

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President's News Conference of March 19, 1953, *in* PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: DWIGHT D. EISENHOWER 104, 108 (1953).

136 H.R. MISC. DOC. NO. 88-124, at 12 (1963).

137 *See* 42 U.S.C. § 3608(e) (2006) (requiring federal agencies and grantees to administer programs "in a manner affirmatively to further the policies" of the FHA).

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

They must collect racial and ethnic data and conduct impact assessments;[139] conduct outreach to minorities, limited English proficient persons, low-income groups, and persons with disabilities;[140] and propose, evaluate, and implement more inclusive alternatives.[141] In short, equality directives require grantees to take positive steps to ensure that their funding, programs, and policies serve to advance integration, nondiscrimination, and inclusion.

In requiring states and localities to take the initiative to assess how their programs might further inclusion and equality, these directives bear some similarity to measures adopted by other countries that place positive duties on state actors. Most prominently, in the United Kingdom, equality law places a set of proactive duties on government to achieve equality by having "due regard" to eliminate discrimination, promote equality of opportunity, and further "good relations" between racial and ethnic groups.[142] From this general "due regard" duty, public authorities engage in a set of more specific activities, including assessing the equality impact of their activities, and considering how these impacts might be reduced.[143]

c. Pervasive and Embedded

A final noteworthy aspect of equality directives is that they embed a set of equity-promoting requirements in the daily operation of state-funded

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139 *See, e.g.*, FTA C 4702.1A, *supra* note 1, at V-1 (requiring transit agencies receiving certain federal funds to collect demographic data on the impact of their activities); OFFICE OF CIVIL RIGHTS, *supra* note 3, at 1 (requiring an analysis of the impact of agriculture policies on racial and ethnic minorities and persons with disabilities).

140 *See, e.g.*, DOT Policy Guidance Concerning Recipients' Responsibilities to Limited English Proficient (LEP) Persons, 70 Fed. Reg. 74,087 (Dec. 14, 2005) (requiring the inclusion of LEP populations by translating relevant information and the inclusion of such LEP populations in impact assessments); FTA C 4702.1A, *supra* note 1, at IV-4 (requiring federally funded transit agencies to develop a public participation strategy to "seek out and consider" views of low-income, minority, and LEP populations).

141 *See, e.g.*, FTA C 4702.1A, *supra* note 1, at V-5, V-7 (requiring evaluations of the impact of transit services, service and fare changes, and requiring the adoption of alternatives that eliminate disparities).

142 *See* Northern Ireland Act, 1998, c. 47, § 75 (U.K.) (requiring public authorities to have "due regard" to the need to promote equal opportunity with attention to a range of categories including religion, race and ethnicity, gender and disability); *Race Relations (Amendment) Act 2000: Summary of the 2000 Act*, LEGISLATION.GOV.UK (2000), http://www.legislation.gov.uk/ukpga/2000/34/notes/division/3 (describing the law as placing a duty on specified public authorities to work towards the elimination of unlawful discrimination and promote equality of opportunity and good relations between persons of different racial groups).

143 *See* Race Relations: The Race Relations Act 1976 (Statutory Duties) Order 3006 (2003), *available at* http://www.legislation.gov.uk/uksi/2003/3006/pdfs/uksi_20033006_en.pdf (requiring particular government entities to assess the likely adverse racial impacts of their policies, monitor existing policies for adverse impact and consult with affected communities).

and state-operated programs by imposing ongoing requirements of self-evaluation, monitoring, and reporting. For instance, all recipients of federal mass transit funds must conduct impact assessments, outreach, and other practices to include minority groups, persons with disabilities, and groups with limited English proficiency.[144] Unlike traditional antidiscrimination requirements, these are not admonishments to avoid or remedy bias and exclusion. Rather, they are requirements that multi-billion-dollar federal programs continuously operate in ways that promote the robust participation and inclusion of varied groups.

In this regard, a key strength of these programs is that the requirements are embedded in existing grant programs. These directives require the consideration of civil rights or equity concerns as part of the ongoing process of receiving and spending federal funds in particular programs. When a transit agency or locality takes federal funds, they must assess the impacts of existing and proposed programs and policies, conduct outreach to include groups in planning and design, and adopt practices that promote goals of housing integration and access to transit.[145] These duties do not depend on filing an administrative or legal complaint, but rather are triggered by the receipt of federal funds. These directives draw on the spending and oversight relationship that exists between the federal government and its subnational grantees. They are implemented primarily through that regulatory architecture.

## II
## BEYOND ANTIDISCRIMINATION

Before providing a more detailed examination of the implementation of these directives in housing and transportation, this Part argues that equality directives warrant greater attention from those interested in promoting social equality and inclusion today. Decrying the failure of civil rights laws has become fashionable, even among those interested in advancing their goals. Commentators argue that discrimination provides a poor explanation for contemporary forms of inequality.[146] The thin normative goal of preventing discrimination, they argue, should shift toward a more robust goal of promoting structural inclusion and

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144 *See infra* notes 183–188 and accompanying text (detailing regulatory requirements).

145 *See infra* Parts III.A.3, III.B.3 (detailing federal, state, and local implementation of directives in housing and transportation).

146 *See, e.g.*, RICHARD THOMPSON FORD, RIGHTS GONE WRONG: HOW LAW CORRUPTS THE STRUGGLE FOR EQUALITY 11–14 (2011) (arguing that antidiscrimination law is a poor tool for promoting inclusion and equity because it detracts attention from inequities that are not caused by overt prejudice or simple discrimination); Banks & Ford, *supra* note 18, at 1058–59 (noting the limitations of explicit bias in explaining current forms of racial and ethnic inequality).

opportunity.[147] My claim is that equality directives provide an answer, relying on existing civil rights law to promote goals that extend beyond remedying bias.

The essential features of equality directives outlined above—that they engage broader forms of administrative power, are positive, and are pervasive—give thos directives a power beyond the standard antidiscrimination model of civil rights. For instance, they engage the power of the state at a time when the demise of formal types of state exclusion would make it tempting to ignore the continued role of the state in shaping inequality.[148] Moreover, equality directives harness a broader set of regulatory tools than traditional antidiscrimination law, which focuses on courts or state adjudicatory power. Equality directives use the state's power to create new programs, oversee existing programs, make rules to govern programs and spending, and centralize and dispense information and research.

Significantly, directives do not require wholesale abandonment of civil rights responses in favor of social welfare responses to address societal inequality.[149] They are, after all, creatures of existing civil rights statutes. Indeed, they point to the untapped regulatory potential that remains in these statutes. Yet equality directives demand that civil rights proponents move away from a focus on eradicating bias in courts. In the area of race and ethnicity, such a move is particularly crucial given that racial inequality is sustained not just by contemporary bias, but also by a complex interplay of historic and contemporary bias, poverty, and class-related disadvantage.[150]

### A. *Regulating the State Itself*

I have noted that equality directives harness different aspects of state power than the paradigmatic Title VII model, which focuses on using state power to further prosecution and resolution of discrimination claims. Under the typical account of Title VII, Congress prohibits discrimination and

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147 *See, e.g.*, Susan Sturm, *The Architecture of Inclusion: Advancing Workplace Equity in Higher Education*, 29 HARV. J.L. & GENDER 247, 249–50 (2006) (arguing for "institutional citizenship" rather than diversity or antidiscrimination as a framework for promoting workplace equity).

148 *See infra* notes 156–160 and accompanying text (discussing the continued salience of the state in determining equality and opportunity).

149 *See* Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 54–56 (2004) (arguing that, while disability advocacy has recently found success through social welfare strategies, advocates should remember their previous criticisms of the social welfare model).

150 *See infra* notes 159–162 and accompanying text (discussing the landscape of contemporary inequality).

delegates enforcement to public and private actors, and federal agencies have the power to investigate and prosecute claims. The directives on which I focus here are centrally about the less celebrated administrative tools of advancing civil rights—the powers of spending, rulemaking, and oversight.

The power of this alternative civil rights framework depends on the federal government's capacity to leverage change through its programs. Even at a time of greatly diminishing federal resources, such resources are rising rather than declining in relative influence. Practically speaking, federal spending remains crucial to the sustenance of state and local level programs in a broad range of programmatic areas of concern to social welfare, particularly housing, transportation, health, and education.[151] In many areas, federal spending is actually increasing as a percentage of state spending.[152] Even if federal resources are declining, they still represent billions of dollars—a vast set of programs and amount of spending with the power to structure equality. For instance, federal spending on transportation stands at about ninety-one billion dollars annually, making it one of the largest domestic discretionary spending programs.[153] Simply put, even in an era of tightening budgets, federal grant-in-aid programs remain extensive. Thus, attaching equity rules to these programs has great potential to promote broad standards of inclusion.

### *B. An Emphasis on Structure*

Equality directives also warrant greater attention from those concerned about civil rights and equity because the state has the ongoing power to structure a complex set of racial, ethnic, and socioeconomic arrangements. While the public and private attorney general models of civil rights are fundamentally about enhancing the antidiscrimination apparatus,

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[151] *See generally* Johnson, *supra* note 138, at 161 (detailing the rise in federal spending as a proportion of state spending); Daniel Klaff & Adam Lawton, *Conditional Spending and Other Forms of Federal Cost Sharing* 32 (Harvard Law Sch. Fed. Budget Policy Seminar, Briefing Paper No. 18, 2008), *available at* http://www.law.harvard.edu/faculty/hjackson/ConditionalSpending_18(rev).pdf (providing a graphical depiction of grants to state and local governments over time).

[152] *See* Johnson, *supra* note 138, at 161, 172–79 (describing the critical role of federal spending from the 2008 stimulus in supporting states' housing, education, and transportation programs).

[153] *See* OFFICE OF MGMT. & BUDGET, ANALYTICAL PERSPECTIVES, BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2013, at tbl.32-1, *available at* http://www.whitehouse.gov/sites/default/files/omb/budget/fy2013/assets/32_1.pdf (showing that education, employment, and social service spending is about $127 billion). By way of context, $706 billion is spent each year on Social Security, and $690 billion on defense (with an additional $102 billion spent on veteran's benefits and programs). *Id.*

equality directives have the power to intervene to reverse structural and persistent forms of inequity. Here, the object of regulation is the state itself—or the choices made by state actors about how to structure the programs they operate and fund to better advance racial and other forms of equality.

This argument depends on understanding the state's continuing contribution to inequality as well as its potential to redistribute or otherwise advance equality. The state's contribution might seem less important when Title VII is the paradigmatic example. But, while some commentators argue that changes in private-sphere behavior are most salient for promoting equity,[154] in my view we should not underemphasize the ongoing role of the state. Otherwise, as formalized discrimination by government actors has disappeared, the government may recede as an important target for addressing inequality.

In fact, much evidence reveals that while the causes of continued racial and ethnic inequality are complex, government decisions play an ongoing role. In the housing context, residentially segregated communities of concentrated poverty limit or deny residents access to high-quality schooling, quality jobs, opportunity networks, and basic elements of public safety.[155] Funding and programmatic decisions made at the federal, state, and local levels influence the cost of transportation for dependent populations. Such decisions also structure access to jobs and other

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154 *See, e.g.*, WILLIAM N. ESKRIDGE JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 4 (2010) (arguing for the importance of applying civil rights norms to private behavior).

155 *See* Xavier de Souza Briggs, *More* Pluribus*, Less* Unum*? Changing Geography of Race and Opportunity*, *in* THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA 29–32 (Xavier de Souza Briggs ed., 2005) (detailing the geographic concentration of school failure); James H. Carr & Nandinee K. Kutty, *The New Imperative for Equality*, *in* SEGREGATION: THE RISING COSTS FOR AMERICA 17–20 (James H. Carr & Nandinee K. Kutty eds., 2008) [hereinafter SEGREGATION] (delineating mechanisms by which neighborhoods of segregation and concentrated poverty contribute to poor educational outcomes); Joleen Kirschenman & Kathryn M. Neckerman, *"We'd Love to Hire Them, But . . .": The Meaning of Race for Employers*, *in* THE URBAN UNDERCLASS 203 (Christopher Jencks & Paul E. Peterson eds., 1991) (detailing how residence and race interact to restrict job opportunities for African-Americans); Deborah L. McKoy & Jeffrey M. Vincent, *Housing & Education: The Inextricable Link*, *in* SEGREGATION, *supra*, at 125–26 (explaining increased racial and economic segregation across metropolitan regions and their effect on segregation in public schools); Margery Austin Turner, *Residential Segregation and Employment Inequality*, *in* SEGREGATION, *supra*, at 151, 170–71 (discussing residential segregation as a contributing factor to less effective job networks for minorities). Data from the 2010 census show a modest but important decrease in the level of Black-White segregation. *See* JOHN R. LOGAN & BRIAN J. STULTS, THE PERSISTENCE OF SEGREGATION IN THE METROPOLIS: NEW FINDINGS FROM THE 2010 CENSUS 1, 4 (2011), *available at* http://www.s4.brown.edu/us2010/Data/Report/report2.pdf. At the same time, Black-White segregation levels remain "very high," particularly in terms of African-American exposure to Whites. *Id.* at 4.

opportunities.[156] Decisions made on where to locate affordable housing affect whether poor families have access to the range of education, tax, social capital, and other benefits that accompany location in low-poverty or majority White neighborhoods.[157] These geographical decisions help explain why racial inequality in particular has endured.[158] Even macro-level changes in determinants of racial inequality that are prompted by seemingly race-neutral influences—such as the decline of the industrial or blue-collar economy—have racially disparate effects, given spatial forms of inequity.[159]

Public decisions also influence private forms of discrimination by interacting with micro-level private discrimination.[160] Modern-day employment discrimination is not just individualized or firm-level racial discrimination. It also impacts how employers perceive applicants based on the confluence of race and the neighborhoods in which they live.[161] Housing discrimination through racial steering is legitimated by the racialized landscape of residential neighborhoods as well as the often explicit desires of customers and realtors to avoid low-poverty, high-minority neighborhoods.[162] In short, ensuring that public decisions and policies operate to promote equity can address enduring problems at the intersection of racial, ethnic, and class inequality.

This account of why the state matters as an object of civil rights regulation is most obviously true for race and ethnicity, where the social science literature has documented the state's contribution to persistent forms of inequity in housing, transportation, and wealth. It also matters in other areas of civil rights and equity regulation such as disability, not only

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156 *See, e.g.*, THOMAS W. SANCHEZ & MARC BRENMAN, WITH JACINTA S. MA AND RICHARD H. STOLZ, THE RIGHT TO TRANSPORTATION: MOVING TO EQUITY 1–2, 53–57 (2007) (introducing the importance of transportation to racial equity and detailing the contribution of transportation to the "spatial mismatch" between where low-income, urban, often minority households live, and where jobs are located).

157 *See* Carr & Kutty, *supra* note 155, at 23 (discussing lack of wealth, access to credit, and other systemic disparity associated with distressed neighborhoods that impair the accumulation of wealth).

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

159 *See id.* at 12–13, 183–84 (describing the mutually reinforcing nature of segregation and economic decline in inner cities).

160 For an account of the literature that supports this proposition in housing, see Johnson, *supra* note 56, at 1211–14.

161 *See* Kirschenman & Neckerman, *supra* note 155, at 215 (documenting employer skepticism about hiring "inner-city" workers through interviews).

162 *See* George C. Galster & W. Mark Keeney, *Race, Residence, Discrimination, and Economic Opportunity: Modeling the Nexus of Urban Racial Phenomena*, 24 URB. AFF. Q. 87, 103 (1988) (showing how Whites avoid neighborhoods perceived as "integrated").

because of federal government complicity, but because of the government's power to leverage change going forward.[163]

### C. Beyond Bias

Engaging the state as an equity-promoting actor goes beyond the goal of remedying bias, and thus responds to some of the limitations of antidiscrimination law in addressing contemporary forms of inequality. By bias, I mean the disparate treatment of similarly situated individuals.[164] In the constitutional context, commentators have long argued that antidiscrimination law as constructed by courts has proved too focused on questions of intent and malice.[165] The doctrinal solutions proposed under equal protection—such as requiring public actors to evaluate the extent to which their actions promote harm and to consider less harmful alternatives[166]—are precisely the goals of a regime that places positive

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163 *See, e.g.*, SANCHEZ ET AL., *supra* note 156, at 114, 116–18 (discussing the importance of transportation in securing mobility for persons with disabilities and detailing principles of transportation equity for persons with disabilities, including assuring access and inclusiveness); *see also* Elizabeth F. Emens, *Intimate Discrimination: The State's Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1381 (2009) (arguing that the state should take affirmative steps to address "intimate discrimination" in the area of disability, as well as race).

164 Bias could also be defined more broadly at the institutional level, to include the failure of officials to remedy racial disparate impacts. For instance, Professor Glenn Loury has noted that "race-indifference" is maintained by "a disregard for the effects of a policy choice on the welfare of persons in different racial groups." GLENN C. LOURY, THE ANATOMY OF RACIAL INEQUALITY 166 (2002). While Loury describes this phenomenon as reflecting the stigma associated with race, one could plausibly term it a form of institutional-level "bias." *Cf.* Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 7 (1976) (arguing that intentional discrimination violating the Equal Protection Clause might also be extended to include race-dependent decisions based on "racially selective sympathy and indifference"); Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1317 (2011) (defining "bias" as including "structural discrimination"). I am using the term more narrowly to reflect not institutional or policy level decisions, but the type of individual level bias that Loury would call "reward bias," or "unequal returns to equally productive contributors." LOURY, *supra,* at 160 (contrasting "reward bias" with "development bias," defined as "unequal chances to realize one's productive potential").

165 *See, e.g.*, Charles R. Lawrence, III, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 321–22 (1987) (arguing that the Court's focus on conscious and intentional motivation ignores the effects of racial history on the individual and collective unconscious); Siegel, *supra* note 16, at 1135 (contending that the Court's equal protection jurisprudence has defined discriminatory purpose in "terms that are extraordinarily difficult to prove").

166 *See* Lawrence, *supra* note 165, at 356 (proposing that courts "analyze governmental behavior much like a cultural anthropologist might: by considering evidence regarding the historical and social context in which the decision was made and effectuated"); Lenhardt, *supra* note 17, at 891 (proposing that courts consider whether government action causes stigmatic harm by "preparing what would effectively be a racial impact statement"). Of course, these approaches differ sharply from the equality directive approach, in that they would require such analysis

duties on state actors. The disparate impact component of statutory antidiscrimination law could be another avenue for asking these questions.[167] However, the way in which courts doctrinally construct disparate impact law has narrowed its efficacy and scope. For instance, in asking whether disparate impacts are justified by institutional necessity, courts often grant much deference to institutional decisionmakers.[168] Such deference likely reflects courts' reluctance to find public institutions liable for decisions that reflect a set of complex tradeoffs.[169] Take, for instance, Title VI disparate impact cases, in which courts typically have been reluctant to find transit agencies liable for funding and service decisions that harmed minorities.[170]

Equality directives implement the goals of disparate impact law, but do so affirmatively and proactively in the planning stages of decisionmaking. They require grant recipients to conduct front-end assessment of impacts, evaluate alternatives, and include groups not normally at the table. This approach thus avoids the back-end problems of court enforcement of disparate impact by incorporating an equity and inclusionary lens before policies and programs are implemented. In requiring upfront assessment, inclusion, and redesign, equality directives have the features of a different strand of antidiscrimination law: the Americans with Disabilities Act's requirement of "reasonable

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retrospectively by courts rather than prospectively and concurrently by the primary governmental decisionmaker.

167 *See* Siegel, *supra* note 164, at 1317 (describing Title VII's disparate impact standard as designed in part to "challenge structural discrimination—discrimination that arises from the interaction of workplace criteria with other race-salient social practices").

168 *See* Charles F. Abernathy, *Legal Realism and the Failure of the "Effects" Test for Discrimination*, 94 GEO. L.J. 267, 312 (2006) (finding few successful Title VI disparate impact cases); Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 13–15 (2006) (noting the difficulty of prevailing in Title VII disparate impact cases because they require that often complex employment decisions be broken down into discrete elements); Johnson, *supra* note 117, at 400–01 (arguing that Title VI's disparate impact test, as employed by courts, has proven ill-suited to addressing practices that cause disparate impact through their interaction with "structural and embedded racial inequalities"); Michael Selmi, *Was the Disparate Impact Theory a Mistake*?, 53 UCLA L. REV. 701, 734–43 (2006) (reviewing appellate and district court decisions and finding that "[d]isparate impact claims are more difficult to prove than standard intentional discrimination claims.").

169 *Cf.* ESKRIDGE & FEREJOHN, *supra* note 154, at 54 (discussing the limits of adjudication in resolving problems that are polycentric, future-oriented, and reallocational).

170 A landmark case against the Los Angeles Transit system successfully relied on the Title VI disparate impact standard. Labor/Cmty. Strategy Ctr. v. L.A. Cty. Metro. Transp. Auth., 263 F.3d 1041 (9th Cir. 2001); *see infra* note 190 and accompanying text. But other similar lawsuits were unsuccessful. *See infra* note 191. However, as I note in Part III, even this unsuccessful litigation contributed to the development of the DOT's regulatory equality directives. *See infra* notes 190–192 and accompanying text.

accommodation."[171] Yet, as shown by the specific examples presented in Part III, equality directives do more than set up broad goals akin to "reasonable accommodation"; they require grantees to take a set of specific steps of self-assessment, mitigation, and inclusion to meet those goals.

In moving beyond the prohibitory focus of antidiscrimination law and instead encouraging affirmative steps, equality directives provide a broader normative frame for civil rights goals than is captured by remedying bias. In this Article, I use "equality" or "equity" as a more expansive short hand than "antidiscrimination," to signal that these directives do not simply seek to remedy or avoid bias, but also to share federal resources, dismantle long-standing barriers in the distribution of federal funds, promote integration, and further inclusion in policymaking, planning, and services.[172]

Finally, this normative shift away from bias has instrumental benefits: It responds to the reality that individual or firm bias is at most only one contributor to contemporary racial inequality. Some argue that bias is no longer pervasive and that it should be demoted as an explanation for contemporary racial inequality.[173] Even short of this claim,[174] too much

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[171] *See* Americans with Disabilities Act of 1990 § 102(b)(5)(A), 42 U.S.C. § 12112(b)(5)(A) (2006) (including in the definition of discrimination "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual"). Commentators have argued that features of Title VII, including the requirement of remedying unjustified disparate impacts, forbidding stereotyping, and disallowing employers to cater to employer preferences, are similar to the ADA's accommodation requirement. *See, e.g.*, Samuel R. Bagenstos, *"Rational Discrimination," Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 859–60, 866–67 (2003) (arguing that the normative aims of traditional antidiscrimination law and the ADA are similar—dismantling "group-based subordination"—and employ similar means, by prohibiting "rational discrimination"); Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 645 (2001) (arguing that Title VII's disparate impact test imposes requirements of accommodation and, for that reason, antidiscrimination and accommodation are best understood as "overlapping rather than fundamentally distinct categories").

[172] This point can be overstated. As Professor Bagenstos has noted, Title VII's ultimate goal is not just lifting formal bias but preventing subordination and promoting full inclusion. *See* Bagenstos, *supra* note 171, at 859–60. Key supporters articulated the Fair Housing Act's goals as both promoting integration and combating bias. *See, e.g.*, 114 CONG. REC. 3422 (1968) (statement of Sen. Mondale) (stating that the goal of the FHA was to promote "an integrated society, a stable society free of the conditions which spawn riots, free of riots themselves").

[173] *See* LOURY, *supra* note 164, at 79–84 (arguing that discrimination should be "demoted, dislodged from its current prominent place in the conceptual discourse on racial inequality in American life"); Banks & Ford, *supra* note 18, at 1114 (arguing that "many decisions and practices that adversely affect racial minorities do not fit neatly within the conventional antidiscrimination framework"); Loury, *supra* note 17, at 121 (arguing that "market discrimination is only one small part of" race disparities and that current tools for combating market discrimination are inadequate to the task of reducing economic disparities between racial groups).

[174] For accounts of pervasive bias in both lower- and higher-wage job markets and in all levels of housing, see generally Devah Pager, Bruce Western, and Bart Bonikowski, *Discrimination in a*

focus on bias and antidiscrimination risks emphasizing the problems of those well positioned to benefit from the removal of formalized barriers to equality, while leaving untouched the enduring and embedded problems of poverty. Often affecting low-income persons of color, those problems include poor access to jobs, high incarceration, and poor social capital.[175] While the private and public attorney general model centers on eradicating discrimination and bias primarily in private markets, the regulatory directives I describe focus on the state's contribution to building a landscape that provides access and opportunity. For these reasons, equality directives provide a potentially powerful mechanism for promoting inclusion and opportunity.

## III
## DIRECTIVES FOR HOUSING AND TRANSPORTATION EQUITY

Believing in the capacity of equality directives requires understanding how they have emerged and how they operate in specific contexts. In this Part, I begin by providing an account of how these directives arose in the areas of transportation and housing—two areas in which the directives are more developed and which are particularly salient points of intervention for addressing contemporary inequality. This account reveals that Title VI and Title VIII provided the statutory framework, but the regulatory implementation was prompted by a confluence of public and private actions. Such actions included litigation and advocacy by civil rights groups, trends in the use of presidential directives to spur agency action and create policy, and Supreme Court jurisprudence weakening private enforcement.

While my chief goal in this Part is to describe these developments,

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*Low-Wage Labor Market: A Field Experiment*, 74 AM. SOC. REV. 777 (2009). Johnson, *supra* note 56, at 1197–1200, discusses the risk of overstating this point.

175 Recent legal scholarship has begun to look closely at the structural aspects of inequality, including the contribution of government policies, the effects of cumulative and historic inequities on contemporary discrimination, and the institutional and inter-institutional practices that operate to exclude or disadvantage particular groups. *See, e.g.*, Johnson, *supra* note 117, at 384 (encouraging legal scholarship to move beyond discussions of bias to address how "[d]ecades of discrimination have created a social structure that shapes in distinctly racial terms" residential segregation, access to wealth, educational resources, and social capital); R.A. Lenhardt, *Race Audits*, 62 HASTINGS L.J. 1527, 1540–43 (2011) (describing theoretical underpinnings of "structuralism," which "emphasizes the cumulative effect of institutional structures and systems on outcomes for institutions, groups, and individuals" (citing Michael B. Katz, Mark J. Stern & Jamie J. Fader, *The New African American Identity*, 92 J. AM. HIST. 75, 75–76 (2005)); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 470–71 (2001) (showing how "ongoing patterns of interaction shaped by organizational culture . . . influence workplace conditions, access, and opportunities for advancement over time").

understanding this history is central to the normative arguments that I develop in Part IV. As I explained earlier, civil rights commentators and advocates have proved deeply skeptical about administrative agency capacity and have celebrated instead the power of private enforcement.[176] The case studies I describe in this Part should give commentators and advocates reason to place faith in a regulatory approach as well, because private group advocacy pressure has already contributed to the development of equality directives and will remain key to their efficacy. In addition, a key feature of equality directives is an emphasis on regulatory rather than adjudicative power.[177] These case studies are intended to amplify this point. They show how equality directives are in fact implemented at the state and local levels, even in the absence of enforcement action or litigation.

### *A. Transportation Impact Assessments*

#### *1. Overview*

Transportation policy raises enduring questions of inclusion and equality. Decisions on the location, physical accessibility, languages, and cost of public transit all determine how individuals and communities will be connected to opportunity-enhancing resources such as employment, schools, social services, and parks. Such decisions therefore have vast consequences for the economic development of communities, the environment, and human health. Mobility through public transit serves to promote independence and access to resources for persons with disabilities.[178] For minorities, the distribution and accessibility of transportation resources contributes to poverty and joblessness. For instance, high-minority, poor communities are often disconnected from emerging job centers.[179] In addition, transportation policies have had profound influence in shaping segregation in metropolitan areas—

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[176] *See supra* notes 107–110 and accompanying text (detailing civil rights advocates' and commentators' skepticism of administrative enforcement).

[177] *See supra* notes 138–145 and accompanying text (arguing that equality directives harness a broad set of state powers).

[178] *See* SANCHEZ ET AL., *supra* note 156, at 113–14 (framing transportation accessibility as a civil right).

[179] *See* Harry J. Holzer, *The Spatial Mismatch Hypothesis: What Has the Evidence Shown?*, 28 URB. STUD. 105, 109–11, 118 (1991) (reviewing literature that finds gaps between the location of jobs and where Blacks reside, but also noting contradictory evidence on whether this spatial mismatch accounts for racial economic disparities); Thomas W. Sanchez, *The Impact of Public Transportation on U.S. Metropolitan Wage Inequality*, 39 URB. STUD. 423, 434 (2002) (documenting links between the availability of public transportation and wage inequality in large metropolitan areas, since Blacks in particular live farther on average from employment centers).

encouraging White flight from central cities and contributing to concentrated, racialized poverty in urban areas.[180]

The DOT's Federal Transit Administration (FTA) provides billions of dollars in formula and discretionary funds for buses, subways, railways, and other mass transit systems. Administered by the FTA, this money is used to build, modernize, and extend transit systems, as well as to subsidize transit fares.[181] In recent years, the FTA has begun issuing equality directives.[182] FTA regulations and guidance now require grant recipients to assess how their programs and activities impact minority communities and to take steps to avert adverse impacts. Specifically, funding recipients must integrate into their programs an environmental justice analysis of (1) whether their programs and activities have adverse health and environmental impacts on minority communities, (2) comparisons between effects on minority communities and nonminority communities, and (3) documentation of actions taken to mitigate those concerns.[183] FTA grant recipients must also conduct community outreach to ensure participation of minority and LEP communities.[184] For mass-transit programs and activities in larger regions, DOT requires funding recipients to gather and analyze data to evaluate whether minority groups are benefiting fairly from federally funded programs and services;[185] develop quantitative measures to

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180 *See* KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES (1985) (detailing the contribution of highway development to suburbanization, sprawl, and segregation).

181 *See* FED. TRANSIT ADMIN., U.S. DEP'T OF TRANSP., HIGHLIGHTS OF THE FEDERAL TRANSIT ADMINISTRATION'S IMPACT ON PUBLIC TRANSIT IN THE UNITED STATES 1–5, *available at* http://www.fta.dot.gov/documents/FtaImpactBook_Web.pdf (last visited Aug. 18, 2012) (describing the role and accomplishments of the FTA).

182 The Federal Highway Administration—which administers an even larger store of funds for surface transit—has similar directives. *See* FED. HIGHWAY ADMIN., U.S. DEP'T OF TRANSP., NO. 6640.23A, FHWA ACTIONS TO ADDRESS ENVIRONMENTAL JUSTICE IN MINORITY POPULATIONS AND LOW-INCOME POPULATIONS (June 14, 2012), *available at* http://www.fhwa.dot.gov/legsregs/directives/orders/664023a.htm (establishing policies and procedures for the Federal Highway Administration's compliance with Executive Order 12,898, 59 Fed. Reg. 7629 (Feb. 16, 1994)); *Community Impact Assessment: A Quick Reference for Transportation*, FED. HIGHWAY ADMIN., U.S. DEP'T OF TRANSP. (Sept. 1996), http://www.ciatrans.net/CIA_Quick_Reference/Purpose.html (integrating federal statutes and regulations, including those related to environmental justice and nondiscrimination, to require grantees to assess transportation projects for their impact on a community and its quality of life).

183 For FTA construction projects covered by the National Environmental Policy Act, recipients should complete an environmental justice analysis. *See* FTA C 4702.1A, *supra* note 1, at IV-4.

184 *See id.* ("[Grantees] should seek out and consider the viewpoints of minority, low-income, and LEP populations . . . . An agency's public participation strategy shall offer early and continuous opportunities for the public to be involved in the identification of social, economic, and environmental impacts of proposed transportation decisions.").

185 *See id.* at V-1 (including a "Requirement to Collect Demographic Data"). DOT suggests a

evaluate whether services are being provided in similar ways to different racial and ethnic groups;[186] evaluate significant system-wide service and fare changes to determine whether they have a discriminatory impact;[187] monitor services every three years to ensure that prior decisions have not resulted in disparate impact; and "take corrective action to remedy [any] disparities."[188] While "informal," this guidance is an implementation of DOT's Title VI regulations, and there are possible sanctions for failures to comply.[189]

In effect, these requirements transform Title VI's statutory prohibition on "discrimination" into a set of affirmative requirements: to conduct an equity analysis that analyzes impacts and considers alternatives, and to promote full participation.

### 2. *Emergence*

These directives did not emerge from a single government pronouncement. Rather, they emerged over a number of years, from a set of regulatory actions and from private group litigation and advocacy.

First, these regulations were made possible by Title VI litigation and complaints brought in the mid-1990s against transit departments before *Sandoval*, most prominently *Labor/Community Strategy Center v. Los Angeles County Metropolitan Transportation Authority*, which successfully sought redress for claims that the transit system's funding and policies disfavored predominantly minority bus riders.[190] Aside from the Los Angeles case, much of this litigation was unsuccessful.[191] However, these

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number of options for satisfying this requirement, including geographic information system mapping, survey information collection, or a locally developed alternative that meets the regulatory obligations of 49 C.F.R. § 21.9(b) (2011). *See* FTA C 4702.1A, *supra* note 1, at V-1 to V-3.

186 *See* FTA C 4702.1A, *supra* note 1, at V-3 (including a "Requirement to Set Systemwide Service Standards"). The circular goes on to recommend system-wide standards such as the system's on-time performance, frequency of service, distribution of comfort and amenities (such as benches, shelters, and route maps), and service availability. FTA C 4702.1A, *supra* note 1, at V-3 to V-4.

187 *See id.* at V-5 to V-7 ("Requirement to Evaluate Service and Fare Changes").

188 *Id.* at V-7.

189 *See id.* at VIII-2 to VIII-3 (authorizing DOT to suspend, terminate, refuse to grant, or continue federal financial assistance to grantees who are out of compliance).

190 263 F.3d 1041 (9th Cir. 2001). In the case, minority bus riders brought a claim that the transit authority was expanding rail services while disfavoring funding for buses primarily ridden by minorities, resulting in intentional and disparate impact discrimination in violation of Title VI and its regulations. The suit resulted in an eventual consent decree against the transit authority. *Id.* As a student intern at the NAACP Legal Defense & Education Fund, I assisted in this litigation in its initial stages.

191 *See, e.g.*, N.Y. Urban League, Inc. v. New York, 71 F.3d 1031 (2d Cir. 1995) (vacating a district court order enjoining the New York Metropolitan Transit Authority from raising fares

demands for the full inclusion of racial and ethnic minorities in the planning and the distribution of transit resources framed transportation equity as a Title VI concern.[192]

Second, executive orders promulgated in the late 1990s enabled these directives by requiring that federal programs integrate goals related to environmental justice and improve access for communities with limited English proficiency. Since 1972, grantees under key DOT programs have had a duty to certify that they are complying with Title VI's antidiscrimination and disparate impact regulations.[193] These rules include the standard disparate impact provision, which prohibits recipients from "utilizing criteria or methods of administration which have the effect of subjecting people to discrimination on the basis of their race, color, or national origin."[194] They also require recipients "even in the absence of prior discriminatory practice or usage" to "take affirmative action to assure that no person is excluded from participation nor denied the benefits" of programs based on race or ethnicity.[195]

The 2007 revision of the DOT guidelines aims to provide clearer guidance and procedures on the meaning of disparate impact.[196] It implements two executive orders. The first was a 1994 Clinton Administration Executive Order directing all federal agencies to integrate environmental justice concerns into federal programs by evaluating the environmental and human health effects of their programs and policies on

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twenty percent for urban transit while only raising them nine percent for commuter rail service); Comm. for a Better N. Phila. v. Se. Pa. Transp. Auth., 935 F.3d. 1280 (3d Cir. 1991) (rejecting plaintiffs' claim that the allocation of federal subsidies for the Southeastern Pennsylvania Transit Authority (SEPTA)'s commuter rail division at the expense of SEPTA's city transit division had a disparate impact on minorities in violation of Title VI).

[192] In adopting equality directives, DOT specifically referenced these Title VI complaints and presented the guidance, in part as a response to a set of systemic complaints filed against transit systems. *See* Notice of Proposed Title VI Circular, 71 Fed. Reg. 40,178, 40,180 (July 14, 2006) (providing examples of Title VI litigation and administrative complaints).

[193] *See generally* 49 C.F.R. § 21 (2012) (DOT's regulations implementing Title VI). Grant recipients must certify annually to the FTA that they are complying with Title VI. *Id*. § 21.9(b); FTA C 4702.1A, *supra* note 1, at IV-1. Every three years, grant recipients must complete a more extensive written submission documenting their compliance with Title VI, including summaries of public outreach and involvement; written plans for inclusion of people with limited English proficiency; a record of Title VI complaints; investigations and lawsuits; and a documentation of their procedures for tracking and investigating Title VI complaints. *Id.* at IV-3.

[194] 49 C.F.R. § 21.5(b)(2).

[195] *Id.*

[196] *See* Notice of Proposed Title VI Circular, 71 Fed. Reg. 40,178, 40,179 (stating that the rule revisions were prompted by a desire to provide grantees greater specificity on the "types of actions" that meet the 49 C.F.R. § 21.5(b)(7) requirement that grantees take affirmative steps to promote inclusion).

minority and low-income communities.[197] In addition to affirming existing prohibitions on discriminatory actions and those with unjustified discriminatory effects,[198] the Executive Order requires each agency to develop an environmental justice strategy identifying environmental effects,[199] gather and disseminate specific data,[200] and promote public participation in decisionmaking and research.[201]

DOT's equality directives also arise from a second executive order, issued by the Clinton Administration in 2000 and implemented by federal agencies under George W. Bush. The second Order requires federal agencies to take affirmative steps to provide "meaningful access" to persons with limited English proficiency (LEP).[202] As the Order makes clear, the "meaningful access" requirement had long been part of Title VI's regulations,[203] but the Order requires agencies to develop more specific

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197 *See* Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 16, 1994).

198 *See id.* at 7630 (prohibiting federal agencies, whose programs and activities affect human health and the environment, from discriminating or excluding individuals based on race, color, or national origin).

199 The environmental justice strategy must identify "programs, policies, planning and public participation processes, enforcement, and/or rulemakings related to human health or the environment." *Id.*

200 The Order requires that agencies conducting environmental health research analyze activities that significantly impact minority, low-income persons, and other at-risk populations. *Id.* at 7631. All agencies should regularly collect and analyze information regarding whether their programs, policies, or activities have a disproportionate effect on minority and low-income populations. *Id.*

201 The Executive Order directs agencies to promote public participation in decisionmaking related to the environment by requiring public hearings and notice, as well as by ensuring that documents are understandable to the general public and translated for LEP populations. *Id.* at 7632; *see also* Memorandum from William Clinton, President, for the Heads of All Departments and Agencies (Feb. 11, 1994) *available at* http://www.epa.gov/compliance/ej/resources/policy/clinton_memo_12898.pdf.

202 Exec. Order No. 13,166, 65 Fed. Reg. 50,121 (Aug. 16, 2000); *see also* Notice of Proposed Title VI Circular, 71 Fed. Reg. 40,178 (July 14, 2006) (notice of revision of Title VI guidance for urban mass transit agencies).

203 *See* DOJ Policy Guidance, Enforcement of Title VI of the Civil Rights Act of 1964—National Origin Discrimination Against Persons with Limited English Proficiency, 65 Fed. Reg. 50,123 (Aug. 16, 2000) ("This policy guidance does not create new obligations, but rather, clarifies existing Title VI responsibilities."). The DOJ issued a policy guidance for Clinton's Executive Order, and the DOJ's role in coordinating and implementing the Order continued during the Bush Administration with a set of regulatory guidances on the inclusion of LEP communities. *See* DOT Policy Guidance Concerning Recipients' Responsibilities to Limited English Proficient (LEP) Persons, 70 Fed. Reg. 74,087 (Dec. 14, 2005) (providing LEP guidance for recipients of DOT's federal financial assistance); *see also* FTA C 4702.1A, *supra* note 1, at IV-1 to IV-2 (providing LEP guidance for Urban Mass Transit Programs receiving federal financial assistance); Ralph F. Boyd, Jr., Assistant Attorney General, Civil Rights Division, U.S. Dep't of Justice, Memorandum for Heads of Departments and Agencies, General Counsels and Civil Rights Directors (Oct. 26, 2001), *available at* http://www.justice.gov/crt/about/cor/lep/Oct26memorandum.pdf (clarifying for agencies the

rules and guidelines to ensure that funding recipients and federal agencies meet this requirement.[204]

The final factor in the creation of equality directives in transportation was *Sandoval* itself, which ended private enforcement of Title VI's disparate impact regulations and created the possibility of additional administrative complaints against grant recipients. In its 2007 guidance requiring impact assessments and greater inclusion of minorities and other disadvantaged groups, the agency noted that *Sandoval* was likely to lead to an increase in administrative complaints against the DOT; thus, revision of the guidance would assist grantees in preventing disparate impacts.[205]

### 3. *Implementation*

These transit directives are becoming embedded in federal, state, and local programs, spurring recipients to incorporate equality and inclusionary goals at the front-end planning stages. The FTA now implements its equality directives by requiring grantees to conduct impact assessments, outreach, and mitigation;[206] providing technical assistance on how to conduct impact assessments;[207] supplying information on best practices for ensuring outreach and public participation;[208] and withholding federal funds pending compliance with impact assessments and other measures.[209] To

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requirements for implementing the LEP Executive Order).

[204] *See* DOJ Policy Guidance, 65 Fed. Reg. 50,123 (requiring agencies to draft LEP guidance and to develop an implementation plan). The DOT also incorporated its goals for the inclusion of LEP populations in the 2000 circular's requirement that recipients translate relevant information for LEP populations and include such communities in impact assessments and community outreach. *See* DOT Policy Guidance, 70 Fed. Reg. at 74,088 (implementing LEP guidance for DOT financial assistance recipients).

[205] *See* Notice of Proposed Title VI Circular, 71 Fed. Reg. at 40,179 (noting that *Sandoval* would likely lead to an increase in disparate impact complaints and thus that "recipients of FTA funds and the general public would benefit from guidance clarifying what steps they should take to demonstrate that their programs, policies, and activities do not result in a disparate impact on the basis of race, color, or national origin").

[206] *See* Letter from Peter Rogoff, Fed. Transit Admin., to Grantees (Mar. 8, 2011), *available at* http://www.fta.dot.gov/newsroom/12910_12480.html (reminding grantees of the importance of complying with Title VI and FTA's implementing guidance).

[207] *See* Fed. Transit Admin., U.S. Dep't of Transp., Transit Service and Fare Equity Analysis Webinar (Aug. 18, 2010) (webinar announcement on file with the *New York University Law Review*) (explaining how to perform fare analysis and which kinds of changes warrant such analysis).

[208] *See, e.g.*, NAT'L COOP. HIGHWAY RESEARCH PROGRAM, RESEARCH RESULTS DIGEST 340: STATE DOT BEST PRACTICES FOR TITLE VI COMPLIANCE 10–11 (Dec. 2009), *available at* http://onlinepubs.trb.org/onlinepubs/nchrp/nchrp_rrd_340.pdf (providing examples from the field on effective outreach, decisionmaking, and inclusion of the public in planning).

[209] *See* S. MYERS, LEE CNTY. TRANSIT DEP'T, TITLE VI PLAN: 2009 PROGRAM UPDATE 7 (2009), *available at* http://www.rideleetran.com/pdfs/2009 LeeTran Title VI Plan.pdf (explaining that the FTA required improvement in state and local transit authorities' compliance with Title

comply with DOT's equality directives, state and local transit agencies must collect demographic data; conduct outreach to include minorities, LEP communities, and persons with disabilities; incorporate equity assessments of service, fare, and other changes into their transit decisions; and adopt measures to mitigate harm to minority and transit-dependent populations.[210]

Equality directives also prompt transit agencies to include equity concerns in the upfront design of their transit system. For example, while enforcing equality directives, Chicago researchers, community groups, and the public transit authority collaborated to design transit system extensions that more effectively meet the needs of minority, transit-dependent, and low-income populations.[211] The Minneapolis transit agency also included an equity analysis in the initial design of a new light rail system, structuring the proposed routes to enhance benefits and avoid harm to minority communities.[212]

In addition, equality directives have led agencies to mitigate harm to minority groups when making transit reductions.[213] The Washington

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VI); SE. REG'L PLANNING & ECON. DEV. DIST., SRTA FIXED ROUTE SYSTEM FARE STUDY FOR THE CITIES OF FALL RIVER AND NEW BEDFORD 2 (2008), *available at* http://www.srpedd.org/transportation/SRTA Route Survey - AUGUST 2008.pdf (including a fare equity study conducted in response to a letter from the FTA's Office of Civil Rights).

210 *See* Larry W. Thomas, *Reductions in Transit Service or Increases in Fares: Civil Rights, ADA, Regulatory, and Environmental Justice Implications*, 35 L. RES. DIG., Mar. 2011, at 3 (reporting a survey describing the integration of impact assessments, with relation to service cuts and fare increases); Transit Coop. Research Program, *Transit Agency Compliance with Title VI: Limited English Proficiency Requirements*, 97 RES. RESULTS DIG., Jan. 2011, at 1 (describing the integration of LEP-focused requirements).

211 *See* NATHALIE P. VOORHEES CTR. FOR NEIGHBORHOOD & CMTY. IMPROVEMENT, UNIV. OF ILL. AT CHI., TRANSIT EQUITY MATTERS: AN EQUITY INDEX AND REGIONAL ANALYSIS OF THE RED LINE AND TWO OTHER PROPOSED CTA TRANSIT EXTENSIONS 16–17 (2009), *available at* http://www.uic.edu/cuppa/voorheesctr/Publications/Transit Equity Matters 12.09.pdf (building on FTA's Title VI and environmental justice guidance to develop an "equity index"—consisting of indicators of the extent to which transit enhances mobility, economic and housing development, and environmental and human health).

212 *See* CENTRAL CORRIDOR LIGHT RAIL TRANSIT PROJECT, CENTRAL CORRIDOR TITLE VI ANALYSIS: APPENDIX I (2009), *available at* http://www.metrocouncil.org/transportation/ccorridor/FEIS/AppendixI.pdf (documenting Title VI concerns raised by Minneapolis community groups and mitigation efforts taken by the transit authority); Dist. Councils Collaborative of St. Paul and Minneapolis, *Stops For Us*, DISTRICT COUNCILS COLLABORATIVE, http://dcc-stpaul-mpls.org/special-projects/stops-us (last visited Aug. 18, 2012) (describing community groups' use of public input and the Title VI complaint process to ensure that the federally-funded light rail initiative included stops in low-income and minority areas); *see also Public Influence on the Central Corridor Project*, METROPOLITAN COUNCIL (Oct. 19, 2011), http://www.metrocouncil.org/transportation/ccorridor/PublicInfluence.htm (describing public input, additional stations, and other changes made to provide better access for disability groups).

213 *See* SE. REG'L PLANNING AND ECON. DEV. DIST., *supra* note 209, at 8 (recommending

Metropolitan Area Transit Authority recently conducted a fare and service analysis when budget shortfalls forced increases in fares and changes in service. After holding public hearings and extending outreach and language assistance to LEP populations, the transit system increased fares but structured them to mitigate harms to transit-dependent minority and low-income riders.[214] Similarly, the New Jersey Transit Authority—under pressure from local advocates to reveal their impact assessments—adopted a plan to minimize the effects of fare increases on minority, low-income, and transit-dependent populations.[215]

As discussed in Part IV, governments and civil society groups can do more to strengthen implementation.[216] Yet this account of federal oversight of transit agencies and integration of the directives by transit agencies shows the promise of this new regime.

### *B. Furthering Housing Integration*

#### *1. Overview*

Fair housing provides my second example of equality directives. As noted above, housing segregation and the location of affordable housing are key determinants of social mobility and access to opportunity.[217] As I have argued elsewhere, dismantling spatial segregation requires the federal government to do more than advance nondiscrimination and reduce private

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alternatives to mitigate the potential harm of fare and service changes); *see also* MYERS, *supra* note 209, at 10–13 (detailing analyses of service and fare changes and of the distribution of transit services and amenities); MADISON CNTY. COUNCIL OF GOV'TS, PUBLIC PARTICIPATION PLAN FOR THE ANDERSON/MADISON COUNTY METROPOLITAN PLANNING AREA (2007), *available at* http://www.mccog.net/pdf/mccog_public_participation_policy.pdf (describing public outreach strategies and designs in response to the FTA's guidance); Robert L. Hickey et al., *Using Quantitative Methods in Equity and Demographic Analysis to Inform Transit Fare Restructuring Decisions*, 2144 TRANSP. RES. REC.: J. TRANSP. RES. BOARD 80 (2010) (describing a fare equity analysis conducted by New York City's transit system); *Commission Meeting Minutes*, DES MOINES TRANSIT AUTH. (Mar. 29, 2011), http://www.ridedart.com/4 - Minutes 3-29-11.pdf (detailing outreach to the LEP community and proposed fare and equity analysis).

214 *See* WASH. METRO. AREA TRANSIT AUTH., TITLE VI EQUITY EVALUATION: PROPOSED ADJUSTMENTS TO PASSENGER FARES, ROUTES, HOURS OF SERVICE, AND OTHER CHANGES 3–5 (2010), *available at* http://www.wmata.com/about_metro/docs/Title_VI_Equity_Evaluation_of_FY2011_Budget.pdf (summarizing the potential impact to particular populations and actions taken to mitigate any harm).

215 Kyle Wiswall, *NJ Transit Releases Equity Analysis in Nick of Time, Admits Some Impacts*, MOBILIZING REGION (Apr. 23, 2010), http://blog.tstc.org/2010/04/23/nj-transit-releases-equity-analysis-in-nick-of-time-admits-some-impacts.

216 *See infra* Part IV (providing recommendations for improving efficacy of equality directives).

217 *See supra* notes 155–159 and accompanying text (detailing the consequences of spatial segregation).

market bias—it also requires the government to use its regulatory and programmatic power to promote integrated affordable housing opportunities.[218]

Equality directives in housing aim to use federal power to promote these goals of nondiscrimination and integration. State and local governments that receive federal community development funds must evaluate public and private obstacles to achieving fair housing in their communities and take steps to reduce those obstacles. These regulatory requirements, adopted in 1995, are known as the "analysis of impediments." They apply to Community Development Block Grants, one of the largest sources of federal funding for the revitalization of low-income communities.[219] A HUD manual implementing these regulations provides guidance on the range of ways that grantees can meet these obligations, specifying both how to collect and analyze data and how to structure programs to better promote integration and nondiscrimination.[220] These regulations and informal guidance proved central in a recent case holding Westchester County liable for failing to comply with its statutory duty to affirmatively further fair housing under Title VIII.[221]

*2. Emergence*

The statutory backdrop here is Title VIII's requirement that federal agencies and federal grantees "affirmatively further" fair housing.[222] This provision responds to past federal complicity in creating segregation; evidence shows that key drafters of the provision sought greater engagement by federal actors to combat private market discrimination and to use federal programs to promote integration.[223] Yet the federal government did little to enforce the provision until spurred by litigation in the 1970s. At that time, advocates relied on the provision to challenge

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[218] *See* Johnson, *supra* note 56, at 1212–14 (showing how federal, state, and local governments contribute to residential segregation and urging involvement of government actors in promoting integration opportunities).

[219] The Housing Community Development Act of 1974 requires grantees to certify that they are in compliance with the Fair Housing Act and that they will affirmatively further fair housing. *See* 42 U.S.C. §§ 5304(b)(2), 5306(d)(5) (2006). HUD regulations again require this certification—and more specifically require that grantees conduct a fair housing analysis. *See* 24 C.F.R. § 570.601(a)(2) (2012).

[220] FAIR HOUSING PLANNING GUIDE, *supra* note 2.

[221] U.S. *ex rel.* Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty., 668 F. Supp. 2d 548, 561–62 (S.D.N.Y. 2009).

[222] 42 U.S.C. § 3608(d) (2006).

[223] *See* Florence Wagman Roisman, *Affirmatively Furthering Fair Housing in Regional Housing Markets: The Baltimore Public Housing Desegregation Litigation*, 42 WAKE FOREST L. REV. 333, 389 (2007) (providing the legislative history of the provision).

HUD's past history of creating racial segregation in public housing, as well as ongoing siting practices by HUD and local grantees that operated to further racial segregation. The result was a set of important lower court cases holding that HUD's duty to further fair housing required HUD to promote integration in locating public and subsidized housing.[224] HUD complied by promulgating its first set of regulations on racialized site selection, which prohibited federally funded projects from furthering segregation (or "minority concentration") unless necessary to meet an "overriding need" for housing in the target community.[225]

More than twenty years later, the Clinton Administration issued an order giving further life to the statutory directive. The 1994 Executive Order directs federal agencies to further fair housing in the design of their policies and the administration of their programs.[226] More specifically, one order directs HUD to require grantees to analyze "impediments" to fair housing.[227] HUD now requires that communities seeking to receive grants

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[224] *See, e.g.*, Shannon v. U.S. Dep't of Hous. & Urban Dev., 436 F.2d 809, 816, 821–22 (3d Cir. 1970) (holding that the Fair Housing Act and Title VI require HUD to affirmatively further fair housing by considering the racial and socioeconomic effects of its site selection decisions); NAACP, Bos. Chapter v. Sec'y of Hous. & Urban Dev., 817 F.2d 149, 155 (1st Cir. 1987) (finding the Fair Housing Act to require that HUD "use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases.").

[225] Subpart N—Project Selection Criteria, 37 Fed. Reg. 203–04 (1972) (formerly codified at 24 C.F.R. pt. 200) (rescinded by Elimination of Obsolete Parts, 60 Fed. Reg. 47,260–61 (Sept. 11, 1995)). Prior to *Shannon*, HUD had begun an effort to establish site selection criteria. *See* Steven Lev, *HUD Site and Neighborhood Selection Standards: An Easing for Placement Restrictions*, 22 URB. L. ANN. 199, 207 (1981) (describing efforts undertaken by Secretary George Romney in the Nixon Administration). The Third Circuit's actions in *Shannon* in a sense catalyzed this action. *See* BONASTIA, *supra* note 110, at 128 (providing an account of the effect of the decision on HUD policy).

[226] The order required agencies to promote fair housing in the design and operation of their programs, to publish regulations to implement fair housing directives, and to establish a process for promoting compliance, including procedures for investigation, informal resolution, and sanctions. *See* Exec. Order No. 12,892, 59 Fed. Reg. 2939 (Jan. 17, 1994) (implementing requirements to affirmatively futher fair housing by executive departments and federal agencies).

[227] *Id.* at 2941. The Order requires that HUD "describe a method to identify impediments in programs or activities that restrict fair housing choice and implement incentives that will maximize the achievement of practices that affirmatively further fair housing." *Id*. The Analysis of Impediments (AI) directive also stems from legislation requiring community development grantees to further fair housing. Specifically, in 1983, Congress required that all grantees receiving community development block grant funds certify that they would affirmatively further fair housing. *See* Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633 (codified as amended in scattered titles and sections of U.S.C.). Congress required certification in another HUD affordable housing program in 1990. *See* Cranston-Gonzalez National Affordable Housing Act of 1990 (NAHA), 42 U.S.C. § 12705(b)(15)–(16) (2006) (requiring certification); *id.* § 12704(21) (defining certification).

under major housing affordability and community development programs[228] submit an AFFH certification,[229] analyze "impediments to fair housing choice within the jurisdiction," "take appropriate actions to overcome the effects of any impediments identified through that analysis," and "maintain [relevant] records."[230]

### 3. *Implementation*

As in the area of transportation, federal, state, and local actors are taking steps to implement the fair housing equality directive. At the federal level, HUD implements the directive by providing guidance on how communities can proactively promote fair housing. HUD's *Fair Housing Planning Guide* requires that entities, when conducting their analysis of impediments, assess how relevant laws and policies affect the availability, location, and accessibility of housing and review all conditions affecting fair housing choice on the basis of race, ethnicity, disability, and other categories.[231] The *Planning Guide* requires that jurisdictions take a regional approach to fair housing planning (which is intended to further integration within metropolitan areas), establish procedures for public input, and conduct effective data analysis.[232] The *Planning Guide* then requires jurisdictions to take actions to address these impediments, though, as I discuss in greater detail below, the *Planning Guide*'s language could be more directive on the details of the specific actions that must be taken.[233]

The *Planning Guide* also provides examples of best practices and model interventions to address impediments to fair housing, including creating local fair housing commissions,[234] enacting legislation mandating

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228 In 1995, HUD consolidated the Community Development Block Grant Program (CDBG) with other housing affordability and community development programs, requiring specifically that communities submit what is known as the Consolidated Plan. Consolidated Submission for Community Planning and Development Programs, 60 Fed. Reg. 1896, 1897 (Jan. 5, 1995) (codified at 24 C.F.R. pt. 91, § 91.2 (2012)).

229 Certification requires a written assertion, "[b]ased on supporting evidence," "[a]vailable for inspection" by HUD, the Inspector General, and the public, and "[d]eemed accurate" unless the Secretary determines otherwise. FAIR HOUSING PLANNING GUIDE, *supra* note 2, at 1-4.

230 24 C.F.R. § 91.225(a)(1) (2012).

231 FAIR HOUSING PLANNING GUIDE, *supra* note 2, at 4-4. "Impediments" to fair housing choice include not just violations of the Fair Housing Act, but also actions or omissions that have the effect of restricting housing opportunities on the basis of race, disability, and other areas, and that are "counterproductive to fair housing choice such as" "[c]ommunity resistance" to "minorities, persons with disabilities" and others. *Id.* at 2-17.

232 *Id.* at 2-9, 2-11, 3-27.

233 *See infra* text accompanying notes 261–262 (discussing areas where the *Fair Housing Planning Guide* leaves much discretion to grantees).

234 FAIR HOUSING PLANNING GUIDE, *supra* note 2, at 3-13.

pro-integrative site selection for affordable housing in localities,[235] increasing funding for local fair housing and human rights agencies,[236] adopting laws prohibiting source of income discrimination,[237] creating housing accessibility and inclusionary zoning ordinances,[238] working with local groups to establish fair housing testing programs,[239] and providing mobility assistance for housing voucher recipients.[240]

HUD's most recent guidance to grantees expands on the *Planning Guide* by requiring grant recipients to adopt a comprehensive regional approach to dismantling racial and economic segregation and to promoting housing integration.[241] Research and practice show that the problem of racialized concentration of poverty requires solutions at the regional level. Segregation is manifest not only in terms of racial and economic differences between neighborhoods, but also in the spatial divide between suburbs and cities.[242] Indeed, political and geographical boundaries are often shaped and defined by economic and racial segregation.[243] In that vein, HUD requires federal grantees to work not just within geographically defined barriers but also in conjunction with other localities to remove barriers to segregation. Specifically, grantees must conduct a regional equity assessment to identify areas of racial and ethnic segregation and racially concentrated areas of poverty;[244] understand the demographic trends and the forces driving segregation; identify disparities in access to opportunities such as quality schools, jobs, and stable housing;[245] and take steps at the regional level to address segregation and disparities in

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235 *Id.* at 3-14.

236 *Id.*

237 *Id.* at 4-9.

238 *Id.*

239 *Id.* at 4-11.

240 *Id.*

241 U.S. DEP'T OF HOUS. & URBAN DEV., ADDRESSING EQUITY & OPPORTUNITY: THE REGIONAL FAIR HOUSING AND EQUITY ASSESSMENT (FHEA) GRANT OBLIGATION (2011), *available at* http://www.prrac.org/pdf/Regional_FH_Equity_Assessment_HUD_Aug_2011.pdf [hereinafter ADDRESSING EQUITY]. This regional approach is consistent with the overall goals of the FHA.

242 *See* Briggs, *supra* note 155, at 18, 23.

243 *See id.* at 23; Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1844 (1994) (introducing the argument that political and jurisdictional boundaries can promote racially unequal distributions of political and economic resources).

244 ADDRESSING EQUITY, *supra* note 241, at 7. "Racially Concentrated Areas of Poverty" are defined as census tracks that are a majority non-White and have family poverty rates of more than forty percent. *Id.* at 14.

245 *Id.* at 18. HUD has created five indices for identifying access to opportunity: "School Proficiency Index, Poverty Index, Labor Market Index, Housing Stability Index, [and] Job Access Index." *Id.* at 19.

opportunity.[246]

Notably, this recent guidance articulates goals beyond antidiscrimination, specifying that grantees "do more than just combat discrimination"; they must work towards equity and opportunity.[247] The aim is to create "geographies of opportunity": locations that "effectively connect people to jobs, quality public schools," and other resources necessary for social and economic advancement.[248] This guidance illustrates the approach of equality directives by providing a location for proactive planning and policymaking towards goals of substantive inclusion and equality.

At the state and local levels, grantees are beginning to engage in programs and policies to affirmatively further fair housing goals. The HUD *Fair Housing Planning Guide* provides examples of specific states, including Montana, Pennsylvania, Utah, and Indiana, that have used the analysis of impediments and affirmatively furthering directives to engage in fair housing planning, identify key obstacles to fair housing, and map responsive solutions.[249] Planning professionals and community members have lauded localities in Illinois, Tennessee, Ohio, and Nevada for developing robust analyses of impediments in recent years.[250] Massachusetts has built on HUD's equality directives to undertake in vigorous fair housing planning and programming. For instance, the state gives priority funding to projects and communities that meet certain fair housing criteria. Those criteria include: creating affordable racially and ethnically inclusive housing; accommodating persons with disabilities; and using federal funds to provide housing search assistance to help link families receiving vouchers to housing opportunities in low-poverty, integrated neighborhoods.[251] The state has also required localities seeking federal housing funding to develop an affirmative fair housing program with particular elements, including strengthening the fair housing

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[246] *Id*.

[247] *Id.* at 6.

[248] *Id.* at 3.

[249] FAIR HOUSING PLANNING GUIDE, *supra* note 2, app. C.

[250] *See* Michael Allen, *No Certification, No Money: The Revival of Civil Rights Obligations in HUD Funding Programs*, 78 PLAN. COMMISSIONERS J. 16, 17 (2010) (citing as exemplary the Naperville, Illinois analysis of impediments); *see also* Daniel Lauber, *Analyses of Impediments to Fair Housing Choice*, PLAN./COMM., http://www.planningcommunications.com (follow "Analyses of Impediments to Fair Housing" hyperlink) (last visited Aug. 18, 2012) (describing a planning consultant's examples of analyses of impediments he helped produce in Naperville, Illinois and in localities in Tennessee, Ohio, and Nevada).

[251] *See* MASS. DEP'T OF HOUS. & CMTY. DEV., AFFIRMATIVE FAIR HOUSING AND CIVIL RIGHTS POLICY 22, 24–25 (2010), *available at* http://www.mass.gov/hed/docs/dhcd/hd/fair/affirmativefairhousingp.pdf (detailing civil rights initiatives and specifying programs and policies required of localities).

compliance infrastructure; developing site selection and land use policies that promote affordable housing; conducting outreach to underrepresented groups; eliminating local residency preferences; and reforming exclusionary zoning practices.[252]

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

## IV
## TAKING EQUALITY DIRECTIVES SERIOUSLY

Thus far, I have argued that the existence of American equality directives should prompt academic commentators to rethink the fundamental structure of American civil rights regulation. Civil rights law depends not only on adjudicatory power, but also on regulatory and programmatic power. In bringing attention to these directives, I hope to reshape civil rights commentary now dominated by accounts of court decisions. I hope to make equality directives more central to the study and teaching of civil rights law.

I have argued above that my account has implications not just for scholars but also for the real-world practice of antidiscrimination and equity. In this final Part, I direct my arguments to those who might implement these equality directives. The case studies on housing and transportation reveal an emerging effort to develop and implement equality directives. They suggest a basis for faith in a regulatory approach, despite the real constraints of administrative agencies.

In this Part, I show what government actors and private groups might do to strengthen the equality directive regime. I am not arguing that these models should supplant existing antidiscrimination law, nor do I want to suggest that equality directives are a solution to all existing antidiscrimination and inequity problems. I contend only that much more can be done to harness their capacity. Implementation of these directives will require government oversight and creative and persistent advocacy by private groups, including litigation and policy advocacy.

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[252] *See id.* at 24.

I begin this Part with ways to strengthen equality directives themselves, balancing their emphasis on flexibility and process-based solutions with the need to ensure that these equality directives achieve results. I then turn to strengthening the role of government actors in overseeing and implementing these directives, a crucial part of which depends on prodding by private actors. Finally, I turn to how private groups can strengthen and expand emerging implementation efforts, relying on traditional forms of administrative and court enforcement where possible—but also, crucially, non-litigation forms of advocacy and implementation. My faith in the approach ultimately depends on private group engagement with the directives: Civil rights groups, community organizers, and policy advocates can help spur implementation, enhance the capacity of equality directives, and thereby help transform civil rights practice to better promote equity and social inclusion.

### *A. Strengthening Directives*

A key strength of equality directives is that they emphasize regulatory forms not typically associated with civil rights law—an emphasis on process and flexibility, as described below. Yet, equality directives are also nested within a compliance frame: the carrot and stick of the Spending Clause. Implementing equality directives requires balancing flexibility and innovation with incentives to ensure compliance. My aim here is not to prescribe a particular formula for equality directives: The correct balance of incentives and flexibility for individual directives should be tailored to the particular circumstances and developed through an interchange among government, regulated actors, and private parties. But here I lay out some key considerations to guide this development going forward. I also address some potential constitutional concerns with directives.

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

Equality directives emphasize a set of procedural planning mechanisms (impact assessment, evaluation of alternatives, and participation) as a means of furthering substantive equity goals. This emphasis on self-assessment and participation is a key strength of the approach. Indeed, the procedural "means" is intertwined with the substantive ends: inclusion. In fact, the harm repeatedly identified by transportation equity advocates is the failure to include people of color, people with disabilities, and others in the planning, design, and implementation of policies and programs.[253]

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[253] Thomas Sanchez and Marc Brenman begin their definition of transportation equity with the

In addition, integrating equity and inclusionary concerns during front-end planning, before a decision is made, has advantages over the traditional method of civil rights regulation. In other contexts, commentators have found that regulatory intervention at the planning stage allows the regulated actors—who have the most information about the problem—to devise standards and goals, rather than imposing government standards through top-down regulation.[254] Regimes that allow for innovation and experimentation can also promote the development of effective solutions in cases of regulatory uncertainty—that is, when the regulator, regulated party, and private parties are unclear about the proper solution.[255] Beyond the advantages of expertise and innovation, front-end planning helps promote stakeholder buy-ins and compliance.[256] Similarly, with equality directives, front-end planning with an equity lens may yield better results than federal mandates or retrospective evaluation by courts and agencies. Equality directives can help jurisdictions tailor solutions to local conditions, creating solutions that may have more legitimacy with grantees.[257]

This emphasis on procedural interventions is a strength, yet equality directives will in some instances benefit from more specific delineation of the procedural steps that grantees should take. These rules will differ in particular contexts and must be tailored to the needs of particular areas (e.g., transportation, housing, agriculture, or criminal justice, among others). For instance, transportation advocates have sought more specific

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concept of ensuring "opportunities for meaningful involvement in the transportation planning process." SANCHEZ ET AL., *supra* note 156, at 8; *see also id.* at 115 (describing disability groups' emphasis on inclusion in policy and planning).

254 *See, e.g.*, Cary Coglianese & David Lazer, *Management-Based Regulation: Prescribing Private Management to Achieve Public Goals*, 37 LAW & SOC'Y REV. 691, 693–94 (2003) (conducting case studies in the area of food safety, industrial safety, and environmental protection to support an account of "management-based regulation"—a regime that directs regulated entities to engage in a planning process to achieve public goals).

255 *See generally* Charles F. Sabel & William H. Simon, *Contextualizing Regimes: Institutionalization as a Response to the Limits of Interpretation and Policy Engineering*, 110 MICH. L. REV. 1265 (2012) (discussing the emergence of contextualizing regimes: regulatory regimes that structure engagement by various stakeholders to address public problems compounded by ignorance or uncertainty).

256 *See* Coglianese & Lazer, *supra* note 254, at 695–96 (arguing that by allowing stakeholders to develop solutions, management-based regulation may promote better compliance with government rules as well as innovative solutions).

257 *Cf.* Sabel & Simon, *supra* note 255, at 1308 (describing contextualizing regimes as beginning with broad norms that evolve and are refined after investigation and deliberation); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1069 (2004) (discussing, in the context of public law remedies, "rolling-rule regime[s]"—provisional rules that "incorporate a process of reassessment and revision with continuing stakeholder participation").

guidance to grantees on the methodology for conducting impact assessments.[258] Similarly, fair housing advocates have asked HUD to revise its AFFH regulations to require more specific metrics for measuring progress towards fair housing goals.[259]

*2. Suggesting and Directing*

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

As an example, the FTA's equality directives mandate inclusion, but only recommend a set of "[e]ffective practices," making clear that "[r]ecipients and subrecipients have wide latitude to determine how, when, and how often specific public involvement measures should take place, and what specific measures are most appropriate."[260] While the FTA mandates impact assessments, no guidance specifies the methodology for determining impacts. Additionally, although "major" changes require impact assessments, the agency lets grantees define what is "major."[261] HUD's *Fair Housing Planning Guide* similarly leaves to grantees the determination of what constitutes a fair housing barrier, whom to include in planning, proper data collection methods, and appropriate remedies.[262]

Some latitude permits innovation, tailoring, and flexibility. Yet equality directives should delineate specific, effective methodologies for conducting impact assessments or analyzing barriers to fair housing, and should provide strong incentives for grantees to adopt such approaches. For communities seeking to remedy impediments to fair housing, for instance, equality directives might require jurisdictions to certify that they have

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258 *See infra* note 307 and accompanying text (describing transportation advocates' requests for more specific regulatory guidance in the aftermath of a successful administrative complaint).

259 *E.g.*, THE OPPORTUNITY AGENDA, PUBLIC POLICY BRIEF: REFORMING HUD'S REGULATIONS TO AFFIRMATIVELY FURTHER FAIR HOUSING 3 (2010), *available at* http://opportunityagenda.org/files/field_file/2010.03ReformingHUDRegulations.pdf.

260 FTA C 4702.1A, *supra* note 1, at IV-5 ("Recipients should make these determinations based on the composition of the population affected by the recipient's action, the type of public involvement process planned by the recipient, and the resources available to the agency.").

261 *See id.* at V-5 (stating that a "major service change[]" is often "defined as a numerical standard, such as a change that affects 25 percent of service hours of a route").

262 *See* FAIR HOUSING PLANNING GUIDE, *supra* note 2, at 1-5, 2-6 to 2-10, 2-12 to 2-14, 2-23 to 2-24 (providing a framework for an analysis of impediments analysis and the development of a remedial plan).

eliminated the most common barriers to fair housing or adopted proven best practices. In general, equality directives should allow tailoring of solutions by grantees, but they should also strengthen incentives and guidance to ensure that grantees adopt effective methods for promoting equality and inclusion.[263] The balance between these two goals will need to be developed in specific contexts, with the input of civil rights organizations, community groups, the private sector, state and local governments, and other groups. Consistent with this strategy, civil rights groups have sought to shape more specific AFFH regulatory guidelines.[264]

### *3. Addressing Constitutional Concerns*

It is worth noting that equality directives, in requiring the affirmative consideration of race and ethnicity, may spark constitutional concerns. A powerful feature of the regime is that many of these directives condition federal spending—and thus depend at least in part on Congress's Spending Power.[265] To date, the Court has construed the Spending Clause to allow Congress broad power to regulate as long as Congress avoids violating other constitutional provisions such as the Equal Protection Clause.[266]

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

[264] *See* Letter from Philip Tegeler, Poverty & Race Research Action Council, et al., to Shaun Donovan, Sec'y of Hous. & Urban Dev., U.S. Dep't of Hous. & Urban Dev. (Oct. 29, 2010), *available at* http://prrac.org/pdf/AFFH_rule_final_pre-publication_comments_10-29-10.pdf (suggesting components of a strong AFFH rule including accountability and oversight measures).

[265] *See* U.S. CONST., art. I, § 8, cl. 1 (giving Congress the "Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States").

[266] Apart from the Fair Housing Act, the directives I have highlighted emerge from statutes that are the proper exercise of Congress's Spending Power. This is clear because (1) underlying programs promote the general welfare in providing transportation, housing, and other services; (2) the conditions imposed are related to the federal interest in ensuring that all groups fairly benefit from federal programs and funding; and (3) the conditions are not unduly coercive for states and localities. *See* S. Dakota v. Dole, 483 U.S. 203, 207, 211, 217–18 (1987) (discussing direct limitations on the Spending Power and upholding Congress's conditioning of federal highway funds on state adoption of a 21-year-old drinking age); *see also* Barnes v. Gorman, 536 U.S. 181, 185 (2002) ("Title VI invokes Congress's power under the Spending Clause, U.S. Const., Art. I, § 8, cl. 1, to place conditions on the grant of federal funds.").

The Supreme Court's recent decision finding that Congress's expansion of the federal Medicaid program—conditioned on states' loss of federal Medicaid funds—violates the Spending

Some may raise concerns about whether equality directives risk running afoul of the Equal Protection Clause.[267] On this score, the Supreme Court's recent decisions point to a tension between the disparate impact standard and the Equal Protection Clause.[268] However, equality directives only require that racial and ethnic harms be taken into consideration in the planning and design of program and policy. Given that equality directives do not require the adoption of an explicitly race-conscious action, they should not run afoul of current understandings of the Equal Protection Clause.[269]

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Power is unlikely to alter this analysis for at least four reasons. *See* National Fed. of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2604–06 (2012) (finding Congress's conditioning of Medicaid expansion on termination of all federal Medicaid funds unduly coercive). First, the Court reaffirmed the core holding of *Dole* that the federal government may place conditions on grants to states. *See id.* at 2604–05 (explaining and distinguishing *Dole*). Second, few programs will have the reach of Medicaid, which accounts for a substantial twenty percent of state budgets. *See id.* at 2604 (also noting that federal money covers fifty to eighty-three percent of those costs). By contrast, transportation spending—as important as it is in providing jobs, services, and mobility—accounts for 7.7% of state budgets, about one third of which comes from federal funds. *See* NAT'L ASS'N OF STATE BUDGET OFFICERS, FISCAL YEAR 2010 STATE EXPENDITURE REPORT 5, 62 (2011), *available at* http://www.nasbo.org/sites/default/files/2010%20State%20Expenditure%20Report.pdf. Accordingly, a court is unlikely to find termination of funds for failure to comply with federal conditions under these programs unduly coercive. *See National Fed. of Indep. Bus.*, 132 S. Ct. at 2604 (finding Medicaid changes to be more than mere inducement for state compliance but effectively a "gun to the head"). Third, unlike with the Medicaid Expansion, an agency's ability to terminate funds under equality directives extends only to the specific program that is noncompliant, rather than independent programs. *See, e.g.*, 42 U.S.C. § 2000d-1 (2006) (limiting fund termination "to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and . . . its effect to the particular program, or part thereof, in which such noncompliance has been so found"). Finally, Title VI of the 1964 Civil Rights Act addresses race and ethnic discrimination, so it is also justified under Congress's power to enforce section five of the Fourteenth Amendment. *See* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 727–28 (2003) ("Congress may enact so-called prophylactic legislation [under the enforcement clauses of the Fourteenth Amendment] that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.").

[267] U.S. CONST. amend. XIV, § 1; *see Dole*, 483 U.S. at 210–11 (holding that exercises of the Spending Power cannot run afoul of another constitutional provision).

[268] The Court's decision in *Ricci v. DeStefano* suggests the existence of a tension between the disparate treatment norm embodied in statutes and the Constitution, as compared with that embodied in the statutory disparate impact framework. *See* 129 S. Ct. 2658, 2664 (2009). The Court has so far declined to take up Justice Scalia's invitations to confront this tension directly. *See id.* at 2681–82 (Scalia, J., concurring) ("[The decision] . . . postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection?").

[269] *Cf.* Sheila R. Foster, *Environmental Justice & the Constitution*, 39 ENVTL. L. REP. 10,347, 10,350 (2009) (arguing prior to *Ricci* that environmental justice provisions that forbid actions with an unjustified impact do not contain the type of "'racial classification' that federal courts have been willing to find justifies strict judicial scrutiny of such policies").

### *B. Enhancing Government Implementation*

Equality directives depend in large part on the capacity and will for development of these directives at the federal level, as well as the implementation of these directives by federal, state, and local actors. In this section, I explain that the existing system of oversight contains strong incentives for states and localities to comply. At the same time, I show how the system might be strengthened. Any suggestions I make here are necessarily intertwined with private implementation, which I address in the following section. Strong government oversight and implementation will certainly depend on prompting by private actors using a range of advocacy tools.

#### *1. Oversight Structure*

A system of federal agency review backs an equality directive regime, with possible sanctions for failure to comply. For instance, transportation-funding recipients are required to certify their compliance with Title VI annually. Every three years, they are required to submit a detailed report to the Department of Transportation documenting disparate impact assessments and mitigation efforts taken in response to found impacts, and providing a record of Title VI complaints and litigation.[270] Failure to adhere to regulatory requirements can lead to a finding that a funding recipient is "deficient."[271] The Title VI report is then returned to the grantee for improvement. Grantees are deemed "noncompliant" if they engage in practices that have the "purpose or effect of denying persons the benefits of" the grantee's services, or discriminatorily "exclude" individuals or groups.[272] A finding of noncompliance allows the agency to withhold federal funds pending resolution of the matter, or to begin a process to terminate federal funding.[273] Similarly, HUD requires an annual certification from community development grantees that they are affirmatively furthering fair housing.[274]

The actual strength of this formal regime depends on agency willingness to conduct civil rights reviews and to threaten federal funds termination for failure to do so. In the wake of litigation in Westchester to

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[270] *See* FTA C 4702.1A, *supra* note 1, at II-2 (describing FTA review of recipients and subrecipients).

[271] *Id.* If the FTA reviews the reporting and finds it satisfactory, the FTA will approve the reporting as having "no deficiency." *Id.* at VIII-2.

[272] *Id.* at VIII-2 to VIII-3; *id.* at II-3 (defining "non-compliance").

[273] *Id.*

[274] *See* 42 U.S.C. § 5304(b)(2) (2006) (requiring grantees to certify that the grant will be conducted to "affirmatively further fair housing").

enforce the fair housing directives,[275] for instance, HUD has started to initiate civil rights reviews of state and local grantees—even apart from prompting through private complaints or legal action.[276] As an example, HUD recently found that Marin County, California, had failed to meet its obligation to affirmatively further fair housing. In particular, the County had received community development funds, but a review by HUD showed that the County failed to promote fair housing and inclusion, ensure meaningful citizen participation, and provide adequate accessibility for persons with disabilities.[277] In the end, the County signed a voluntary agreement with HUD that required it to affirmatively market affordable housing to minorities and persons with disabilities; to complete an analysis of impediments to fair housing; and to increase outreach and services to racial and ethnic minorities, those with limited English speaking proficiency, and to persons with disabilities.[278] HUD also recently threatened to terminate $10 million in federal funding to a parish in Louisiana due to the racially and ethnically discriminatory effect of the parish's proposed restrictions on multifamily occupancy.[279] In response, the parish rescinded the proposed rules.[280] Similarly, HUD withheld $1.7 billion in federal funds from Texas for failing to adhere to AFFH requirements.[281] Because state and local grant recipients are a relatively small set of repeat players who interact with federal agencies, even a few

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[275] U.S. *ex rel.* Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty., 668 F. Supp. 2d 548 (S.D.N.Y. 2009); *see infra* notes 288–293 and accompanying text (describing the *Westchester* litigation).

[276] The National Low Income Housing Coalition, an advocacy group, noted that "legal action did not precipitate" the Marin County agreement—"another indication that HUD is giving greater scrutiny and heightened enforcement to affirmatively furthering fair housing." Memorandum from National Low Income Housing Coalition to Members 3 (Jan. 14, 2011), *available at* http://nlihc.org/sites/default/files/Memo16-2.pdf.

[277] *See* Press Release, Dep't of Hous. and Urban Dev., HUD and Marin County Agreement Will Promote Affordable Housing Opportunities for Minorities and Persons with Disabilities (Jan. 4, 2011), *available at* http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2011/HUDNo. 11-002 (asserting that "Marin County had failed to meet its [f]air [h]ousing obligations" in its use of HUD funds).

[278] *Id.*

[279] *See* Craig Gurian & Michael Allen, *Making Real the Desegregating Promise of the Fair Housing Act: "Affirmatively Furthering Fair Housing" Comes of Age*, 43 CLEARINGHOUSE REV. 560, 569 (2010) (noting HUD's threat to withhold $10 million in federal funds to the parish).

[280] *See* Chris Kirkham, *St. Bernard Parish Council Backs Off on Vote on Apartments*, THE TIMES-PICAYUNE (Nov. 3, 2009, 10:14 PM), http://www.nola.com/politics/index.ssf/2009/11/st_bernard_parish_council_back.html (reporting on the parish's rescission of multifamily occupancy rule in the wake of a federal threat).

[281] *See* Rhiannon Meyers, *State Plan for Ike Money Draws 2nd Complaint*, GALVESTON COUNTY DAILY NEWS (Dec. 9, 2009), http://galvestondailynews.com/story/148454/ (detailing the withholding of federal disaster recovery funding).

such enforcement actions may spur greater compliance by grantees.

### 2. *Addressing Constraints*

Relying on federal agencies and executive power also presents challenges. The level of civil rights enforcement may vary by presidential administration. This constraint is potentially significant, but should not be overstated. For instance, the Bush administration—generally perceived as less supportive of civil rights—expanded DOT's equality directives.[282] The Bush Administration also reissued the analysis of impediments guidance and the *Fair Housing Planning Guide*, "remind[ing]" jurisdictions of the need to update their analyses of impediments and of the relevant fair housing regulations.[283] Moreover, once established, equality directives can be sustained by their own political economy, making wholesale abandonment of their goals less likely. The structure of equality directives allows diffusion of goals at the state and local levels, which allows buy-in by a wide array of willing state and local stakeholders. This diffusion in turn allows the development of interest group pressure to implement such goals.[284]

A related challenge is that federal agencies vary in their capacity to further inclusionary norms, and some even have regulatory interests that

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282 *See supra* notes 196–205 and accompanying text (detailing the 2007 post-*Sandoval* revision of the DOT environmental justice and LEP guidelines).

283 *See* Memorandum from Nelson R. Bregón, Gen. Deputy Assistant Sec'y for Cmty. Planning & Dev., and Carolyn Peoples, Assistant Sec'y for Fair Hous. & Equal Opportunity, U.S. Dep't of Hous. & Urban Dev., to all CPD Field Office Dirs., et al. (Sept. 2, 2004), *available at* http://www.hud.gov/offices/fheo/library/finaljointletter.pdf. The Bush Administration again reminded community development grantees of their fair housing duties in 2007. *See* Memorandum from Pamela H. Patenaude, Assistant Sec'y for Cmty. Planning & Dev., and Kim Kendrick, Assistant Sec'y for Fair Hous. & Opportunity, U.S. Dep't of Hous. & Urban Dev., to Cmty. Planning & Dev. Field Dirs., et al. (Feb. 9, 2007), *available at* http://www.hud.gov/offices/fheo/promotingfh/fairhousing-cdbg.pdf.

284 Of course, whether this happens with equality directives remains to be seen. But the development and diffusion of other civil rights norms and policies shows that a complex political economy can develop to sustain even controversial programs. For instance, John Skrentny has shown how pragmatic bureaucrats in federal agencies and political leaders like Richard Nixon came to promote affirmative action in employment. *See* JOHN D. SKRENTNY, THE IRONIES OF AFFIRMATIVE ACTION 221–25 (1996) (summarizing his account of the complex culture and politics that helped lead to the development and endurance of affirmative action despite its tension with moral and political goals of colorblindness). I do not invoke this analogy to suggest that equality directives should follow along the same fraught path as affirmative action, but only to emphasize that policies help create politics, and politics in turn sustain policies. *Cf.* Mara S. Sidney, *National Fair Housing Policy and Its (Perverse) Effects on Local Advocacy*, *in* FRAGILE RIGHTS WITHIN CITIES, *supra* note 84, at 208–09 (arguing that policies mobilize groups by allocating resources to them and by instantiating the definition of a social problem). As I discuss later, I believe that the political alliances that will help sustain equality directives are worth developing. *See infra* notes 309–315 and accompanying text.

run counter to civil rights and equity concerns.[285] Importantly, this challenge stems from what I have previously identified as a strength of the equality directives approach.[286] Equality directives' power lies in their "embeddedness" in federal agencies that distribute funding, oversee programs, and have rulemaking authority—agencies like the DOT and HUD—rather than agencies that are dedicated to addressing civil rights, like the EEOC.

Yet this embedded strength can prove a constraint when civil rights goals are not a federal agency's priority. Addressing this constraint requires supporting the civil rights capacity of the agencies by, for instance, expanding staff and other resources to conduct oversight and provide technical assistance. Particular equality directives might require revision to incorporate increased oversight and reporting. For instance, the Government Accounting Office (GAO) recently recommended a set of changes to improve the efficacy of the analysis of impediments process. In its recommendations, the GAO advised that HUD should not only increase oversight, but also promulgate regulations requiring periodic updating of the analysis of impediments and submission for reviews of the same by HUD.[287]

In short, increasing support and funding for government oversight and implementation is crucial. This is true not simply at the federal level, but at all levels of government. The question is how to create incentives to more fully implement the regime. The best answer, I believe, lies in private group advocacy. Private groups must engage these directives—by explaining their benefits in particular substantive areas, pushing for expansion where appropriate, and advocating for greater funding, implementation, and oversight at all levels of government. As I show in the next section, I see promising efforts emerging upon which civil society groups might expand.

### C. *Expanding Private Group Engagement*

Agency-driven oversight is only one way of ensuring that these directives are brought to life. Depending on agency enforcement presents

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[285] *See, e.g.*, BONASTIA, *supra* note 110, at 13–14, 139 (arguing that HUD has historically proved a weak "institutional home" for civil rights enforcement); SANCHEZ ET AL., *supra* note 156, at 76–77 (noting the limitations of DOT in enforcing civil rights).

[286] *See* text accompanying notes 139–141 (describing the virtues of integrating civil rights requirements into the ongoing requirements and operations of a funding program).

[287] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-905, HOUSING AND COMMUNITY GRANTS: HUD NEEDS TO ENHANCE ITS REQUIREMENTS AND OVERSIGHT OF JURISDICTIONS' FAIR HOUSING PLANS 32–33 (Sept. 2010), *available at* http://www.gao.gov/assets/320/311065.pdf.

the risk of paper compliance—merely ensuring that grantees have completed paperwork certifying their compliance with Title VI or AFFH directives. Moreover, lacking resources or will, agencies might fail to take further steps to evaluate whether grantees have met substantive goals. In addition, relying on administrative review is likely to generate little enthusiasm from civil society groups traditionally interested in rights enforcement. Even with the benefits I have articulated, such a system compares poorly to courts if it operates without the support of private civil society groups. From this vantage point, an administrative enforcement regime that leaves little room for private engagement will seem thin.

For these reasons, I see private group engagement as a vital part of the equality directive regime. Building on existing efforts to enforce and implement these directives can occur through traditional forms of private attorney general-type enforcement, as I describe below. But private implementation of equality directives should not be limited to traditional forms of enforcement. Equality directives' success depends on civil rights groups using a variety of advocacy tools to further implementation. Success also depends on civil rights groups engaging with community-based groups, particularly at the state and local levels.

### *1. Harnessing the Private Attorney General*

Where possible, private advocates should use traditional litigation tools and administrative enforcement to encourage states and localities to comply with equality directives, to create incentives for broader compliance, and to strengthen the scope of equality directives. Promising efforts are already emerging.

#### a. Litigation

A New York–based fair housing group recently brought suit to enforce the fair housing equality directives in Westchester County, New York. As previously noted, Supreme Court jurisprudence limiting implied private rights of action inhibits litigation to enforce equality directives.[288] In the Westchester case, the plaintiffs effectively surmounted this doctrinal

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[288] *See supra* notes 61–63 and accompanying text. *Alexander v. Sandoval*, 532 U.S. 275 (2001), and *Gonzaga v. Doe*, 536 U.S. 273 (2002), raise formidable challenges to private enforcement of provisions in Title VI and Title VIII that lack explicit private rights of action. The *Sandoval* Court appeared to leave open the possibility of private enforcement through 42 U.S.C. § 1983 (2006). *See Sandoval*, 532 U.S. at 299–300 (Stevens, J., dissenting) (suggesting that Title VI's disparate impact regulation could be enforced using § 1983). However, some lower courts have not allowed the use of § 1983 to enforce Title VIII's AFFH provision. *See, e.g.*, Asylum Hill Problem Solving Revitalization Ass'n v. King, 36 Conn. L. Rptr. 422 (Super. Ct. 2004) (declining to enforce Title VIII's AFFH provisions using § 1983).

challenge by relying on a novel argument. They argued that Westchester's annual certifications to the federal government, which stated that it had complied with the equality directives, were "false" within the meaning of the False Claims Act.[289] The district court substantially accepted the plaintiffs' arguments and granted them partial summary judgment. The judgment held that the County failed to conduct a proper analysis of impediments or take action to address racial discrimination and segregation within the County.[290] With the help of HUD, the parties negotiated a consent decree that remains subject to monitoring by the district court.

It may be too early to deem the case a complete success. Positively, the consent decree requires Westchester to pay $30 million to the federal government, $21.6 million of which would be placed in a HUD account specifically for the purpose of developing integrated housing in the County.[291] The settlement also requires the County to spend $30 million to build affordable housing in communities with low minority populations.[292] At the same time, as of this writing, the plaintiffs' counsel contend that the County and the court-appointed monitor have taken insufficient action to comply with the decree.[293]

However, in significant ways the case has already strengthened the fair housing equality directive regime. For example, in holding Westchester

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[289] U.S. *ex rel.* Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty., 668 F. Supp. 2d 548, 550 (S.D.N.Y. 2009) (adjudicating plaintiffs' claim under the False Claims Act). The False Claims Act includes a *qui tam* provision that allows third parties to bring suits against alleged defrauders of the federal government. *See* 31 U.S.C. §§ 3729–33 (2006). The Antidiscrimination Center of New York (ADC) claimed that Westchester took $52 million in federal grants for housing development between 2000 and 2006 while falsely certifying that it was complying with the FHA regulations to affirmatively further fair housing. *See* Complaint-in-Intervention of the United States at 13, 668 F. Supp. 2d 548 (No. 06 Civ. 2860 (DLC)). In previous work, I have written more extensively about the facts and legal theories in the case. *See* Johnson, *supra* note 56, at 1215–18 (summarizing the *Westchester* litigation).

[290] *See Westchester*, 668 F. Supp. 2d at 564–65 (concluding that the County "utterly failed to comply with the regulatory requirement that the County perform and maintain a record of its analysis of the impediments to fair housing choice in terms of race").

[291] *See* Stipulation and Order of Settlement and Dismissal ¶ 3, U.S. *ex rel.* Anti-Discrimination Ctr. of Metro N.Y., Inc., v. Westchester Cnty., 668 F. Supp. 2d 548 (S.D.N.Y. 2009) (No. 06 Civ. 2860 (DLC)).

[292] *Id.* ¶ 5.

[293] *See Doesn't the Westchester Consent Decree Require an Implementation Plan That Insures Pro-AFFH Development?*, ANTI-DISCRIMINATION CTR. (Jul. 21, 2012), http://www.antibiaslaw.com/westchester-false-claims-case/doesnt-westchester-consent-decree-require-implementation-plan-insures- (decrying the lack of an adequate implementation plan to promote integrated housing in the County); *Monitor's "2-year" Review Fails to Hold Westchester to Account*, ANTI-DISCRIMINATION CTR. (Jan. 10, 2012), http://www.antibiaslaw.com/westchester-false-claims-case/monitor's-"2year-review"-fails-hold-westchester-account (contending that Westchester County is violating the implementation consent decree and that the court-appointed monitor is failing to take appropriate action).

County liable, the opinion makes clear that states and localities need to do more than paper compliance with equality directives; they must do a meaningful analysis of impediments to fair housing and take remedial action. This ruling will thus likely affect jurisdictions beyond Westchester County. More than one thousand state and local grantees under the community development block grant program must certify that they are furthering fair housing,[294] must implement a more robust meaning of that certification, and may face consequences—adverse litigation and administrative action—for failing to further those goals.[295] A stable set of repeat players means that actors should have institutional incentives to further the equality directive's goals. Grantees regularly receive state and local federal funding (in this case through the Community Development and Block Grant Program), interact with federal administrators about the funding proposals,[296] and engage in learning networks with each other.[297]

Relatedly, in its actions surrounding the case, the federal government

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[294] *See Community Development Block Grant Program—CDBG*, U.S. DEP'T OF HOUS. & URBAN DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/communitydevelopment/programs (last visited July 4, 2012) (summarizing the CDBG program).

[295] Most CDBG grantees are known as "entitlement jurisdictions." These jurisdictions are generally urban counties and metropolitan areas that receive annual grants on a formula basis. *See Community Development Block Grant Entitlement Communities Grants*, U.S. DEP'T OF HOUS. & URBAN DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/communitydevelopment/programs/entitlement (last visited July 4, 2012).

[296] To receive its annual CDBG entitlement grant, a grantee must prepare and submit a Consolidated Plan to HUD. *See* 24 C.F.R. § 91 (2006) (specifying the scope and requirements of a Consolidated Plan). A Consolidated Plan is a jurisdiction's comprehensive planning document and application for funding under certain Community Planning and Development formula grant programs. *Community Development Block Grant Entitlement Communities Grants*, *supra* note 295. HUD provides on-going technical assistance and training for grantees. *See, e.g.*, *"Basically CDBG" Course Training Manual*, U.S. DEP'T OF HOUS. & URBAN DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/communitydevelopment/training/basicallycdbg (last visited July 4, 2012) (providing training on requirements for CDBG grantees).

[297] Learning networks occur through nonprofit umbrella associations comprised of local governments. The associations provide technical assistance and serve as a clearinghouse for information about CDBG and other HUD programs. *See, e.g.*, *National Community Development Association—About NCDA*, NAT'L CMTY. DEV. ASS'N, http://www.ncdaonline.org/overview.asp (last visited July 4, 2012) (describing the association as comprised of 550 local governments and designed to provide information on federally funded community and economic development programs). HUD's trainings also provide opportunities to share information, as do nonprofit foundations and the general dissemination of research and best practices. *See, e.g.*, *Publications—Community and Economic Development*, U.S. DEP'T OF HOUS. & URBAN DEV., http://www.huduser.org/portal/taxonomy/term/34 (last visited July 4, 2012); *Training*, U.S. DEP'T OF HOUS. & URBAN DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/communitydevelopment/training (last visited July 4, 2012).

conveyed that it would take enforcement of the regulatory directives more seriously. HUD not only helped broker the settlement, but also vowed to strengthen the fair housing regulations and to enforce them more vigorously.[298]

Finally, the case mobilized private actors. For instance, it prompted advocacy from fair housing groups that previously focused mainly on private litigation in individual cases.[299] One effect of the case was to reveal to fair housing groups the potential gains of increased attention to these equality directives. National, state, and local housing groups have banded together to press for a broader revision of the AFFH rules. They advocate for a more specific set of goals and requirements on housing and urban development grant recipients.[300]

b. Administrative Enforcement

Private groups can also participate in enforcement of the equality directives through administrative complaint mechanisms at both federal and state levels. The success of administrative complaints depends in substantial part on agency willingness to process them and take them seriously. Private groups need to engage in advocacy to ensure such enforcement occurs. A recent complaint against a local transit agency provides a powerful example of the potential of such complaints to prompt compliance by grantees.

In 2009, several San Francisco Bay Area groups filed a Title VI complaint against the Bay Area Regional Transit Authority (BART), which operates the public rail system that connects San Francisco, California with the surrounding East Bay and Northern San Mateo counties. BART sought to extend the transit system using regional revenue, $70 million in stimulus

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298 A HUD official was quoted in the *New York Times* as saying, "Until now, we tended to lay dormant. This is historic, because we are going to hold people's feet to the fire." Sam Roberts, *Housing Accord in Westchester*, N.Y. TIMES, Aug. 11, 2009, at A1; *see also* Allen, *supra* note 250, at 16 (describing the *Westchester* litigation as a "groundbreaking lawsuit" which contributes to stronger civil rights enforcement in housing); Johnson, *supra* note 56, at 1223–24 (describing HUD efforts to revise the AFFH regulations and to enforce existing requirements in state and local programs).

299 *See* Johnson, *supra* note 56, at 1223–24 (providing an account of private group mobilization as a result of the *Westchester* case).

300 *See Housing Fairness Act of 2009: Hearing on H.R. 476 Before the Subcomm. on Hous. and Cmty. Opportunity of the H. Comm. on Fin. Servs.*, 111th Cong. 5–6 (2010) (statement of John D. Trasviña, Assistant Sec'y for Fair Hous. and Equal Opportunity) (describing efforts to reform the AFFH rule); Affirmatively Furthering Fair Housing and Fair Housing Plans, Notice of Informal Meeting, 74 Fed. Reg. 33,456 (July 13, 2009) (announcing informal meeting to collect public views on proposed rules to implement AFFH); Gurian & Allen, *supra* note 279 (noting that the *Westchester* case helped to spur current rulemaking).

funds,[301] and loans from the DOT.[302] The groups argued that the system extension would not adequately service public transit–dependent low-income and minority populations of East Oakland and that it would ignore the environmental impacts on communities of color.[303] In their complaint to the Federal Transit Agency, the groups alleged that BART failed to prepare the required service and fare equity analyses as required by DOT's equality directive[304] or to conduct a proper analysis of disparate impact.[305] Agreeing that BART's impact analyses were insufficient, the DOT reallocated $70 million from the airport connection project to other BART projects.[306]

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[301] The region's Metropolitan Transportation Commission (MTC) oversees funding for the BART system. The extension project cost $459 million overall. *Abstract: Resolution No. 3434, Revised*, METRO. TRANSP. COMM'N (Dec. 19, 2001), *available at* http://mtc.ca.gov/planning/rtep/pdf/RES-3434.pdf. In 2009, the MTC allegedly agreed to allocate $70 million in stimulus money to help fund the project. *See* Complaint Under Title VI of the Civil Rights Act of 1964 and Executive Order 12,898, Urban Habitat Program v. Bay Area Rapid Transit Dist., at 21–22 (Sept. 1, 2009) [hereinafter BART Complaint], *available at* http://www.publicadvocates.org/sites/default/files/library/fta_titlevi_complaint_09109final.pdf.

[302] This loan was anticipated to be up to $150 million through the Transportation Infrastructure Finance and Innovation Act. In addition to receiving funding for this specific project, BART received federal financial assistance through Section 5307 of the Urbanized Area Formula grants program. *See* BART Complaint, *supra* note 301, at 16.

[303] The groups were: Urban Habitat, an Oakland-based nonprofit environmental justice organization; TransForm, an Oakland-based group that seeks to strengthen public transportation infrastructure in the Bay Area; and Genesis, a regional faith-based organization whose members and constituents include low-income people and people of color. The public interest firm Public Advocates represented them. *See id.* at 1.

[304] *See* FTA C 4702.1A, *supra* note 1, at V-5.

[305] The complaint contended that BART failed to follow the equality directives in three ways. Namely, BART failed (1) to base its analysis on current demographic data; (2) to conduct a comparative analysis of the impact of alternative proposals on service, affordability, speed, and cost-efficiency; and (3) to analyze the effect of replacing existing transit service and removing certain existing transit stops. *See* BART Complaint, *supra* note 301, at 22. The plaintiffs also alleged that BART had failed to take steps to mitigate impacts or consider less discriminatory alternatives. *See id.* at 22–23.

[306] Initially, the FTA administrator contacted relevant BART and MTC officials expressing serious concerns regarding the failure to conduct an equity analysis and threatening the withdrawal of federal stimulus funds. *See* Letter from Peter M. Rogoff, U.S. Dep't of Transp., Fed. Transit Admin., to Steve Heminger, Executive Dir., Metro. Transp. Comm'n, & Dorothy Dugger, Gen. Manager, S.F. Bay Area Rapid Transit Dist. (Jan. 15, 2010), *available at* http://www.bart.gov/docs/BART_MTC_Letter_On_OAC.pdf. BART responded by submitting a document purporting to conduct a Title VI analysis of the project's impact on environmental justice, on racial and ethnic minorities, and on LEP persons. *See* Letter from Peter Rogoff, U.S. Dep't of Transp., Fed. Transit Admin., to Steve Heminger, Executive Dir., Metro. Transp. Comm'n, & Dorothy Dugger, Gen. Manager, S.F. Bay Area Rapid Transit Dist. 1 (Feb. 12, 2010), *available at* http://www.urbanhabitat.org/files/Feb%2012%20BART%20MTC%20Letter_0.pdf (indicating that BART had submitted a corrective action plan in response to FTA's January 15, 2010 letter). The FTA, however, found that BART had failed to provide a coherent policy for evaluating changes in system services, conduct a proper analysis of impacts of major service changes, assess alternative methods of transportation, or properly include affected minority and low-income

The BART case illustrates the power of the administrative complaint process as a means of enforcing equality directives. Much like the Westchester example, this case renders a seemingly procedural requirement into a tool for meaningful change. Namely, it requires a meaningful impact assessment that incorporates appropriate data and effective methodology and that adequately considers alternatives. Moreover, in withholding funds from the project, the agency showed its willingness to impose sanctions for failing to comply with the equality directive. The significance of the enforcement action will likely extend well beyond BART, prompting more robust compliance by transit agencies with the equality directives and pursuit of the goals that they represent.

Civil society groups, too, have leveraged the BART case in important ways. For instance, they have used it to promote improvements in DOT's impact assessment process and to argue that DOT should revise the guidance it gives to grantees.[307] The FTA has so far declined to revise its rules. However, the FTA did issue a written notice to all funding recipients, affirming the need to follow the Circular's specific directive to assess the impacts of service and fare changes.[308]

### 2. *Becoming the Private Implementer*

Litigation and administrative action are thus important forms of intervention to enforce and implement equality directives. They should not, however, be the only tools used to implement equality directives. In part, this is justified by the practical reasons I have previously mentioned—the constraints of private and administrative enforcement mechanisms.[309] Even apart from these constraints, equality directives present an opportunity to use a broader range of advocacy tools. Equality directives thus provide a

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communities. *See id.* (rejecting BART's plan as inadequate for compliance before FTA's March 5, 2010 deadline).

[307] *See generally* PUBLIC ADVOCATES & URBAN HABITAT, CIVIL RIGHTS AND ENVIRONMENTAL JUSTICE IN PUBLIC TRANSPORTATION: PROPOSED FTA ACTIONS TO BUILD ON ITS STRONG RECORD OF ENFORCEMENT (2010), *available at* http://www.prrac.org/pdf/White_Paper_on_FTA_Title_VI_Circular_with_cover_letter_12-20-10.pdf (outlining transportation equity groups' recommendations to the FTA regarding strengthening Title VI enforcement). Transit equity and other public interest groups have recommended that DOT adopt specific guidance to grantees on how to analyze whether an action has an impact on a protected population. *Id.* at 7.

[308] Letter from Peter Rogoff, U.S. Dep't of Transp., Fed. Transit Admin., to Colleagues (Mar. 8, 2011), *available at* http://www.fta.dot.gov/documents/Dear_Colleague_Letter_-_Civil_Rights_-_March_2011.pdf.

[309] *See supra* notes 43–49 and accompanying text (discussing Supreme Court jurisprudence having the effect of limiting private enforcement); *supra* notes 100–103 and accompanying text (detailing the limits of administrative enforcement).

mechanism for broadening the practice of civil rights law—extending it beyond adjudicative enforcement and connecting civil rights groups to the work of community-based groups. I show below an emerging practice to enforce equality directives lying at the intersection of civil rights law—with its traditional focus on court-enforced rights—and community-based policy advocacy. As I explain, civil society groups are already undertaking efforts to implement existing equality directives, to expand their meaning and efficacy, and to oversee state and federal implementation of their objectives.

One component of this work is sharing model interventions with state and local governments and other advocacy groups. For instance, groups have begun to publish reports showing whether states and localities effectively promote fair housing in federally funded programs and to gather concrete examples of innovative interventions.[310] Similarly, transportation advocates and researchers publicize model impact assessments and effective interventions in transportation equity, such as efforts to include minority groups in public participation and planning.[311] Stakeholders can use these efforts as a roadmap to creatively use federal fair housing funds. Advocates can use information about best practices to pressure less enthusiastic states and localities.

Another aspect of this work involves urging federal-level actors to monitor and enforce equality directives. Advocates are encouraging federal government actors to issue more specific equality rules, strengthen oversight of state and local grantees, and sanction noncompliant states and

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310 *See, e.g.*, SARAH BOOKBINDER ET AL., POVERTY & RACE RESEARCH ACTION COUNCIL & LAWYERS' COMM. FOR CIVIL RIGHTS, BUILDING OPPORTUNITY: CIVIL RIGHTS BEST PRACTICES IN THE LOW INCOME HOUSING TAX CREDIT PROGRAM (2008), *available at* http://www.prrac.org/pdf/BuildingOpportunity.pdf; *Opportunity Communities*, KIRWAN INST., http://www.kirwaninstitute.org/research/opportunity-communities/page/4/ (last visited July 4, 2012) (describing work in Wisconsin to link affordable housing siting to job-rich opportunity networks); *Twin Cities Low Income Housing*, INST. ON RACE & POVERTY, UNIV. OF MINN., http://www.irpumn.org/website/projects/index.php?strWebAction=project_detail&intProjectID=28 (last visited July 4, 2012) (showing siting and levels of segregation in federally funded low-income housing programs). Notably, many of these groups consider themselves to be civil rights organizations, but do not engage in traditional litigation.

311 *See, e.g.*, THOMAS W. SANCHEZ ET AL., CTR. FOR COMM. CHANGE & THE CIVIL RIGHTS PROJECT, MOVING TO EQUITY: ADDRESSING INEQUITABLE EFFECTS OF TRANSPORTATION POLICY ON MINORITIES 32–34 (2003), *available at* http://civilrightsproject.ucla.edu/research/metro-and-regional-inequalities/transportation/moving-to-equity-addressing-inequitable-effects-of-transportation-policies-on-minorities/sanchez-moving-to-equity-transportation-policies.pdf (describing participation by minority groups in transportation planning and LEP-related improvements and delineating challenges in ensuring robust participation); *id.* at 38–40 (recommending mechanisms for improving the inclusion of minority and low-income groups).

localities.[312] This will entail the familiar work of federal level advocacy—publishing letters and issuing reports, meeting with agency and congressional officials, and generating public awareness. Relatedly, civil society groups can show how state and local governments are falling short of the requirements and goals of the equality directives. In the area of transportation, these groups highlight the lack of public participation and the failure to include minorities and women in transportation planning.[313] They also advocate for improvements in federally subsidized public transit.[314] In housing, they evaluate whether states and localities have completed analyses of impediments and comprehensively analyzed barriers to fair housing. Advocates also continue to monitor whether governments are taking steps to overcome their identified impediments.[315]

Equality directives are relatively new, and so too is this advocacy. Thus, its ultimate success remains to be seen. Yet advocates on the ground are beginning to incorporate these directives into their broader advocacy strategies. In this vein, national organizations have begun to instruct their state and local partners on how to make use of equality directives. In the area of fair housing, for instance, the National Low Income Housing Coalition (NLIHC)—a group of low-income housing advocates and providers—guides its members on enforcement of the analysis of impediments required in their jurisdictions. In its guide to low-income housing advocacy, the group explains the regulatory requirements and the process for devising analyses of impediments. The NLIHC guide also provides examples showing advocates how to use HUD's *Fair Housing*

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[312] *See, e.g.*, THE OPPORTUNITY AGENDA, *supra* note 259, at 11–18 (providing recommendations for strengthening implementation of the AFFH equality directive); Letter from Philip Tegeler, Poverty & Race Research Action Council, et al., to John Trasviña, Assistant Sec'y, U.S. Dep't of Hous. & Urban Dev., and HUD staff (July 29, 2009), *available at* http://www.prrac.org/pdf/AffirmativelyFurtheringFairHousing7-29-09comments.pdf (providing comments on proposed AFFH regulation).

[313] *See, e.g.*, Thomas W. Sanchez, *An Equity Analysis of Transportation Funding*, RACE, POVERTY & ENV'T, Fall 2008, at 72, *available at* http://urbanhabitat.org/node/2812 (providing data showing underrepresentation of women and minorities on transportation planning boards and advocating for increased representation).

[314] For example, the Minnesota Urban League and the University of Minnesota's Institute of Race and Poverty document the effect of transit cuts on communities of color and successfully advocate for restoration of crucial services. *See Transit Equity on the Northside*, INST. ON RACE & POVERTY, UNIV. OF MINN., http://www.irpumn.org/website/projects/index.php?strWebAction=project_detail&intProjectID=21 (last visited July 4, 2012).

[315] For examples of such work, see *Building Inclusive Communities*, INCLUSIVE COMMUNITIES PROJECT, http://www.inclusivecommunities.net/build.php (last visited July 4, 2012) and *Affordable Housing*, ANTI-DISCRIMINATION CTR., http://www.antibiaslaw.com/affordable-housing (last visited July 4, 2012).

*Planning Guide* in their work,[316] including participating in the development of analyses of impediments, monitoring compliance on actions to address impediments, and seeking remedies from HUD.[317] Similarly, the Transportation Equity Network—a coalition of state and locally based non-governmental organizations—instructs its members on the regulatory requirements and provides examples of effective litigation, administrative advocacy, and organizing strategies.[318]

This emerging advocacy builds on instances of "hard" enforcement of equality directives by administrative agencies and courts. The NLIHC encourages state and local groups to take the Westchester case to their jurisdictions and reminds them of the court's holding that the "AFFH certification was not a mere boilerplate formality, but rather was a substantive requirement . . . ."[319] Similarly, transportation advocates highlight the successes of litigation and administrative complaints such as the BART case.[320] This new advocacy involves providing technical assistance, shaming noncompliant states and localities, prodding and advocacy, and participating in the impact assessments and other tools of equality directives. One might call this work private implementation of equality directives. The private implementer builds on the gains of the private attorney general, but is not constrained by adjudicative advocacy.

The work to implement equality directives has the potential to engage a broader set of groups than traditional adjudicative civil rights

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[316] *See* NATIONAL LOW INCOME HOUSING COALITION (NLIHC), *2011 Advocates' Guide to Housing and Community Development Policy* 16–20 (2011), *available at* http://nlihc.org/sites/default/files/2011-Advocates-Guide.pdf (explaining how advocates can monitor compliance with analysis of impediments requirements and providing examples of successful administrative and legal complaints against jurisdictions that failed to appropriately further fair housing).

[317] *See id.* at 17–18 (suggesting that advocates invoke the public participation requirements of the Consolidated Plan to participate in analysis of impediments development and listing the requirements of analyses of impediments and steps advocates should take when jurisdictions fail to comply).

[318] *See* Marc Brenman, Webinar Powerpoint Presentation, *Unlocking Title VI: Understanding Your Rights*, TRANSPORTATION EQUITY NETWORK, http://www.transportationequity.org/index.php?option=com_content&view=article&id=285:civil-rights-act-webinar-tools-for-equity&catid=63:feature (follow "Presentation by Marc Brenman" hyperlink) (last visited July 4, 2012).

[319] *HUD Affirmatively Furthering Fair Housing in Westchester County, N.Y.*, NAT'L LOW INCOME HOUS. COAL. (June 5, 2009), http://www2398.ssldomain.com/nlihc/detail/article.cfm?article_id=6182 (quoting U.S. *ex rel.* Anti-Discrimination Center v. Westchester Cnty., 668 F. Supp. 2d 548, 569 (S.D.N.Y. 2009)).

[320] *See, e.g.*, Guillermo Mayer, Senior Staff Att'y, Public Advocates Inc., *The Oakland Airport Connector: A Case Study on Title VI Administrative Enforcement*, TRANSPORTATION EQUITY, http://www.transportationequity.org/images/downloads/TEN_Title_VI_Webinar_20100708_G.Mayer.pdf (last visited Aug. 18, 2012) (describing Public Advocates Inc.'s efforts in the Oakland Airport Connector case).

enforcement. As the housing and transportation examples show, this advocacy connects groups that have traditionally focused on rights enforcement with those who engage in non-litigation advocacy and community organizing. These efforts also bring "rights" groups—who operate in an antidiscrimination frame—together with groups concerned with poverty alleviation, community revitalization, and environmental reform. In that vein, private implementation efforts of equality directives respond to the critique that civil rights lawyering is too centered on formal rights that benefit the middle class and insufficiently focused on the structural problems of poverty and exclusion.[321]

One must acknowledge that even with strong advocacy and oversight efforts, some states and localities may not adopt or implement a robust regime of equality directives. Grantees might undertake only half-hearted efforts, even in the face of federal oversight or advocacy by private actors. This will be true in any regime that depends in large part on willing government partners.[322] Evidence from the structural reform literature shows that these constraints exist even in regimes that depend primarily on judicial enforcement: They, too, require government cooperation for implementation of court-ordered remedies.[323] Equality directives provide a

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[321] *See, e.g.*, Banks & Ford, *supra* note 18, at 1120 (arguing that "the goal of eliminating discrimination is too modest, not ambitious enough" given the state of structural inequity). For instance, in the area of transportation, two groups in Northern California—Policy Link and Public Advocates (a civil rights law firm)—have sought not only to monitor transportation equity issues in their state and at the federal level, but also to more broadly increase the capacity of state and local groups to perform such monitoring. *See, e.g.*, POLICY LINK, MAKING EQUITY CENTRAL TO FEDERAL TRANSPORTATION POLICY 6 (2009), *available at* http://www.policylink.org/atf/cf/%7B97C6D565-BB43-406D-A6D5-ECA3BBF35AF0%7D/Transportation-Equity-Executive-Summary.pdf (announcing the goal of building the capacity of local, state, and regional transportation equity leaders). The Los Angeles–based Transportation Equity Network has spearheaded advocacy in Southern California. *See, e.g.*, Letter from Barbara J. Schultz et al., L.A. Transp. Network to L.A. Cnty. Metro. Transp. Auth. (Apr. 11, 2001) (on file with the *New York University Law Review*) (arguing that the Los Angeles transportation plan failed to properly conduct a Title VI analysis or to properly include required groups).

[322] *See* Johnson, *supra* note 117, at 422 (describing enforcement challenges in juvenile justice and No Child Left Behind which depend on the "political landscape in particular states, the existence of internal reform agents, [and] the skill of the nongovernmental organizations in applying political pressure").

[323] For instance, Gerald Rosenberg authored an important work calling into doubt the capacity of courts to produce significant social reform. He argues that courts will be successful only under particular conditions, including where there is support for reform by the executive, legislative, and administrative branches of government. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 35–36 (1991) (listing, among other conditions: "support for change from substantial numbers in Congress and from the executive" and "[a]dministrators and officials crucial for implementation [who] are willing to act and see court orders as a tool for leveraging additional resources or for hiding behind").

new infrastructure for civil rights, one that now seeks to promote structural equality and inclusion. And equality directives provide a platform from which to leverage existing litigation efforts and connect civil rights lawyers with community groups already engaging in advocacy and community mobilization. If the success of civil rights and inclusionary goals depends not just on courts but on broader forms of political and social mobilization,[324] then equality directives both depend on and enhance these forms of mobilization.

## CONCLUSION

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

Many of these equality directives are new. Future academic studies might examine: (1) how these directives continue to be internalized at the federal level in the "permanent government"[325] of agencies; (2) how they are implemented at the state and local levels; and (3) their potential utility in areas outside of transportation and housing, such as criminal justice or public health. Subsequent examinations should also consider the relationship between equality directives and a broader trend of requiring racial impact assessments of government policies: Several states have recently adopted legislation requiring that state legislatures and agencies evaluate the racial impact of pending legislation and regulations and

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324 The academic literature provides support for this view about the likely components of effective social reform. *See, e.g.*, MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 294–96 (1994) (studying the gender pay equity movement and concluding that litigation used in conjunction with other advocacy tactics can be an effective tool for social change); ROSENBERG, *supra* note 323, at 342–43 (arguing that significant social reform requires "mobilization and participation" by social groups in addition to litigation). At the same time, one must acknowledge that social science is unable to prove the relative efficacy of various reform strategies. *See generally* John Goering, *The Effectiveness of Fair Housing Programs and Policy Options*, *in* FRAGILE RIGHTS WITHIN CITIES, *supra* note 84, at 254 (explaining, in the context of fair housing, the difficulty of disentangling the relative contributions of law, public policy, and non-policy-driven social reforms in producing social and behavioral change); Michael W. McCann, *Reform Litigation on Trial*, 17 LAW & SOC. INQUIRY 715, 727–28 (1991) (reviewing Gerald Rosenberg's *The Hollow Hope* and arguing that Rosenberg's account of the inefficacy of courts ignores evidence that judicial rulings resulted in advancements in particular areas related to civil rights; arguing further that Rosenberg fails to evaluate the constraints of courts relative to other bureaucratic institutions).

325 GRAHAM, *supra* note 55, at 7.

consider race-neutral alternatives.[326]

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

For civil rights advocates and commentators interested in promoting social equity and inclusion, this Article aims to direct attention to the potential that lies in equality directives. An emphasis on individualized harm, antidiscrimination, and the private sphere is inadequate to the task of promoting equality and inclusion today. Equality directives supplement the antidiscrimination frame because they are attuned to the structural dimensions of inequality. They extend beyond bias to address the state's contribution to contemporary inequality, as well as the state's capacity to promote inclusion. To fully unleash the capacity of equality directives requires building on promising initiatives that are beginning to alter the nature of contemporary civil rights advocacy. These initiatives are moving beyond the conception of the civil rights advocate as a private attorney general and using a range of advocacy tools to expand, implement, and leverage these directives at the federal, state, and local levels.

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[326] *See* H.B. 5933, § 5, 2008 Conn. Acts No. 08-143 (Reg. Sess.) (codified at CONN. GEN. STAT. ANN. § 2-24b (2012) (effective June 5, 2008)), *available at* http://www.cga.ct.gov/2008/ACT/PA/2008PA-00143-R00HB-05933-PA.htm (requiring a racial impact assessment of proposed legislation affecting criminal justice and sentencing); H.F. 2393, § 3, 82d Gen. Assem., Reg. Sess. (Iowa 2008) (codified as amended at IOWA CODE § 8.11 (2012)), *available at* http://coolice.legis.iowa.gov/Cool-ICE/default.asp?Category=billinfo&Service=Billbook&menu=false&ga=82&hbill=HF2393 (requiring minority impact statements for state grant applications and changes to state criminal or sentencing law or procedures).