Leveraging Antidiscrimination

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LEVERAGING ANTIDISCRIMINATION
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On turning 50, a friend of mine said: “you can’t pretend you are young anymore.”

INTRODUCTION

As the Civil Rights Act turns fifty, antidiscrimination law has become unfashionable. For those commentators and reformers who concern themselves with addressing racial, ethnic, and gender disparities, antidiscrimination law occupies a less central role than it did fifty years ago, perhaps even a marginal one. The core problem, it seems, is that discrimination is a limited explanation for current forms of contemporary inequality. Discussing race, economist Glenn Loury has argued that discrimination should be “demoted, dislodged from its current prominent place in the conceptual discourse on racial inequality in American life.”1 Richard Ford and Richard Banks offer a similar assessment, arguing that if “we are legitimately concerned about substantive disparities” then the “goal of eliminating discrimination is too modest, not ambitious enough.”2 It is not uncommon to speak of remedying discrimination as separate from a larger goal of addressing inequality. And civil rights strategies are posited as not up to the serious task of improving mobility for low-wage workers or providing access into entry-level employment. The antidiscrimination approach, it is said, is “based on the principle of freedom of individual opportunity” which necessarily helps the more advantaged and better-trained, and is thus inadequate for reducing substantive inequality in our society.3 If one is seeking innovations to address poverty and inequality or to promote economic and social opportunity, much commentary suggests that antidiscrimination law is not the place to find them.

It is not hard to harness reasons to demote “discrimination” in contemporary inequality discourse. Discrimination remains prevalent in our society, and continues to explain extant disparities between groups.4 However, there is much to suggest that addressing contemporary inequities requires confronting the full range of mechanisms that disparately affect racial and

4 See, e.g., Roland G. Fryer et al., Racial Disparities in Job Finding and Offered Wages, 56 J.L. & ECON, 633, 635-36 (2011) (study finding that racial discrimination in offered wages accounted for at least one third of the black-white wage gap); Devah Pager et al., Discrimination in a Low-Wage Labor Market: A Field Experiment, 74 AMER. SOC. REV. 777. 792-93 (2009) (study of white, black, and Latino applicants seeking entry-level jobs in the low-wage labor market in New York City finding that blacks were half as likely to receive callbacks or job offers as were equally qualified whites, and that black and Latino applicants without a criminal record were treated no better than a white applicant just released from prison). See also KEVIN STAINBACK & DONALD TOMASKOVIC-DEVYEY, DOCUMENTING DESEGREGATION: RACIAL AND GENDER SEGREGATION IN PRIVATE-SECTOR EMPLOYMENT SINCE THE CIVIL RIGHTS ACT (2013).
ethnic minorities and women, including improving education and training of minority workers,⁵ the decreasing fortune of less skilled workers,⁶ the effects of immigration status on social mobility, and how geography and place structures opportunity.⁷ Given the complex reasons for contemporary inequality social reform is less likely to center merely on questions of individualized bias, but on social welfare and education programs, interventions to improve the economic status of unskilled and semi-skilled workers, and strategies to diminish spatial segregation and improve the conditions facing communities of concentrated poverty. Contemporary advocates might now organize their work around narratives of social inclusion,⁸ or addressing spatial inequities in the distribution of opportunity.⁹

Yet there is a danger in casting aside the Civil Rights Act as one charts this new course. For one, as I discuss in Part I, such a move misunderstands the force of the antidiscrimination directive that undergirded Act, one not limited to formal discrimination or bias and which drew on a broad set of private and public implementation tools to respond to evolving problems of exclusion. Reminding ourselves of the implementation strategies that emerged in the first decade after the Act, produces a richer account of what we mean by “discrimination” and attunes us to a broader set of implementation tools than is conventionally associated with antidiscrimination law. Second, as I show in Part II, the Civil Rights Act continues to sustain an important set of strategies to promote inclusion. In that Part, I discuss the emergence of strategies to address contemporary disparities under Title VI of the Civil Rights Act, as well as emerging efforts under Title VII – reminiscent of Title VII’s early years – to make Title VII more responsive to contemporary forces shaping exclusion in labor markets.

Part III concludes with the value of retaining hold of this civil rights infrastructure, even as reformers develop other tools and strategies for promoting equity and inclusion. My argument here is that the Act provides an important regulatory framework for addressing problems of exclusion facing a broad range of groups (including women and racial and ethnic minorities), across a range of domains (education, employment, transportation, environment, agriculture and more) and using a range of potentially powerful public and private enforcement strategies. Transformative statutes do not come to us every day. For pragmatic as well as expressive reasons, it is worth continuing to consider what one might wrest from the Act’s great aspiration and powerful design.

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⁶See, e.g., WILSON, supra note 3.
I. REVISITING AMBITION

Antidiscrimination is at the core of the Civil Rights Act of 1964. While the Act uses a range of terms—Title VI of the Act 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 subjected to discrimination under any program or activity receiving Federal financial assistance”10 and Title VII prohibits discrimination, as well as segregation and classification in ways that deprive employees of opportunities11—our collective shorthand for the Act is that it prohibits “discrimination.”

Among those concerned with addressing contemporary race, ethnic, or gender disparities or with promoting economic inclusion, the antidiscrimination approach typified by the Act is often framed as inadequate.12 In part, this assessment stems from a determination that discrimination is either in significant decline, or a fairly marginal explanation of contemporary disparities.13 In part, this assessment also represents a critique of the strategies underlying civil rights law: the antidiscrimination approach is seen as intertwined with an emphasis on litigation at the expense of other approaches.14 The thrust of these critiques is that the antidiscrimination idea centers on formal, market discrimination and bias, and is thus not sufficiently robust to be relevant today.

However, I urge caution in characterizing the 1964 Act as centered on formal or explicit discrimination. Rather, one can fairly characterize the Act’s regime as seeking to address a range of institutional practices that disadvantaged blacks (the main target at the Act’s inception). By “regime” I mean to emphasize both the Act as apparently contemplated by its initial drafters and legislative and executive proponents, but even more by the private and public enforcement structure that emerged in the years after its enactment.

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11 Title VII makes it unlawful for an employer “to fail or refuse to hire or to discharge an individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin[].” 42 U.S.C. §2000e-2(a). The Act also makes it an unlawful employment practice for an employer “to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.” Id.

12 See Banks & Ford, supra note 2, at 1113-14 (contending that “many decisions and practices that adversely affect racial minorities do not fit neatly within the conventional antidiscrimination framework”); Glenn C. Loury, Discrimination in the Post-Civil Rights Era: Beyond Market Interactions, 12 J. ECON. PERSP. 117 (1998) (arguing that “market discrimination is only one small part of” contemporary racial disparities). And this argument is not new. When the Civil Rights Act was not yet 25 years old, Derek Bell decried the insufficiency of antidiscrimination law in addressing ongoing “race-related disadvantages,” noting that “[t]he harvest is past, the summer is ended, and we are not saved.” DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 5 (1987).

13 See, e.g., Banks & Ford, supra note 2, at 1113 (doubting that racial bias “explains all or even most of the racial injustices that plague our society”); LOURY, supra note 1, at 160 (arguing in the context of racial inequality that thinking simply in terms of “discrimination” obscures the “causal feedback loops that can perpetuate racial inequality from one generation to the next”).

The statutory history – which has been much pored over in the half a century following passage of the Act – shows the breadth of the Act’s goals. In finally announcing support for civil rights legislation in employment and education, President Kennedy promoted such efforts as necessary to ensure full equality in American society and participation in economic life.\(^{15}\) In his address on the floor of the U.S. House of Representatives introducing the legislation, Kennedy cast fair employment laws as part of a quest to end racial disparities in unemployment, en route to the larger goal of assuring full employment for all workers.\(^{16}\) Introducing Title VI which prohibited discrimination in federally funded programs, Kennedy expansively defined the antidiscrimination idea underlying the legislation, declaring that: “[S]imple justice 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.”\(^{17}\) “Indirect discrimination” through subsidization, Kennedy emphasized, is “invidious” discrimination.\(^{18}\)

Legislative history from the House and Senate speaks to the goals of this new legislation.\(^{19}\) The House Report to one of the bills that would culminate in the Civil Rights Act declared that discrimination is an “urgent and most serious national problem” requiring extensive action to eradicate exclusion in voting, public accommodation, federal financial assistance, and employment.\(^{20}\) Recognizing that states had initiated important civil rights legislation, the House Report nevertheless recognized the need for national action: “in the last decade it has become increasingly clear that progress has been too slow and that national legislation is required to meet a national need.”\(^{21}\) In addition, the legislature identified goals that went beyond market discrimination emphasizing that discrimination was not limited to explicit exclusionary actions, but “ranges in degrees from patent absolute rejection to more subtle forms of invidious distinctions.”\(^{22}\) As an example, this House Report alluded to the effect of seemingly racially neutral practices such as “last hired, first fired” and to the relegation of minorities “to ‘traditional’ positions and through discriminatory promotion practices.”\(^{23}\) Occupational segregation was achieved through “traditional expectations” as well as the segregation of minorities in “involuntary part-time work.”\(^{24}\) Discrimination could be subtle: the House Report noted that while employment agencies often engaged in “outright refusal to deal with minority group applications,” as prevalent was the refusal to refer minorities due to “expressed agreements, tacit understandings, and assumptions based on traditional practices.”\(^{25}\) In this

\(^{15}\) See Civil Rights and Job Opportunities, 109 Cong. Rec. 11,175 (1963) (statement of John F. Kennedy, President of the United States).

\(^{16}\) See id.

\(^{17}\) Id. at 11,178.

\(^{18}\) Id.


\(^{20}\) H.R. No. 814 (to accompany H.R. 7152, 88th Cong., 1st Sess. (1963), at 2 (citing evidence from hearing making it “abundantly clear that job opportunity discrimination permeates the national social fabric-North, South, East and West”).

\(^{21}\) Id.

\(^{22}\) Id.

\(^{23}\) Id. at 3.

\(^{24}\) Id. at 3.

\(^{25}\) Id.
congressional history, labor and entry-level jobs emerge as a particular point of focus. The House Report refers to efforts to improve opportunities in construction unions, and ensure access to apprenticeship training programs often run by labor unions because of the crucial role these pathways played in “improving the skills, knowledge and capability of” workers.26

To be sure, key portions of the legislative history of the Act reveal legislative concerns about avoiding race-conscious action or intrusions into the “prerogatives” of management (prefiguring subsequent debates in Title VII over the extent to which the Act should be interpreted to allow disparate impact or affirmative action27). And forces aligned against the Act sought to minimize administrative power to implement Title VII, most notably succeeding in diminishing the powers of the Equal Employment Opportunity Commission.28 Yet, this journey into the statutory history is meant to check modern characterizations of the antidiscrimination goal as aimed at simply removing explicit or blatant barriers or disconnected from the goal of economic opportunity. Instead, the legislative history offers a more richly conceived notion of the degree to which discrimination was embedded in employment and credentialing institutions such as unions, the range of explicit and implicit barriers to inclusion, and the connection between the antidiscrimination method and achieving fuller economic participation.

The ambition of the Act is further revealed when we consider the Act’s implementation context – the strategies that public and private actors undertook to implement and enforce the Act. Implementation would come to include strategies to: (1) define the Act broadly to reach more than intentional discrimination; (2) leveraging administrative and private resources for systemic enforcement; and (3) requiring regulated actors to take affirmative inclusionary steps.

The move beyond intentional discrimination is seen most sharply in the public and private implementation of the Act to reach actions with an unjustified disparate impact. Within the year after passage of the Act, federal agencies charged with implementing Title VI of the Act interpreted the provision to reach not just actions by funding recipients that were intentional, but

26Id.
28 Civil rights reformers had advocated for a strong fair employment agency akin to the National Labor Relations Board (NLRB) with power to enforce antidiscrimination laws through a cease-and-desist power. Instead, legislative compromises meant an EEOC with limited power – charged only with the power to investigate claims and mediate disputes. See Francis J. Vaas, Title VII: Legislative History, 7 B.C. L. Rev. 431, 453 (1966) (detailing Title VII legislative proposals for strong enforcement agency); Robert C. Lieberman, Private Power and American Bureaucracy: The EEOC and Civil Rights Enforcement 1-2 (Colum. Univ. Dep’t of Political Science, Working Paper, 2010) available at http://web1.millercenter.org/apd/colloquia/pdf/col_2005_0318_lieberman.pdf (“As originally conceived by civil rights advocates, the EEOC was to have full regulatory powers, particularly the power to issue binding cease-and-desist orders to employers.”). Until 1972, the EEOC even lacked power to sue private employers in its own name. See Equal Employment Opportunity Act, Pub. L. No. 92-261, 86 Stat. 103 (1972).
those that had the “effect of subjecting individuals to discrimination.”

(Notably these regulations were drafted by the agencies, with the involvement of private actors and the White House, and formally approved by the President.) What we now understand as the disparate impact standard in employment grew in part out of the guidelines issued by the EEOC on employment tests, in response to the adoption by southern employers of formally race-neutral practices that operated to discriminate. Two years after passage of the Act, the EEOC issued guidance instructing employers to administer an occupational test only where it “fairly measures the knowledge or skills required by the particular job or class of job.” A few years later, the EEOC issued additional guidelines requiring that employers using tests have “available ‘data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.’” It was in giving “substantial deference” to the EEOC in Griggs v. Duke Power that the Supreme Court allowed that the Act prohibited in some cases employers’ facially neutral practices that, in fact are “discriminatory in operation.”

Commentators have debated whether the EEOC’s move interpreting the Act to reach disparate impact claims was distorting the meaning of a statute centered on disparate treatment and colorblindness, or whether this move was supported by the language and prevailing

29 45 C.F.R. § 80.3(b)(2) (1965) (“a recipient . . . may not directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals race, color, or national origin.”) (emphasis added). These regulations were created by a task force consisting of the White House, the Civil Rights Commission, the Justice Department and the Bureau of the Budget. See Comment, Title VI of the Civil Rights Act of 1964 – Implementation and Impact, 36 GEO. WASH. L. REV. 824 (1968). Each agency drafted a rule, submitted it to the Department of Justice, which then participated in the task force to draft these rules. Id. The task force first developed regulations for HEW which then became the model for other federal agencies. Id


33 Griggs, 401 U.S. at 431.
understandings of “discrimination.”

Regardless of the position one takes on fidelity to the language or the original legislative deal, the point here is that these early moves by the EEOC implement the Act in ways that reached beyond thin notions of formal discrimination. Instead, the meaning of antidiscrimination emerges in response to the efforts to address the evolving barriers facing workers.

Second, public and private enforcement strategies focused on opening up large scale institutions to black workers by targeting salient industries and leveraging systemic tools such as regulatory guidance, investigations and hearings, and using litigation mechanisms such as the class action device and pattern and practice authority. As other commentators have shown, the EEOC adopted structurally oriented strategies — interpreting language in Title VII to permit it to collect data on the racial composition of employers; using this data to systemically publicize and investigate problems of labor market discrimination in particular regions, sectors and industries. Private enforcement also followed a systemic approach that targeted particular

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35 See 42 U.S.C. §2000e-8(c); 29 C.F.R. §§ 1602.7-1602.14. The EEOC developed what are known now as the EEO-1 Form (the Employer Information Reports form) which requires certain employers to collect and report data on their employees’ race, ethnicity, and sex.

36 See Alfred W. Blumrosen, Administrative Creativity: The First Year of the Equal Employment Opportunity Commission, 38 GEO. WASH. L. REV. 694, 711-20 (1970). As sociologist John Skrentny has observed, the EEO-1 Forms allowed EEOC administrators to move beyond an individual approach: “the administrators could sit back and look at entire industries or geographic areas, and see racial differences not just freely contracting, abstract individuals.” SKRENTNY, supra note 34, at 131. The EEOC used this data to develop “conciliation” plans that required employers to adopt particular hiring practices and affirmative remedies, and to hold forums that brought public attention to the employment practices of major industries. See Robert C. Lieberman, Private Power and American Bureaucracy: The EEOC and Civil Rights Enforcement 27-28 (Colum. Univ. Dept’. of Political Science, Working Paper, 2010) (relying on EEOC research report outlining potential use of EEO-1 data to file “commissioner charges” of discrimination – which did not require a specific plaintiff’s coming forward—and to develop “technical assistance” programs to work with employers with discriminatory practices); see SKRENTNY, supra note 34, at 132 (describing forum on hiring practices for the textile industry in the Carolinas which included forty witnesses representing management, labor, government and private industries); see id. (noting forums on white-collar employment and the pharmaceutical industry).
industries, 37 employed the class-action device, 38 and that sought to take aim at a range of exclusionary practices, in particular the use of non-job related occupational tests, 39 and exclusionary seniority practices. 40 As former NAACP Legal Defense Fund (LDF) attorney Robert Belton has explained: “by 1965 overt discrimination on the basis of race was not fashionable.” 41 Instead, LDF harnessed an approach to challenge “superficially neutral practices, such as testing and educational devices or seniority systems that appeared facially neutral or color-blind but operated to perpetuate the effects of past discrimination[]” 42 and “systemic discrimination imbedded in basic personnel policies or organizational structures of companies and unions.” 43

Third, the enforcement agency used its regulatory power to promote goals apart from the litigation context. While the EEOC (designed to be a weak enforcement agency) lacked (and still lacks) power to issue binding substantive regulations to enforce Title VII, 44 the agency developed guidelines on how to avoid discriminatory practices such as seniority systems, and most famously on the use of occupational tests. Robert Lieberman has described these guidelines as emerging out of the EEOC’s investigation and conciliation power – an attempt by the EEOC to provide a guide for “employers and employees about what practices the commission would find acceptable and unacceptable in probable cause determinations.” 45

This implementation context reveals a robust conception of the antidiscrimination directive at the core of the Act – one that reaches beyond explicit practices to reach subtle, embedded mechanisms that excluded or inhibited opportunities for black workers. In addition this review of the implementation context makes clear that reformers employed a range of strategies to move the Act beyond the redress of individual claims. This is manifest in the leveraging of federal contracting and spending power, the requirement of affirmative inclusionary strategies, the reliance on administrative investigations and regulatory guidance, the use of the class-action device, and the attempt to connect the work of private litigators and

37 LDF and other civil rights and labor activists early on targeted particular industries in the South, including the textile industry, the paper industry, and the steel industry that were large sources of non-farm employment and provided more lucrative wages than many blacks were then earning. See id. See also NANCY MACLEAN, FREEDOM IS NOT ENOUGH: THE OPENING OF THE AMERICAN WORKPLACE 79 (2008) (detailing that the NAACP and the EEOC targeted textile mills because they were the largest non-farm employer of workers with limited education and supplied “more than half of all industrial jobs in the Carolinas and Georgia” and explaining that these jobs though hard, paid higher wages than what was available to most black men and women at the time).
39 See id. at 936-38 (detailing LDF’s litigation efforts in Griggs).
40 See id. at 945-46 (describing litigation culminating in Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971)).
41 Id. at 927.
42 Id.
43 See id. at 928.
44 See 42 U.S.C. §2000e-1 (directing EEOC to issue “suitable procedural regulations to carry out the provisions of this subchapter”).
45 Lieberman, supra note 36, at 28.
community-based organizations. Finally, this context reveals that antidiscrimination strategies would be cognizant of the realities of the industrial economy at that time and connected to core questions of social and economic equality. For instance, the paradigm beneficiary of Title VII was the blue-collar worker, evident in reformers’ focus on manufacturing and construction industries and on organized labor. In its goals and implementation, the Act centered on opening up access to jobs with training and career ladders, and on providing avenues for the acquisition of skills.

By some key accounts, this enforcement approach contributed significantly to improving the social and economic status of blacks in the late 1960s and early 1970s and to substantial progress in the desegregation of schools. However, I do not want to overstate the success or ambition of these public-private strategies or to ignore the possibility of even more transformative paths that might have been pursued particularly with regard to reform of labor institutions. What I propose is in the spirit of correcting how we often regard “antidiscrimination” today – a useful check on our modern tendency to characterize the antidiscrimination idea at the center of the Act as limited to a concern about individual bias, as too court-centered, insufficiently structural, or attenuated from core questions of access to opportunity.

II. CLAIMING RELEVANCE

Today, much of how commentators understand the relevance and capacity of antidiscrimination law is shaped by regimes of court enforcement and by Title VII litigation in particular. Title VII generates more litigation than any other portion of the Act. Title VII cases more frequently gain hearing at the Supreme Court than litigation involving other provisions of

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46 See John J. Donohue III & James Heckman, Continuous Versus Episodic Change: The Impact of Civil Rights Policy on the Economic Status of Blacks, 29 J. ECON. LITERATURE 1603, 1641 (1991) (providing evidence that enforcement of federal civil rights law, including Title VII, “was the major contributor to the sustained improvement in black economic status that began in 1965”); id. at 1637-38 (“[M]uch of the black improvement in the decade following enactment of Title VII of the 1964 Civil Rights Act came in the South”); id. (detailing the role of federal promotion of school integration and enforcement of Title VII). See also MacLean, supra note 37, at 80 (quoting labor organizers in the 1960s who credited federal executive order on nondiscrimination in government contractors with opening up positions for blacks in Southern textile mills); id. at 88 (detailing increased hiring of black workers by Southern textile workers and the contribution manufacturing employment made to the economic status of blacks in the South); Jonathan S. Leonard, The Impact of Affirmative Action Regulation & Equal Employment Law on Black Employment, 4 J. OF ECON. PERSP. 47 (1990).


the Act (or other civil rights statutes).50 And Title VII commands the greatest share of commentary about the Act in the legal academic literature. Title VII’s rise and prominence has coincided with a move away from the earlier more systemic or “structural” focus of the Act. For instance, while individual Title VII cases have continued to rise since the Act’s inception, pattern and practice and class-action litigation has fallen.51 And, even as the overall volume of litigation has increased, litigation has shifted away from the hiring discrimination cases that prevailed in Title VII’s earlier years which sought to open up opportunity for previously excluded workers in economically salient industries, towards more individual claims of termination. This is a trend that researchers identified in the early 1990s before passage of the Civil Rights Act of 1991 (which through damages and other mechanisms increased incentives to bring Title VII claims),52 and that has continued in the subsequent years.53 Attorneys on the ground have noted the irony of this interplay between the Civil Rights Act of 1991’s strengthening of Title VII through a damage regime, and the decline of systemic reform litigation.54 Some of these changes in the shape of litigation no doubt reflect Title VII’s success in creating incentives for fairer

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50 For recent Title VII cases, see Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517 (2013) (requiring a showing of “but for” causation to recover for claims of retaliation); Vance v. Ball State Univ., 133 S. Ct. 2434, 2439 (2013) (defining “supervisor” for the purposes of Title VII as one “empowered by the employer to take tangible employment actions against the victim”); Lewis v. City of Chicago, 560 U.S. 205 (2010) (holding that a plaintiff who fails to file a timely charge when a disparate impact practice is adopted, may challenge the later application of that practice in a disparate impact suit); Ricci v. DeStefano, 557 U.S. 557 (2009) (holding that employers may take race-conscious steps to avoid disparate impact liability under the Act only where there is a “strong basis in evidence” of such liability).

51 After 1991, the volume of charges filed with the EEOC involving Title VII claims of gender, race, national origin and religion discrimination increased over the prior years. See Sean Farhang, Congressional Mobilization of Private Litigants: Evidence from the Civil Rights Act of 1991, 6 J. EMP. LEGAL STUD. 1 (2009). Farhang’s data consists of charges with the EEOC, which though they are a precondition to court filing, do not in all cases lead to court filing. Since at least the 1980s, commentators have identified patterns of declining class action. See J. LeVonne Chambers & Barry Goldstein, Title VII at Twenty: The Continuing Challenge, 1 LAB. LAW. 235, 238 (1985).


54 As two legal services’ attorneys noted several years ago: “the volume of employment discrimination litigation has produced more aggressive gatekeeping by the courts, even as the lawsuits that offer the most hope for long term economic security for our clients — by opening jobs and pathways to advancement — become increasingly rare.” Sharon M. Dietrich & Noah Zatz, A Practical Legal Services Approach to Addressing Racial Discrimination in Employment, 36 CLEARINGHOUSE REV. 39, 42 (2002).
employment practices and the provision’s salience. Still, with the individual Title VII case in mind, one might come to understand the Act as centered on individual bias; one might have reason to question the Act’s broader relevance to contemporary forces and patterns of exclusion.

Yet, focusing on Title VII’s enforcement in individual cases pays insufficient heed to other provisions of the Act such as Title VI, which do not operate primarily in courts or as a tool for redress of individualized bias claims. In addition, emphasizing court enforcement in individual cases overlooks the broader regulatory tools of the Act – in both Title VI and Title VII—that can reach beyond ex post court enforcement in individual cases and that can operate to promote or encourage inclusion, and disrupt patterns of exclusion.

To begin with Title VII, as the story of the 1964 Act’s early history shows, effective implementation of Title VII depended not just on litigation in individual cases but on use of a broad set of tools, including private class action and agency pattern and practice litigation, regulatory guidance, industry targeting, data analysis, and investigations. Furthermore, implementation of Title VII depended not just on narrow conceptions of discrimination centered on market bias or prejudice, but on the use of these hybrid enforcement tools to address a set of on-the-ground, evolving practices that inhibited opportunity for workers and to open up key institutions and industries.

At the outset, it is worth noting even as Title VII litigation today is hobbled by significant doctrinal constraints, such litigation has continued capacity to address patterns of group exclusion, and reform organizational practices. Class actions, pattern and practice, and hiring cases may have declined relative to the early years of Title VII enforcement, but they are not extinct. In recent years, privately initiated Title VII litigation has sought to address exclusionary employment practices by public agencies that exclude minority workers, and practices such as steering and downward channeling that perpetuate occupational segregation in lower-skilled,

55 See Sean Farhang, The Litigation State: Public Regulation and Private Lawsuits in the United States 29-31 (2010) (reviewing available empirical evidence and concluding that the threat of private enforcement litigation in particular regions led employers to adopt equal opportunity practices that improved the employment status of women and minorities). Laws, private enforcement, and regulatory action can also lead to the creation of rules and organizational structures within organizations to promote diversity and equal opportunity. See, e.g., John R. Sutton & Frank Dobbin, The Two Faces of Governance: Responses to Legal Uncertainty in U.S. Firms, 1955 to 1985, 61 AM. SOC. REV. 794 (1996); Lauren B. Edelman, Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law, 97 AM. J. SOC. 1531 (1992). (At the same time, this literature also questions whether this organizational compliance leads to substantive change).

56 See Susan Sturm, Second Generation Employment Discrimination: A Structural Approach, 101 COLUM. L. REV. 458, 467-68 (2001) (describing limitations of Title VII law in addressing contemporary, second generation discrimination which involves “patterns of interaction among groups within the workplace that, over time, exclude nondominant groups.”)

57 See, e.g., Lewis v. City of Chicago, 560 U.S. 205 (2010) (litigation successfully brought against the Chicago Fire Department for the use of written tests with a unjustified disparate impact on black applicants); U.S. v. City of New York, 717 F.3d 72 (2d Cir. 2013) (finding selection practices of the Fire Department of New York to have an unjustified disparate impact on Latino and black applicants).
service sector employment. Litigation in this vein maintains relevance by taking aim at systemic practices and targeting pathways, training institutions like public employment and unions – a traditional focus of Title VII—as well the service sector in which large numbers of women and workers of color are employed (though often in the lowest ranks).

Moreover, innovative litigation stems from important collaborations between antidiscrimination lawyers and groups that organize not around questions of discrimination but toward the goals of improving the condition of workers within particular industries. One group that has received some attention in the academic literature in recent years is the Restaurant Opportunities Center of New York (ROC-NY), which seeks to improve the working conditions and pay of restaurant workers in fine dining establishments in New York City. The group organizes restaurant workers to address wage and hour violations by employers and improve benefits like sick or parenting-related leave. Yet, central to the group’s mission is addressing what the group sees as pervasive discrimination and occupational segregation in the restaurant industry. Much as public and private implementers used the data collected by the EEOC to highlight the exclusion of black workers by Southern manufacturers, ROC-NY also publicizes practices in the restaurant industry that limit opportunity for women, immigrant workers, and workers of color. ROC-NY relies on audit testing — that classic tool of antidiscrimination enforcement used most extensively in the fair housing context — to document discrimination in hiring for particular restaurant positions. In addition, while the group’s strategies center on organizing and policy reform, ROC-NY partners with private attorneys to litigate discrimination

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61 Testers have been used most prominently to address housing discrimination and the Supreme Court has held that the Fair Housing Act provides standing for fair housing testers. See Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) (holding that section 804(d) of the Fair Housing Act’s language making it illegal to “represent to any person . . . that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available” provides a sufficient basis for standing) (citation omitted); Olatunade Johnson, The Last Plank: Rethinking Public and Private Power to Advance Fair Housing, 13 U. PA. J. CONST. L. 1191, 1198-99 (2011) (describing use of audit testing to document and address discrimination in housing).
62 Researcher Mark Bendick conducted the matched pair audits of 138 fine dining restaurants and found pervasive discrimination in hiring for server positions. See THE GREAT SERVICE DIVIDE, supra note 60, at 2, 24. Specifically, the study found that testers of color were only 54 percent as likely as white testers to be offered server positions, and were less likely to receive a job interview. See id. at 54 (81.4% of white testers were granted an interview, compared to 60.5% for testers of color). White testers who received a job interview were more likely to be offered a job than testers of color.
cases, securing remedies in individual and group litigation. Significantly, ROC-NY leverages its investigations into discriminatory practices, its deep knowledge of the industry, its representation of workers, and its litigation successes to publicize exclusionary practices (such as the lack of formal and transparent practices for hiring, training, and promotion), advocate for specific reform interventions, and celebrate and involve employers that perpetuate best practices in the industry.63

There is evidence too of revitalization of the type of public systemic enforcement that gave Title VII its salience in the early years of the Civil Rights Act. The EEOC has long been seen as a broken enforcement agency. Historically overtaxed and under resourced, the increase in Title VII and other employment discrimination cases in the 1990s created additional pressures on the EEOC since Title VII and most other employment claims must first be filed with the agency.64 And there are serious questions about whether the agency has adapted to accommodate this crush of complaints. Indeed, if the early EEOC sought to move away from the volume of individual complaints by focusing on systemic remedies and investigations, accounts of the EEOC in the 1990s and 2000s suggest an agency paralyzed by processing individual complaints.65 The EEOC, too, has recognized its need to enhance its systemic litigation program.66

But rather than wholly abandon the prospect of wresting more from this flawed public enforcement mechanism, it seems worth devoting creative attention to strategies for strengthening the regime. After all, the EEOC has formal tools and capacity unavailable to private litigants. Unlike private litigants, the EEOC can maintain systemic litigation without meeting the requirements of class action Rule 2367 (the difficulties in meeting the rule’s

63 See id. (offering recommendations for industry changes); REST. OPPORTUNITIES CTR. OF N.Y. UNITED & N.Y.C. REST. INDUS. COAL., http://rocny.org/high-road-organizing/ (listing restaurants that take the “high road” by providing safe working conditions, complying with wage and hour law, and providing formal and transparent policies for employment opportunities and grievances).
64 See 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).
65 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) (concluding that the agency has capacity to investigate only a few cases and in the end it determines that most claims have no merit). In the words of one commentator, the “EEOC has been forced to focus on handling charges instead of pursuing enforcement initiatives.” 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).
67 See id. at 2 (noting that EEOC was well-positioned to tackle systemic discrimination because “unlike private litigants, EEOC need not meet the stringent requirements of Rule 23 of the Federal Rules of Civil Procedure in order to maintain a class suit in federal court”).
requirements have hampered private class actions in recent years\textsuperscript{68}. The EEOC can also pursue investigations without an actual complainant, by filing a commissioner’s charge.\textsuperscript{69} More, the EEOC can pursue conciliations, hold hearings to investigate patterns of discrimination, collect data, and issue regulatory guidance.

To reverse its slide away from systemic litigation, the EEOC has recently announced a renewed focus on systemic discrimination, developing a plan for doing so after extensive consultation with experts and advocates.\textsuperscript{70} Indeed in the last three years, the EEOC has begun to bring more pattern and practice litigation; in 2012, it significantly increased its recoveries against employers in systemic discrimination cases over prior years.\textsuperscript{71} The EEOC has announced an increased emphasis on preventing employment discrimination through education and outreach, including by partnering with community groups to focus on the most disadvantaged workers and underserved communities.\textsuperscript{72} And, the EEOC has instituted important regulatory guidance on current barriers facing workers, notably revising its prior guidance on systemic and pattern and practice litigation, considering an applicant’s criminal history.\textsuperscript{73}

I offer these examples not to deem them successes – success remains to be fully seen. The EEOC has had prominent setbacks in its recent systemic disparate impact litigation.\textsuperscript{74} Further, the EEOC could utilize its existing powers more effectively. For instance, the EEOC might increase its ability to identify industries with discriminatory employment practices and to

\textsuperscript{68} See, e.g., Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541 (2011) (holding 5-4 that plaintiffs lacked the “commonality” of factual and legal claims required to satisfy Federal Rule of Civil Procedure 23(a); id. (holding unanimously that plaintiffs claims for back pay could not be certified pursuant to 23(b)(2)); see also Melissa Hart, \textit{Will Employment Discrimination Class Actions Survive?}, 37 AKRON L. REV. 813, 820-27 (2004) (describing pre-Wal-Mart lower courts’ constraints on use of 23(b)(2) certification – the traditional route for class certification in employment discrimination class actions – in cases involving compensatory and punitive damages).

\textsuperscript{69} See \textit{42 U.S.C. § 2000e-5(b)} (outlining EEOC’s commissioner’s charges procedure).


\textsuperscript{74} See EEOC v. Kaplan Higher Education Corp., No. 01:10 CV 2882, 2013 WL 322116 (N.D. Ohio, Jan. 28, 2013) (dismissing EEOC’s suit against an employer for screening applicants based on credit histories, holding that expert’s evidence of disparate impact was inadmissible); EEOC v. Freeman, No. RWT-09-CV-2573, 2013 WL 4464553 (D. Md. Aug. 9, 2013) (granting summary judgment to employer in case involving claims of discriminatory impact of criminal and credit history background checks on minority applicants, holding that expert testimony was unreliable and that disparate impact was not caused by a specific employment practice).
analyze the EEO-1 and other data that it collects on private employers.\textsuperscript{75} EEOC could use data to hold hearings on problematic industry practices, disseminate information and best practices, generate regulatory guidance, and pursue litigation. Another tool that the EEOC might deploy, perhaps in conjunction with nongovernmental organizations and nonprofits, is the use of audit studies to identify hiring discrimination. While courts are not settled on the ability of employment testers to recover damages and injunctive relief,\textsuperscript{76} the results of audit studies might still prove useful for conducting investigations and for providing insight into industry practices.\textsuperscript{77} But the agency’s current emphasis recaptures the focus on systemic discrimination – it attunes us to the possibilities that might still remain in a Title VII that moves beyond a focus on individual litigation.

The other key provision of the Act — Title VI— has also served as an important location in recent years for addressing contemporary problems of exclusion. Title VI differs from Title VII in that its central enforcement target is not private industry but federal agencies and grantees. Its key mode of enforcement is not litigation but administrative regulation, backed by the threat of funding withdrawal. In recent years, regulatory enforcement of Title VI has yielded an

\textsuperscript{75} See Alfred W. Blumrosen, Intentional Job Discrimination in Metropolitan America 4 (2002) (unpublished paper) (on file with author) (describing the EEOC’s failure to make consistent use of EEO-1 data over the period stemming from 1965 through late 1990s). Even when the EEOC has displayed the political will to utilize this data, it has not been able to make good use of this data because it lacked internal resources (staff and technological systems) for adequate data analysis. See STAINBACK & TOMASKOVIC-DEVENY, supra note 4. Also, the EEOC has failed to organize collect, organize and tabulate the data in effective ways. See EEOC, SYSTEMATIC TASK FORCE REPORT (2006), n.37, available at http://www.eeoc.gov/eeoc/task_reports/upload/systemic.pdf (recommending that EEOC organize data to allow for automatic generation of reports on firms and their subsidiaries and comparative analysis between firms within an industry or relevant labor market).

\textsuperscript{76} The Supreme Court has not ruled on the question of whether Title VII grants standing for employment testers (Title VII has different language from the FHA) and lower courts are split on the question. Compare Fair Employment Council of Greater Wash., Inc. v. BMC Mktg. Corp. 28 F.3d 1268 (D.C. Cir. 1994) (finding that employment testers lacked standing to sue because they did not actually intend to form an employment contract with the employer, though allowing organizational standing for group that sponsored the testers) with Kyles v. J.K. Guardian Sec. Servs., Inc., 222 F.3d 289, 297 (7th Cir. 2000) (finding that employment testers had standing to sue under Title VII, reasoning that FHA and Title VII both take “broad aim at discrimination in their respective sectors and in that sense are the functional equivalents of one another”). In regulatory guidance, the EEOC has taken the position that testers can file charges and litigate claims of employment discrimination. See EEOC ENFORCEMENT GUIDANCE NO. 915.002, WHETHER “TESTERS” CAN FILE CHARGES AND LITIGATE CLAIMS OF EMPLOYMENT DISCRIMINATION (1996), available at http://www.eeoc.gov/policy/docs/testers.html.

\textsuperscript{77} The EEOC has in recent years indicated that it will “explore the use of matched-pair testing,” see Eradicating Racism & Colorism from Employment, EEOC www.eeoc.gov/eeoc/initiatives/e-race/index.cfm (last visited Feb. 3, 2014), but currently operates no testing program. The EEOC has tried to initiate matched-pair testing over the past several decades but has abandoned the project in the face of opposition from some members of Congress. See Michael Yelnosky, Testers Revisited (Roger Williams Law Sch. Legal Stud. Working Paper, Research Paper No. 74, 2009) (describing how in 1998 Congress conditioned a budgetary increase for the EEOC on the agency’s abandoning its request for funding for testers). The EEOC has directed funding to private groups to conduct such testing. See id. at 5 (noting that after Congress blocked EEOC’s testing program, the agency provided $200,000 to private groups to carry out a testing program).
important array of regulations that place affirmative requirements of inclusion on grantees. Implementing Title VI, the Department of Agriculture requires federal agencies administering agriculture, forestry, food, and nutrition programs to undertake ongoing analyses to ensure that minorities benefit from these federally funded programs.\textsuperscript{78} Federally funded public transit and highway programs must take affirmative steps to assess the impacts of their programs on minorities and persons with limited English proficiency, adopt mitigating alternatives, and must include minority groups in their planning.\textsuperscript{79} In an account of these directives in mass transit, I showed how they required grantees to incorporate impact assessments in their planning, engage in best practices for ensuring participation of covered groups, and design inclusionary alternatives.\textsuperscript{80}

These Title VI directives bear on the debate about the relevance of discrimination law today: they extend beyond individual bias, and their implementation depends not on \textit{ex post} enforcement by courts (although litigation may sometimes play a role in enforcement) but on implementation by regulated actors. In addition, these directives intervene in regulatory domains that are linchpins for determining inclusion and opportunity distribution today. For instance, mass transportation policy and design has strong effects on economic mobility — high minority and poor communities are often disconnected from important job centers — and access to transportation is a key determinant of the distribution of resources and patterns of racial segregation and concentrated poverty across a metropolitan region.\textsuperscript{81} By encouraging inclusion of the needs of minority communities in design decisions, promoting ongoing equity assessments and mitigation, Title VI mass transit directives seek to interrupt the reproduction of existing, unequal patterns of transportation access and the attendant spatial inequalities. In addition, as in the employment example described above, these Title VI directives are harnessed by groups that do not centrally organize around questions of antidiscrimination — but who instead organize their


advocacy around the problems of particular geographic communities or on a specific policy problem (such as transit equity).  

Perhaps even more than Title VII, Title VI makes plain the risk of leaving the Act behind as reformers focus on questions of mobility, opportunity and spatial equality. Because Title VI commands attention to race and ethnicity in a vast number of federal programs involving billions of dollars, its regulatory infrastructure is too powerful not to employ as a tool for advancing reform.

III. ANTIDISCRIMINATION’S PLACE

As a way of defining a problem, and as a legal intervention, antidiscrimination is no doubt less central than it once was. In education, discriminatory discipline, racialized tracking, and discriminatory student assignment policies may remain problems, but reformers’ attention is understandably attuned to addressing disparities through reforms to improve the quality of educational interventions. In employment, important concerns about discrimination and occupational segregation in labor markets might be overtaken by the fate of workers in an economy that leaves little room for less skilled and semi-skilled workers. Those interested in inclusion and particularly in reducing racial and ethnic disparities would be gravely wrong to frame their claims solely in terms of discrimination (whether a thin or robust account) without engaging a broader set of reform strategies.

Still, the Civil Rights Act has important role to play in these domains. Understanding the Act’s place requires recovering the Act’s central ambition as well as – to use the buzz word of the moment – innovating to make the Act responsive to contemporary problems. Some may argue that the Act in its current formulation is not worth such sustained attention. After all, much innovation might be accomplished through new regulation, new statutes at the federal, state and local level. Such innovation is reflected in statutes requiring targeted attention to the progress of racial and ethnic minorities in education or by requirements that state actors address racial disparities in their juvenile justice systems. Innovation is evident too in efforts to intervene to address practices that may have a particular impact on minority or women but that address the declining fates of all lower-wage workers such as skills training, the expansion of school-to-work and apprenticeship programs, wage reform, reentry programs, the creation of new collective

82 For instance, groups that have been key in implementing and leveraging Title VI’s transportation directives including environmental justice groups, public transit advocacy groups, civil rights organizations and regionalism groups. See, Johnson, supra note 80, at 1406 n.303; id. at 1409 n.314; id. at 1411 n.321.

83 See, e.g., Wilson, supra note 3, at 26-27 (detailing the effect of decline of mass production on low-skilled workers). On the weakening of labor unions, see, e.g., Dorian T. Warren, The American Labor Movement in the Age of Obama: The Challenges and Opportunities of a Racialized Political Economy, 8 Persp. on Pol. 847, 848 (2010) (noting steep decline of labor unions’ share of the American workforce – from over 30 percent of all workers in the 1940s to 12.3 percent of all workers in 2009). On the decline of living wage jobs with career ladders, see Wilson, supra note 3, at 25.


bargaining regimes for low-wage workers,86 child care and sick leave policy87 or reform of the inappropriate uses of employment background checks.88

The reasons for continuing nevertheless to ask how the Civil Rights Act can bear on contemporary questions are both pragmatic and expressive. The pragmatic argument is that it is hard to make progress on inequality without attention to questions of how status — race, ethnicity and gender — structure opportunity in distinct ways. The Civil Rights Act contains one of the few places in American law that directs attention to these categories, and that provides mechanisms for disrupting long-standing patterns of exclusion. More, it provides an expansive, if imperfect, public and private regulatory infrastructure for advancing these goals. The second perhaps more expressive reason is that the Act was never simply about antidiscrimination in the narrowest sense. Even if so conceived by some of its drafters, it has absorbed a meaning through implementation and cultural salience that gestures towards broader claims of citizenship and inclusion.

CONCLUSION

As the Civil Rights Act of 1964 turns fifty, I am sympathetic to the idea that we should demote discrimination. Recognizing this, social reformers increasingly organize their equality claims around questions of opportunity, economic mobility, and diminishing disparities based on geography and place. Yet, the meaning of the 1964 Civil Rights Act is not limited to narrow notions of discrimination; it still has a role to play in structuring claims and advancing reforms in these new domains. As reformers design new strategies, the Act’s initial structural reform ambitions are worth remembering.

86 See Wilson, supra note 3, at 216-17 (proposing improvement in school to work transition programs, skills training and other interventions). For an account of this statute, see Olatunde C. A. Johnson, Disparity Rules, 107 COLUM. L. REV. 374 (2007).
87 See, e.g., The Third Shift, supra note 59.