ADMINISTERED ENTITLEMENTS: COLLECTIVE BARGAINING TO AFFIRMATIVE ACTION

By Paul Moreno*

Abstract: *This essay tells the story of the development of two of the most significant and controversial entitlement programs in twentieth-century U.S. history—collective bargaining and affirmative action. It focuses on the nexus between them—how New Deal empowerment of labor unions contributed to racial discrimination, and thus fed the Great Society race-based programs of affirmative action. The evolving relationship between the courts and the bureaucracies is emphasized, particularly how the judiciary went from an obstacle to an enabler of the entitlement state.*

KEY WORDS: affirmative action, entitlement, disparate impact, collective bargaining, fair representation, fair employment, Philadelphia Plan, Civil Rights Act of 1964

I. Administered Entitlements: Collective Bargaining to Affirmative Action

Policy historian Hugh Davis Graham noted that affirmative action—preferential treatment for minority groups—came about by "a closed system of bureaucratic policymaking, one largely devoid not only of public testimony but even of public awareness that policy was being made."[1] Less often noted is that affirmative action came about in reaction to earlier bureaucratic policymaking—that of the National Labor Relations Board (NLRB) in particular.[2] The two major affirmative action programs—executive orders for government contractors, and the enforcement of the Civil Rights Act of 1964 for all employers—evolved from earlier conflicts between civil rights organizations and the unions empowered by the NLRB. Those unions discriminated against black workers, and the NLRB abetted that discrimination; affirmative action began as an antidote to union discrimination. Political scientist Ken Kersch recently observed that black Americans began to make group-right claims "only after they became trapped" by New Deal labor policy that discriminated against them.[3]

Moreover, few analysts recognize that both collective bargaining (secured by the National Labor Relations Act [NLRA] often called the "Wagner Act," after its sponsor, New York Senator Robert F. Wagner)

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[1] Hugh Davis Graham, "The Great Society's Civil Rights Legacy," in *The Great Society and the High Tide of Liberalism*, ed. Sidney Milkis and Jerome M. Mileur (Amherst: University of Massachusetts Press, 2005), 376.

[2] William B. Gould IV, "Title VII of the Civil Rights Act at Fifty: Ruminations on Past, Present, and Future," *Santa Clara Law Review* 54 (2014): 371.

[3] Ken I. Kersch, *Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law* (Cambridge: Cambridge University Press, 2004), 10.

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and racial nondiscrimination in employment are not "rights" but congressionally provided "entitlements," which require bureaucratic agencies to provide them.[4] When Franklin D. Roosevelt announced the advent of the age of "enlightened administration" in 1932, he said that "the task of statesmanship has always been the redefinition" of the rights declared in the Declaration of Independence.[5] "Redefinition" meant changing the substance or meaning of "rights." Formerly a right was understood as something possessed by the individual before the formation of government. Now rights were given by the government to the individual or group. The New Deal entitlement to collective bargaining would beget the Great Society entitlement to affirmative action.

The American Constitution meant to secure the natural-rights political philosophy expressed in the Declaration of Independence. In it, governments are instituted among men to secure the natural rights that preceded government. Slavery violated one of the most fundamental of these, the right of personal liberty, and was abolished by the Thirteenth Amendment in 1865. Congress then enacted the Civil Rights Act of 1866, which declared the freedmen to be citizens of the United States, and protected their civil rights. The most important of these was the right "to make and enforce contracts"—in short, to ensure that the former slaves were now paid for the labor to which they consented and for which they contracted. But the Act did not compel anyone to make contracts with the freedmen.[6] That would have guaranteed not the right to work, but the entitlement to a job. Similarly, the right to marry is distinguished from the entitlement to a particular spouse, and the right to free speech from the entitlement to an audience. Likewise, in 1973, the Supreme Court decided that the Constitution guaranteed the right to abortion. Three years later it upheld an act of Congress that withheld Medicaid funding for elective abortions. The right to abortion did not entail an entitlement to it.

The National Labor Relations Act (NLRA) provided an entitlement to collective bargaining for union members. The right to make employer-union contracts had always existed, but now employers were compelled to negotiate them. Unions benefited greatly, often at the expense of black workers they excluded. Affirmative action is an administered entitlement meant to counteract that earlier significant bureaucratic benefit. The union entitlement had a clear statutory basis in the Wagner Act (though it would be somewhat curtailed in 1947). Affirmative action has no such legislative basis. It was contrived by bureaucrats and courts despite provisions in the

[4] Even if Title VII were interpreted as requiring the color-blind, equal treatment of individuals, rather than race-conscious equal-group outcomes, it would still provide an entitlement rather than a right.

[5] Address at Commonwealth Club, San Francisco, September 23, 1932, in *Public Papers and Addresses of Franklin D. Roosevelt*, compiled by Samuel L. Rosenman, ed., 13 vols. (New York: Macmillan and Harper, 1938–50), I: 42-56,

[6] The Supreme Court in 1968 decided that it did—*Jones v. Mayer*, 392 U.S. 409.

Civil Rights Act that meant to prevent it. Few policies better illustrate the perennial problem of the clash of the administrative state and democracy. As one scholar recently put it, "I know of no other public policy … that has remained so intensely unpopular both among whites and minority individuals, yet has survived so long."[7] The product of the least democratic parts of American government (federal courts and administrative agencies), affirmative action has consistently faced heavy popular disfavor.[8]

II. The Labor Board and the Birth of the Administrative State

The NLRA capped a long campaign by American unions to escape legal restrictions and acquire state benefits. In the nineteenth century, American labor relations were governed by the common law and the principles of "liberty of contract" and "employment at will." Employers could hire and fire for any reason, and employees could likewise work or quit for any reason. Organized labor leaders claimed that these principles were empty formalisms, failing to recognize the hegemonic economic power of employers.[9] Labor organizers could not compel employers to bargain with them. When they attempted to do so, by strikes and boycotts, courts usually enjoined them from interfering with the employer's operations and with the right of non-strikers to work. American unions lobbied for exemption from court injunctions and immunity from liability for their concerted actions under the antitrust laws. They largely got these privileges in the 1932 Norris-La Guardia Act. The NLRA went further, not just exempting unions from laws that applied to employers and other organizations, but using the federal government to promote unions and to compel employers to bargain with them. The Act did this through an "independent regulatory commission," the Labor Board.

Before the New Deal, courts protected individual rights. In the new administrative state, agencies would provide entitlements like collective bargaining.[10] James M. Landis, one of the founders of American administrative statism, observed in 1937 that the Labor Board was part of "an effort to grant protection to the common man in the realization of new liberties born of a new economic order. The continuity of the common man's radio programs, the security of his bank deposits, his protection against unfair

[7] Peter H. Schuck, *Diversity in America: Keeping Government at a Safe Distance* (Cambridge, MA: Harvard University Press, 2003), 134.

[8] Elaine B. Sharp, *The Sometime Connection: Public Opinion and Social Policy* (Albany: SUNY, 1999), 76, 102; Loan Le and Jack Citrin, "Affirmative Action," in *Public Opinion and Constitutional Controversy*, ed. Nathaniel Persily *et al.* (Oxford: Oxford University Press, 2008), 164–66.

[9] The classic expressions are Roscoe Pound, "Liberty of Contract," *Yale Law Journal* 18 (1909): 454, and Robert L. Hale, "Coercion and Distribution in a Supposedly Non-Coercive State," *Political Science Quarterly* 38 (1923): 470.

[10] Individuals had no cause of action under the Wagner Act, which recognized only organizations of workers.

discrimination in employment[11]… these are some of the new liberties which make up the right of today's common man to the pursuit of happiness, and these liberties for their protection seek the administrative and not the judicial process."[12] Pre-New Deal courts protected rights; the New Deal administrative agencies would provide entitlements. But for both the NLRB and affirmative action agencies, courts would end up being vital allies rather than opponents.

The Labor Board quickly became the most controversial administrative agency in American history. It provoked uproar across the entire American industrial landscape, and became a synonym for bureaucratic abuse. The Board fleshed out the principal doctrines of the Wagner Act, holding that employers *must* bargain *only* with whatever independent[13] representative was chosen by a *majority* of their employees—the compulsory, exclusive, and majority union principles. To almost everybody's surprise, the Supreme Court upheld the Wagner Act in April 1937.[14] This decision came shortly after FDR proposed to "pack" the Court by adding six Justices to it. Many scholars who deny that the Court "switched" in response to the "Court-packing plan" claim that the Wagner Act was better drafted than sloppy "first New Deal" Acts like the National Industrial Recovery Act (NIRA).[15] But this can hardly explain the Court's acceptance of the Wagner Act, which suffered from most of the same infirmities as the NIRA.[16] On the issue of the delegation of legislative power, for example, the Act provided no "intelligible principle."[17] Its announced principles were disparate and contradictory.[18] On the one hand, Congress claimed that employer resistance to labor organizations caused strikes that interfered with interstate commerce, and that collective bargaining would secure "industrial peace." (This was less intelligible than counterintuitive, since the NIRA effort to promote collective bargaining had *caused* the 1934–35 "strike wave." Industry was quite peaceful before 1933.) On the other hand, Wagner claimed that workers suffered from "unequal bargaining power" and did not enjoy "full

[11] Landis was certainly referring to "discrimination" against union organizers or members, not racial discrimination by employers or unions, which the Board rather abetted.

[12] "The Development of the Administrative Commission," address at the Swarthmore Club, February 27, 1937, in Walter Gellhorn, *Administrative Law: Cases and Comments* (Chicago: Foundation Press, 1940), 18.

[13] Most employers tried to establish "employee representation plans," or "company unions," to avoid outside (mostly American Federation of Labor) unions.

[14] There were five cases, at the time generally called "the Labor Board Cases," led by *NLRB v. Jones and Laughlin Steel Corp.*, 301 U.S. 1 (1937).

[15] Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (New York: Oxford University Press, 1998), 35–42.

[16] This Act contained a provision (section 7[a]) meant to promote collective bargaining, and President Roosevelt established two labor boards to do so. Though ineffective, these boards established the principles that went into the Wagner Act.

[17] The Court would accept legislative delegation to agencies if Congress provided an "intelligible principle" to guide the administrators—*J. W. Hampton v. U.S.*, 276 U.S. 394 (1928), 409.

[18] George I. Lovell, *Legislative Deferrals: Statutory Ambiguity, Judicial Power, and American Democracy* (Cambridge: Cambridge University Press, 2003), 218.

freedom of association and liberty of contract."[19] Industrial peace derived from the commerce clause and liberty of contract from the Fifth Amendment, and these two were usually in conflict. The commerce clause was a grant of power to the government, the Fifth Amendment protected individual rights against government. Did the Act intend to promote the public peace, or to secure workers' rights? Might the latter be sacrificed for the sake of the former under different circumstances?[20] The commerce justification could mean that if Congress decided that collective bargaining impeded interstate commerce, it could *prohibit* rather than *promote* it. The Act also ran afoul of other constitutional limitations, especially those concerning Congress' enumerated powers and the Tenth Amendment reiteration of that principle, as well as questions of Fifth Amendment due process.[21]

The Act's sponsors might have honestly expressed its "intelligible principle" as "Do whatever you need to do to empower labor unions." The Act was deliberately and completely one-sided. It contained, for example, a long list of "unfair labor practices" by employers, but left unions unrestrained. But such an admission would have exposed the "naked preference" at the heart of the Act—that it was what was formerly known as "class legislation."[22] So outlandish an Act passed Congress so easily only because most members were sure that the Supreme Court would strike it down. They could thus placate organized labor without having to live with the consequences. [23] Many would be chagrined in the ensuing decade, as it became clear how vast the delegation of legislative power was, and how one-sided the Board was.

Several provisions of the Wagner Act gave the Board discretion to make what were political, not merely technical-administrative, choices. The Act declared it an unfair labor practice for an employer "to refuse to bargain collectively with representatives of his employees."[24] But what did "refusal" mean? Must the required bargaining produce an agreement? It would take many years to iron out what constituted "good-faith bargaining."[25] Another section of the Act gave the Board the power to

[19] 49 Stat. 449 (1935), sec. 1.

[20] Christopher Tomlins, *The State and the Unions: Labor Relations, Law, and the Organized Labor Movement in America, 1880–1960* (Cambridge: Cambridge University Press, 1985), sees the Wagner Act as sacrificing workers' rights to aid the industrial peace required by "corporate liberalism."

[21] The dissenters brought these up, particularly in the case of *Friedman v. Harry-Marks*, 301 U.S. 76 (1937).

[22] Cass R. Sunstein, "Naked Preferences and the Constitution," *Columbia Law Review* 84 (1984): 1689.

[23] *The Secret Diary of Harold L. Ickes: The First Thousand Days, 1933–36* (New York: Simon and Schuster, 1953), 524; Irving Bernstein, *The New Deal Collective Bargaining Policy* (Berkeley: University of California Press, 1950), 116.

[24] Section 8 (5).

[25] James A. Gross, *The Reshaping of the NLRB: National Labor Policy in Transition, 1937–47* (Albany: SUNY, 1981), 18.

determine the "bargaining unit … appropriate for the purpose of collective bargaining [which] shall be the employer unit, craft unit, plant unit, or subdivision thereof," and the Board was permitted to do so "by secret ballot of employees, or utilize any other suitable method to ascertain such representatives."[26] These determinations were not reviewable in court. Board anointing of bargaining units ran into the political morass of craft versus industrial unionism. The American Federation of Labor (AFL) was a "craft" federation, its member unions were organized on the basis of particular skills, and it preferred smaller bargaining units. They came into conflict with labor leaders who wanted to organize the mass of unskilled production workers in the auto, steel, and other manufacturing industries. (The AFL had wanted Congress to lodge the Board in the Labor Department, which it dominated. Industrial union advocates won the independent Board.[27]) The industrial unions of the Congress of Industrial Organizations (CIO) broke off into their own federation, and conflict raged between the AFL and CIO until their reunion in 1955. The AFL accused the Board of bias in favor of CIO unions, many of which were tools of the Communist Party.[28] The Federation soon joined employers (who were often caught in the middle of jurisdictional fights between two unions) in calling for amendments to the Wagner Act. Some of the more conservative union leaders realized that they risked sacrificing fundamental rights (such as the right to strike) to gain the benefit of administrative promotion of collective bargaining—that entitlements came at the cost of rights.

The benefit of collective bargaining for unions came at the cost of the denial of the right of freedom of association for employers. As James Landis observed, the old regime of rights was being transformed into a new one of entitlements.[29] One of the chief differences between rights and entitlements is that rights are not zero-sum: all individuals can exercise their rights simultaneously without infringing on the rights of others. But one individual's enjoyment of an entitlement requires some other individual or group to provide the good.

One of the principal differences between collective bargaining and affirmative action is that the former had more of a legislative base in the Wagner and Taft-Hartley Acts, while the latter was primarily of bureaucratic-judicial provenance. This has given collective bargaining more democratic legitimacy than affirmative action. But in another sense, the special role played by the courts, especially in the creation of affirmative action, fit into

[26] Section 9 (b-c).

[27] Robert E. Cushman, *The Independent Regulatory Commissions* (New York: Oxford University Press, 1941), 362.

[28] The Board itself housed quite a few communists, particularly its Secretary, Nathan Witt (Gross, *Reshaping of the NLRB*, 142–46). Nine communist-dominated unions would be expelled from the CIO in 1949.

[29] See note 12, above.

the "double standard" of constitutional interpretation announced by the Supreme Court in 1938. In a footnote to *U.S. v. Carolene Products*, the Court said that some rights (non-economic ones like freedom and speech) and some groups ("discrete and insular minorities") needed more protection than others.[30] Although the (federal) judiciary was the least democratically accountable branch, it was actually enhancing democracy, by looking after the interests of groups who had the least power in a democracy. This has been the most common justification for modern judicial power, and it could apply to bureaucratic power as well.[31]

With the federal government behind them, the Second World War brought American unions to the apex of their power, with one-third of the private-sector work force organized by 1945. When the war ended, American labor leaders resolved to maintain their wartime gains, having lost similar advances after World War I. An intense "strike wave" befell the economy in 1945–46, turning public opinion against militant (especially CIO) unions. This produced large Republican gains in the 1946 elections, and the passage of the Taft-Hartley Act over President Truman's veto. Though Truman denounced it as a "slave-labor act," Taft-Hartley (formally the Labor-Management Relations Act) preserved the fundamentals of the Wagner Act—the compulsory, majority, and exclusive principles.[32] It addressed some of the administrative abuses of the Labor Board, especially by separating its prosecutorial and adjudicative functions.[33] The Act also defined a set of "unfair labor practices" for unions as well as for management. Its most important provision allowed states to outlaw the "union shop," in which workers were compelled to join unions after being hired, and many states (especially in the South and West) exercised this option and became "right-to-work" states. The Act little impeded the American labor movement, which maintained its 1945 numbers and relative share of the labor market until 1955 before beginning a relative decline.[34] Taft-Hartley has remained the basic template of American labor policy to the present day.

[30] 304 U.S. 144 (1938).

[31] John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press, 1980) is the classic statement of the "democratic process" defense of judicial power. Works on "representative bureaucracy" extend it into administrative agencies.

[32] Interior Secretary Harold Ickes and NLRB member James Reynolds claimed that Truman favored the Act, but vetoed it to placate the unions, knowing that his veto would be overridden. Martin Halpern, *UAW Politics in the Cold War Era* (Albany: SUNY, 1988), 204.

[33] The combination of legislative, executive, and judicial powers in administrative agencies was the principal constitutional objection to the new bureaucratic state. That problem was addressed in the Administrative Procedure Act of 1946, but the NLRB was singled out for special treatment in Taft-Hartley.

[34] This may have been because the Board interpreted the Taft-Hartley Act to suit itself—Sylvester Petro, *How the NLRB Repealed Taft-Hartley* (Washington: Labor Policy Association, 1958).

III. Blacks and the Board

The Wagner Act was essentially an "antidiscrimination" law, forbidding employers to fire workers for attempting to form unions. It gave the Board the power to require employers "to cease and desist from such unfair labor practice, and to take such affirmative action … as will effectuate the policies of this act."[35] But the law made no provision for discrimination *within* the workforce. Almost all American unions engaged in racial discrimination. The railroad brotherhoods, the oldest and most powerful unions, were the most exclusive.[36] Skilled AFL unions usually established segregated locals for blacks. The newer, CIO industrial unions had to include black workers who were already part of the work force, but usually discriminated in matters of training, promotion, and seniority. Civil rights organizations were well aware of the racial record of American unions, and opposed the Wagner Act when the Senator rebuffed their proposals for nondiscrimination provisions.[37] Thirty-five years later, Lester Granger of the National Urban League called the Wagner Act "the worst piece of legislation ever passed by the Congress."[38] Senator Wagner, at the behest of southern Democrats, also excluded agricultural and domestic jobs, since these were the principal occupations of southern blacks. It serves as an example, as one historian puts it, of "when affirmative action was white."[39]

The Labor Board made no effort to interpret the Wagner Act to curtail racial discrimination.[40] The Supreme Court took the first steps against the abuse of union power to discriminate. Black railroad workers sued white unions that were trying to eliminate their jobs. In 1944, the Supreme Court held that the Railway Labor Act required unions to provide "fair representation." The unions did not have to admit blacks as members, but they could not violate the rights of blacks by using the quasi-sovereign power that the statute gave them.[41] Chief Justice Stone's opinion in the first "fair representation" case indicated that the policy derived from concern about interstate commerce, not individual rights. "The purposes of the Act … are the avoidance of 'any interruption to commerce' ….. If a substantial

[35] Sec. 10 (c).

[36] They had been empowered earlier—due to their vital place in the economy and clear identity as engaging in interstate commerce—going back to the Erdman Act of 1898, the Adamson Act of 1916, and especially the Railway Labor Act of 1926.

[37] Jonathan G. Axelrod and Howard J. Kaufman, "Mansion House—Bekins—Handy Andy: The NLRB's Role in Racial Discrimination Cases," *George Washington Law Review* 45 (1977): 682.

[38] Nancy J. Weiss, *The National Urban League, 1910–1940* (New York: Oxford University Press, 1974), 275.

[39] Ira Katznelson, *When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America* (New York: Norton, 2005), 53–79.

[40] Robert Belton, "A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964," *Vanderbilt Law Review* 31 (1978): 912; Paul Frymer, "Acting When Elected Officials Won't: Federal Courts and Civil Rights Enforcement in the United States, 1935–85," *American Political Science Review* 97 (2003): 485.

[41] *Steele v. Louisville and Nashville RR*, 323 U.S. 192 (1944); *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*, 323 U.S. 210 (1944).

minority of the craft were denied the right to have their interests considered … the only recourse of the minority would be to strike, with the attending interruption of commerce, which the Act seeks to avoid."[42] As Stone saw it, Congress had put the entitlement to collective bargaining over the rights of minority workers.

The Court extended the fair representation doctrine from the Railway Labor Act to the Taft-Hartley Act in 1953, but this secured only the right of individual victims of unfair treatment to bring suit, and provided only for union decertification, not orders to cease and desist from this unfair labor practice.[43] The Board provided no administrative remedies until 1964, when it held racial discrimination to be an unfair labor practice.[44] The Board issued this decision on the day the Civil Rights Act of 1964 was passed; the Act largely made it redundant. Board member Howard Jenkins told the President that if the Board had decided the case earlier, the Civil Rights Act would have been unnecessary.[45] Assistant Secretary of Labor Arthur Fletcher, one of the principal architects of affirmative action, said the same.[46] And even after 1964 the Board was less enthusiastic than the courts in policing racial discrimination.[47]

IV. The "Fair Employment" Era, 1945–1964

Affirmative action as we know it today grew out of a series of presidential orders directed at government contractors on the eve of World War Two. As the nation approached full employment in preparation for war, black Americans were not getting what their leaders believed was their fair share of the defense job bonanza. A. Philip Randolph, the head of the all-black Brotherhood of Sleeping Car Porters, threatened a "March on Washington," to bring thousands of black protesters to the capital, unless President Roosevelt prohibited discrimination in defense industries and integrated the armed forces. Randolph accepted a compromise in which Roosevelt ordered nondiscrimination in defense industries but deferred military integration.

[42] *Steele v. Louisville and Nashville RR*, 200-201.

[43] *NLRB v. Hughes Tool Co.*, 104 NLRB 318 (1953)—known as the "first Hughes Tool case." Vincent Martin Bonaventure, "The Duty of Fair Representation Under the Taylor Law: Supreme Court Development, New York State Adoption, and a Call for Independence," *Fordham Urban Law Journal* 20 (1992): 8-12. The Wagner and Taft-Hartley Acts permitted judicial review of the Labor Board's unfair practice decisions, but not of its certification decisions, so blacks who lost a decertification case could not appeal the Board's decision.

[44] *Hughes Tool Co.*, 147 NLRB 1573 (1964)—the "second Hughes Tool case."

[45] Sophia Z. Lee, *The Workplace Constitution: From the New Deal to the New Right* (New York: Cambridge University Press, 2014), 175. The Board held back its decision for fear that it would be interpreted this way—ibid., 150.

[46] *The Silent Sell-Out: Government Betrayal of Blacks to the Craft Unions* (New York: Third Press, 1974), 26.

[47] Timothy J. Boyce, *Fair Representation, the NLRB, and the Courts* (Philadelphia: Wharton Industrial Research Unit, 1978).

Roosevelt issued Executive Order 8802 on June 25, 1941. He emphasized both the need for maximum manpower utilization and "workers' morale and national unity." The nation could not afford to waste underutilized minority skills for the sake of racial prejudice, nor could it allow internal racial conflict (evinced by Randolph's threatened march) that its enemies could exploit. Thus Roosevelt made the case for racial justice primarily on the grounds of national security, rather than on individual rights. This was not unlike Lincoln's Emancipation Proclamation, an executive order issued under his constitutional power as commander-in-chief of the armed forces. The order contained no enforcement mechanism other than the establishment of the President's Committee on Fair Employment Practice (known as the FEPC). Most interpreted this as a vague threat to cancel a lucrative contract if the order was violated.[48]

The FEPC mediated some five thousand complaints, and publicized some of the most egregious discriminatory practices in the economy. Most historians have concluded that its value was largely symbolic, and attribute most of the impressive gains that blacks made during the war years to the tight labor market. But the wartime FEPC became the model for postwar racial egalitarians in the employment field. Civil rights organizations lobbied for a permanent, peacetime FEPC. Southern Democrats, in control of Congress, prevented any serious consideration of this until 1964. In the two postwar decades, ad hoc presidential committees and state agencies promoted fair employment.

President John F. Kennedy took cautious steps toward the expansion of executive-administrative affirmative action. Kennedy issued a new executive order and created a new presidential committee (the President's Committee on Equal Employment Opportunity, or PCEEO) to police discrimination in government contracting. The most significant change (in retrospect) was the order's directive to contractors to "take affirmative action to ensure that applicants are employed [and] treated … without regard to their race, creed, color, or national origin."[49] The phrase, lifted from the Wagner Act, was little noted at the time, and nobody suspected that it presaged the future's preferential treatment or racial quotas.[50] It more likely meant the expansion of "outreach," taking steps to make black workers know that opportunities were available, by altering personnel recruiting policies.[51] The order may have prompted contractors to press the unions that provided their workers, telling businessmen that they could no longer use unions as scapegoats whom they were powerless to control.

[48] 3 CFR 957 (1941).
[49] Ex. Ord. 10925 (1961).
[50] Hugh Davis Graham, *The Civil Rights Era: Origins and Development of National Policy* (Oxford: Oxford University Press, 1990), 34–35. The Wagner Act empowered the Labor Board to order employers to take affirmative action to benefit victims of *anti-union* discrimination. It had nothing to do with *racial* discrimination.
[51] Frank Dobbin, *Inventing Equal Opportunity* (Princeton, NJ: Princeton University Press, 2009).

Thus the marquee administration program was "Plans for Progress," in which large federal contractors voluntarily and conspicuously opened opportunities for minorities. By the end of the Kennedy administration, civil rights groups had become more militant and demanding, and scorned the breakthroughs of Plans for Progress as window-dressing or "tokenism." But the PCEEO also began a national database of racial employment practices by some of the largest industries in the country.[52] Similarly, the Committee worked with the Kennedy Labor Department to pressure unions and contractors to adopt preferential policies for blacks in joint labor-management apprenticeship programs.[53] A statistical and race-based redefinition of equal opportunity was taking shape, replacing the individual, color-blind definition. But by 1963, the protests of the civil rights movement, culminating in the crisis in Birmingham and President Kennedy's call for a national civil rights act, overshadowed the initiatives of the PCEEO.

The states provided the other main venue for postwar fair employment efforts, potentially a much more powerful one. New York enacted the first employment antidiscrimination law in 1945; twenty-five states had done so by 1963. The New York law applied to all employers and unions, not just to government contractors. It was modeled on the Wagner Act, as civil rights organizations desired, with the power to issue cease-and-desist orders that the wartime FEPC and subsequent presidential committees lacked.[54] But the law instructed the State Commission Against Discrimination to begin to address discrimination through "conference, conciliation, and persuasion" before moving on to legal enforcement. These Acts also did not define "discrimination based on race." As many commentators pointed out, proof of discriminatory intent would be very difficult given the large number of factors involved in employment decisions. Inability to sort out these factors might lead to a statistical definition and cause employers to resort to racial quotas.[55]

Civil rights organizations quickly soured on the conciliatory approach of the New York and other state FEPCs, and with their focus on individual complaints rather than industry-wide, statistically driven investigations. But their criticism was relatively muted, and the commissions in their early years were more effective than their critics would acknowledge.[56] Civil rights organizations had won the administrative *form* of the NLRB; they

[52] Graham, *Civil Rights Era*, 47–67.

[53] Paul D. Moreno, *From Direct Action to Affirmative Action: Fair Employment Law and Policy in America, 1933–72* (Baton Rouge: Louisiana State University Press, 1997), 193–96.

[54] Board orders could be challenged in court, but courts almost always upheld them, so they were considered self-enforcing. See Reuel Schiller, "The Age of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law," *Michigan Law Review* 106 (2007).

[55] Arthur Earl Bonfield, "The Origin and Development of American Fair Employment Legislation," *Iowa Law Review* 52 (1967): 1043–92; "An American Legal Dilemma: Proof of Discrimination," *University of Chicago Law Review* 14 (1949): 107–25.

[56] William J. Collins, "The Labor Market Impact of State-Level Anti-Discrimination Laws, 1940–1960," *Industrial and Labor Relations Review* 56 (2003): 244–72.

had not gained its *substance*—a definition of discrimination that looked to equal group outcomes (for unions or racial groups), rather than focusing on the intentional unequal treatment of individuals. The Act was still too rights- rather than entitlement-based. Later analyses of the rise of affirmative action saw it as a response to the urban riots of the 1960s. While this is partly true, the desire for race-conscious preferential treatment was evident long before.[57] Civil rights groups had been unable to "capture" the state commissions, and regarded them as having been captured by employers and their political allies. However, as one the architects of affirmative action later observed, the state FEPCs' evasiveness on the issue of defining discrimination, particularly by avoiding court battles to enforce the laws, left the door open to affirmative action.[58]

The most important state fair employment case came out of Illinois in the midst of Congress' debate on the Civil Rights Act of 1964. Although the episode would become famous for shaping the question of racial bias in employment testing, it also exposed the mischances of "the administrative process," the occasional caprice of obscure bureaucrats. Leon Myart was rejected for a job with the Motorola Corporation in Chicago. The company claimed that he had failed a standardized test; Myart alleged that he had been rejected because of his race. The state FEPC "trial examiner" held that Motorola's test, normed "from standardization on advantaged groups … does not lend itself to equal opportunity to qualify for the hitherto culturally deprived and disadvantaged groups."[59] Motorola appealed this decision to the full state FEPC. The Commission did not rule on the bias claim, but concluded that Myart had passed the test, and that the company had fraudulently recorded a failing grade.[60] Myart had since obtained another job, so the Commission fined Motorola one thousand dollars. The company appealed to the Chicago circuit court, which held that the Commission's evidence was not sufficient for a court, but was enough for a commission, to which the court must defer. But the court held that the legislature had not given the Commission the power to impose fines. On appeal, the Illinois Supreme Court then overturned the entire commission case, and the legislature removed the chairman.[61]

V. The Civil Rights Act of 1964

President John F. Kennedy reluctantly moved beyond his 1961 executive order in the realm of employment discrimination. When 1963 protests in

[57] Moreno, *From Direct Action*, 2.
[58] Blumrosen, *Black Employment and the Law*, 19, 85.
[59] *Congressional Record* 110 (March 19, 1964): 5664. See generally, Irving Kovarsky, "The Harlequinesque Motorola Decision and Its Implications," *Boston College Industrial and Commercial Law Review* 7 (1966): 535–47.
[60] The original test was no longer extant. Myart passed a retest administered by the trial examiner.
[61] *Motorola v. Illinois FEPC*, 51 L.C. 323 (1965); *Motorola v. Illinois FEPC*, 34 Ill. 266 (1966).

Birmingham focused national attention to the brutality of southern segregation, Kennedy called on Congress to enact a civil rights statute, but his proposal included no "fair employment" section beyond giving legislative status to the PCEEO. House liberals added a fair employment section—what would become Title VII. Like the rest of the Civil Rights Act, Title VII did not purport to enforce civil rights under the Fourteenth Amendment, but rather claimed to regulate interstate commerce, which Congress found was impeded by segregation.[62] Like the Wagner Act, the Civil Rights Act raised the question of whether Congress meant to promote commerce or protect individual rights. This suggested that if Congress determined that racial segregation *promoted* interstate commerce, it could *require* it.[63]

Title VII and the agency it created, the Equal Employment Opportunity Commission (EEOC), emerged from a number of political compromises. Civil rights groups and congressional liberals wanted the EEOC to have the NLRB's cease-and-desist power. Instead the Commission could only attempt to "conciliate" individual complaints. Even in these cases, it had to defer to states that had FEPCs. The EEOC could refer cases to the Justice Department, which could also sue in non-individual, "pattern or practice" cases. Individual complainants could sue employers if the Commission failed to reach an agreement. This provision at least introduced to the Civil Rights Act an individual-rights aspect that had been lacking in the Wagner Act.[64] Individual suits would turn Title VII into a powerful engine of affirmative action.

Liberals bemoaned the EEOC structure, but the conservative insistence on judicial rather than administrative enforcement turned out to promote their preferred definition of discrimination.[65] Liberals failed to see the emerging critique of the New Deal administrative state, that bureaucrats were often "captured" by the entities that they were supposed to reform.[66] Democrats still feared the courts as hostile to administrative agencies as they had been in the pre-New Deal era, when in fact the federal bench of the 1960s was about to spur rather than rein in bureaucrats. Republicans still shuddered at memories of the Labor Board of the 1930s, though it had since become a paper tiger that business had long learned to accommodate. Corporations had given up resistance to labor unions after the Court upheld

[62] This was partly because of the (probably erroneous) belief that earlier Supreme Court interpretation had made the Fourteenth Amendment unenforceable, and also because the chairman of the Senate Commerce Committee (Warren Manguson) was more friendly to civil rights than the segregationist chairman of the Senate Judiciary Committee (James O. Eastland).

[63] This, of course, would run into Fifth and Fourteenth Amendment objections, such as those that had to be overcome to secure affirmative action.

[64] An individual victim of anti-union discrimination had no private right to sue if the Labor Board rejected his claim.

[65] Alfred W. Blumrosen, *Modern Law: The Law Transmission System and Equal Employment Opportunity* (Madison: University of Wisconsin Press, 1993), 42.

[66] Theodore J. Lowi, *The End of Liberalism: The Second Republic of the United States*, 40th Anniversary edition (New York: Norton, 2009); Blumrosen, *Black Employment and the Law*, ix, 4–6.

the Wagner Act in 1937 and developed personnel departments to manage them. By 1953, when a Republican administration might have moved to amend or repeal the Wagner Act, big businessmen pressed the Eisenhower administration to leave it alone.[67] Both sides were a generation behind in their perception of the administrative-judicial relationship.

Title VII also contained several important substantive provisions to prevent an overly aggressive enforcement of the law. Most fundamental was the Act's declaration that it was unlawful "to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual … because of such individual's race, color, religion, sex, or national origin."[68] Although the term "to fail" to hire was relatively novel, the rest of the section copied the old state fair employment laws, and repeatedly emphasized the Act's individual, not group, focus.

The Act further made it illegal for an employer "to limit, segregate, or *classify* his employees in any way" that could reduce employment opportunity. Still several congressmen warned that the Act's failure to define "discrimination based on race" would open the door to preferential treatment and quota hiring. To meet this concern about dangerous delegation, the last section of Title VII stated that nothing in it "shall be interpreted to require any employer … to grant preferential treatment to any individual or to any group because of the race … of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race … in comparison with the total number or percentage of persons of such race … in any community."[69] The bill's managers repeatedly swore that it prohibited quotas, with Senate manager Hubert H. Humphrey famously promising to eat the bill page by page if any quota provision could be found in it.[70]

Finally, in response to employer fears about testing after the Illinois Motorola case, another provision allowed the use of "any professionally developed ability test provided that such test … is not designed, intended or used to discriminate because of race." For unions that feared that white workers would have to give way to blacks, the same section permitted "different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system."[71]

[67] Terry M. Moe, "Interests, Institutions, and Positive Theory: The Politics of the NLRB," *Studies in American Political Development* (1984): 282.

[68] Sec. 703(a). The addition of "sex" to the traditional categories of "race, creed, color, and national origin" was a surprise, the work of Virginia Representative Howard W. Smith, a longtime foe of civil rights legislation. It is usually assumed that he offered the amendment as a "poison pill" to help defeat the bill, but he may have been seeking to protect white women, whom he figured would be dismissed to make way for blacks. Graham, *Civil Rights Era*, 136.

[69] Sec. 703(j).

[70] *Congressional Record*, 88th Cong., 2d Sess. (April 9, 1964), 7420; (June 4, 1964): 12723.

[71] Sec. 703(h).

VI. The Philadelphia Plan

The Johnson administration began to strengthen its "affirmative action" government contracting program after the enactment of the Civil Rights Act. This amplified his call to move beyond equality of opportunity and toward equality of results in his 1965 commencement address at Howard University. "Freedom is not enough to wipe away the scars of centuries," the President said. "You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, 'you are free to compete with all the others,' and still justly believe that you have been completely fair. We seek … not just equality as a right and a theory but equality as a fact and equality as a result."[72] The Howard Address had more to do with the Great Society programs than with civil rights legislation. Johnson said that "it is not enough just to open the gates of opportunity. All of our citizens must have the ability to walk through those gates. We seek … not just legal equality but human ability." Civil rights laws and executive orders could hardly "provide ability"; Great Society education, training, and other welfare initiatives would do that. Nevertheless, the civil rights enforcement agencies would pursue equal outcomes whether Great Society social programs provided ability or not.

A few months later, Johnson issued a new executive order that created a new Office of Federal Contract Compliance (OFCC) in the Department of Labor. The OFCC director, Edward C. Sylvester, declared that there was no definition of "affirmative action," and called it "anything that you have to do to get results. But this does not *necessarily* include preferential treatment."[73] As black protests of the early 1960s had helped impel President Kennedy to push for civil rights legislation, the urban riots of the mid-60s and the rise of Black Power certainly fed calls for enhanced affirmative action. But this largely accelerated a latent demand of civil rights groups for proportional representation that had existed for decades.[74]

Like the state commissions, the Labor Department zeroed in on the "lily-white" skilled construction unions. The first program applied to Cleveland, where contractors agreed to provide "manning tables" indicating the racial composition of their work forces, and to employ 110 minority craftsmen of a total of 475. A similar program was adopted for the Philadelphia construction trades—the program would become known as the "Philadelphia Plan." Labor Secretary Willard W. Wirtz emphasized, however, that it would affect only exceptionally discriminatory areas and would not become general.[75] But the Nixon administration revived, expanded, and defended the

[72] June 4, 1965, in *Public Papers of the Presidents of the United States: Lyndon B. Johnson* (Washington, DC: GPO, 1966), II: 635–40.

[73] *The Role of the Federal Government in Promoting Equal Opportunity in Employment and Training* (Washington, DC: Brookings, 1969), 93.

[74] Moreno, *From Direct Action to Affirmative Action*, 2.

[75] Richard P. Nathan, *Jobs and Civil Rights: The Role of the Federal Government in Promoting Equal Opportunity in Employment and Training* (Washington, DC: Brookings, 1969), 109–19; Graham, *Civil Rights Era*, 287–90. The Plan applied to six and at times seven specific crafts.

Philadelphia Plan against the Comptroller General (who claimed that it violated federal procurement regulations) and congressional opponents.

The courts, by now considered the last word in constitutional interpretation, settled the legality of affirmative action. In 1970, a federal district court upheld the Philadelphia Plan. It allowed great latitude to executive orders, and to the departments interpreting those orders. It expressed hearty approval of the policy of affirmative action. "Civil rights, without economic rights, are mere shadows," the court opined, showing the way that nineteenth-century individual rights had become twentieth-century group entitlements. Discrimination "must be eliminated from our society." Its effects were "repugnant, unworthy, and contrary to present national policy. The Philadelphia Plan will provide an unpolluted breath of fresh air to ventilate this unpalatable situation."[76] The Third Circuit Court of Appeals sustained on appeal. The court held that to exclude color-conscious affirmative action would "freeze the status quo" in a way that Congress had not intended.[77] The Court was following the development of lower courts in Title VII cases, which had culminated in the Supreme Court's *Griggs* decision about six weeks earlier. The Supreme Court did not review the Third Circuit's decision, which seemed to be in accord with *Griggs.* The Labor Department then extended the Philadelphia Plan to *all* federal contractors.[78] What started as a unique remedy for peculiarly acute discrimination in the skilled construction trades had become national policy.

The rise of affirmative action, and the Great Society's focus on "new social regulation" rather than old economic regulation, came at the expense, or at least neglect, of the old cynosure of New Deal liberalism—organized labor. The AFL-CIO did not win repeal of section 14(b) of the Taft-Hartley Act (the "right to work" provision), which had long been its top legislative priority. For years Representative Adam Clayton Powell had held up repeal bills, insisting that they be accompanied by a non-discrimination law for unions.[79] Private sector unionism continued the relative decline that had begun in the mid-1950s, and began to decline in absolute numbers in the 1970s. 87 percent of construction workers had been union members in 1948; fewer than 13 percent are today.[80] But there was still some muscle left in the AFL-CIO. The Nixon administration, in an effort to win the support of the patriotic, white working-class "hard-hat" vote, soon allowed construction unions to opt out of Philadelphia Plan programs if they could devise satisfactory "hometown plans." Civil rights organizations largely looked upon

[76] *Contractors Association v. Shultz*, 311 F. Supp. 1002 (1970).
[77] *Contractors Association v. Shultz*, 442 F. 2d 159 (1971).
[78] Graham, *Civil Rights Era*, 341–43.
[79] The AFL-CIO did not oppose nondiscrimination provisions like Powell's. The repeal of 14(b) failed even after the Civil Rights Act of 1964 had enacted one. Arguably, Title VII contained a provision (section 703[h]) to protect discriminatory union seniority systems—discussed below.
[80] A. J. Thieblot, "The Fall and Future of Unionism in Construction," *Journal of Labor Research* 22 (2001): 287; Bureau of Labor Statistics, Economic News Release, January 18, 2019.

this as a political payoff. Assistant Labor Secretary Arthur Fletcher, who had designed the Philadelphia Plan, titled his account of it *The Silent Sell-Out*.[81]

VII. The Present Effects and Disparate Impact Doctrines

Unions also shaped Title VII of the Civil Rights Act, which the new Equal Employment Opportunity Commission and the federal courts fleshed out. The EEOC showed that a relatively powerless administrative agency could leverage results by working with other government agencies, but principally with private litigants and sympathetic judges. The agency that Columbia Law Professor Michael Sovern belittled as a "poor, enfeebled thing" became a powerful policymaker.[82] It also began to collect data on the racial composition of the American labor force by sending "EEO-1" forms to employers. Such statistical data were essential to a race-conscious, group-outcome view of nondiscrimination. The Commission had no power to make substantive rules; it was limited to "suitable procedural regulations." But the collection of racial data appeared to be a significant substantive regulation, for the *statistical* definition of "discrimination" would be *the* principal substantive issue in Title VII's development.

The Commission also parlayed procedural interpretations of Title VII into substantive policy outcomes. It quickly jettisoned "conciliation," its principal legislative mandate, and pursued adversarial court action in cooperation with civil rights organizations.[83] Alfred W. Blumrosen, a law professor who served as counsel to the Commission, and one of the Founding Fathers of affirmative action, boasted of its "administrative creativity" in its formative years. "The EEOC minimized the formal requirements for invoking Title VII, streamlined possibly complex federal-state relations, imposed a national reporting system in the face of seemingly restrictive statutory language, developed a compliance procedure protective of individual rights, laid a foundation for multilateral negotiations between labor, management, and civil rights groups, adopted 'guidelines' since it had no power to engage in substantive rulemaking, and coordinated all of the federal government's power in a massive settlement" with the Newport News Company.[84] As a more critical historian put it, "the judiciary revised or redefined virtually every key provision of Title VII. Rejecting the even-

[81] Fletcher, *The Silent Sell-Out*.

[82] Michael Sovern, *Legal Restraints on Racial Discrimination in Employment* (New York: Twentieth Century Fund, 1966), 205.

[83] David B. Oppenheimer et al., "Be Careful What You Wish For: Ronald Reagan, Donald Trump, the Assault on Civil Rights, and the Surprising Story of How Title VII Got Its Private Right of Action," *Berkeley Journal of Employment and Labor Law* 39 (2018). The labor board predecessors of the NLRB had done the same thing in 1933–35, giving up efforts to settle industrial disputes and promulgating policies that would empower unions, which then were written into the Wagner Act. Gross, *Making of the National Labor Relations Board*, 77.

[84] Blumrosen, *Black Employment and the Law*, 52. Arthur Fletcher brought Blumrosen to the OFCC when launching the Philadelphia Plan.

handed dispute resolution that Congress identified as a principal means of guaranteeing equal employment opportunity, the judiciary transformed Title VII into a one-sided, pro-plaintiff measure."[85] While the Wagner Act had been deliberately one-sided (until amended in the Taft-Hartley Act), the Civil Rights Act was made so by bureaucratic and judicial interpretation.

The use of liberalized procedural rules to promote substantive policy outcomes characterized the rise of modern liberal judicial activism. Courts, federal and state, facilitated plaintiff access with a view toward using lawsuits to promote social change. Courts altered such doctrines as standing, ripeness, and mootness, abandoned the "political questions" doctrine, encouraged class actions, and generally widened the traditional understanding of justiciability, or what defined a genuine "case or controversy."[86] Legislatures often abetted this process by such "private attorney general" provisions seen in Title VII. Courts adopted looser procedural rules that imitated "the administrative process," making it faster and more flexible in the eyes of proponents, or arbitrary and capricious in the eyes of critics.[87] Lawsuits by individuals and public-interest groups often compelled agencies less zealous than the EEOC to act, and essentially turned judges into administrators, supervising schools, prisons, mental hospitals, and other institutions—often through a "special master," or court-appointed administrator. The courts would no longer simply defer to the agencies, they would assist them or compel them in the provision of a host of new entitlements.[88]

Among the EEOC's most important doctrinal victories was to establish that the Civil Rights Act outlawed "the present effects of past discrimination"—in other words, applied to pre-act discrimination. It did this principally in attacking union seniority systems. Black workers often faced the problems of segregated job classifications and seniority lines. Unions would negotiate contracts in which workers would accumulate seniority based upon time served in a particular job line (known as "departmental" seniority, as opposed to "plant" seniority).[89] If they were promoted to a new job line, they would start at the bottom rung of a new seniority ladder. Seniority rules made blacks more vulnerable to layoff if they moved to the better (traditionally "white") jobs now open to them. Civil rights groups argued that blacks should be able to bring their accumulated seniority into the new jobs.

[85] Belz, *Equality Transformed*, 44.

[86] Mark Silverstein and Benjamin Ginsberg, "The Supreme Court and the New Politics of Judicial Power," *Political Science Quarterly* 102 (1987): 371–88; Frymer, "Acting When Elected Officials Won't," 484–91.

[87] This was presaged in the 1938 Federal Rules of Civil Procedure, in which more restrictive common-law procedures gave way to more flexible equitable ones.

[88] David H. Rosenbloom, "The Judicial Response to the Rise of the Administrative State," *American Review of Public Administration* 15 (1981): 29–51.

[89] These agreements were made under the auspices of the NLRB. After 1964, unions blamed management for the old segregation, and management blamed the unions.

In a 1959 "fair representation" case, a federal circuit court rejected this claim, and held that past discrimination did not justify it.[90] This principle became known as the "status quo" position. "Status quo" seniority seemed to be protected by section 703(h) of the Civil Rights Act, on "bona fide seniority systems." By 1968, the EEOC and Justice Department were able to convince the courts to adopt what they called the "rightful place" doctrine.[91] In 1968, a federal district court held that "Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the act."[92]

Of greatest significance was the Commission's promotion of the "disparate impact" definition of discrimination.[93] This doctrine held that job qualification tests, even if not intended to discriminate, were unlawful if they screened out a disproportionate number of minorities. Disparate impact was laid out by the Commission in its 1966 "Guidelines on Employment Testing Procedures." Notwithstanding the Motorola-prompted provisions of section 703(h), protecting tests not intended or used to discriminate,[94] the Supreme Court ultimately adopted the disparate impact theory in the 1971 case of *Griggs v. Duke Power Co.* The Court held that the EEOC's Guidelines were entitled to "great deference," and reflected the fact that Congress did not intend to permit tests to operate as "built-in headwinds for minority groups and are unrelated to measuring job ability." Employers would have to demonstrate "business necessity" to use tests with a disparate impact.[95] Civil rights organizations, some of which viewed *Griggs* as a weak case, were overjoyed. Blumrosen was so elated at the *Griggs* decision that he titled his review of it "Strangers in Paradise." Justice Warren Burger noted that it was the most important decision of his Chief Justiceship.[96] But, as one NAACP lawyer put it, "We always suspected Chief Justice Burger really had no idea at all what he was doing when he wrote *Griggs*."[97]

[90] *Whitfield v. United Steelworkers*, 156 F. Supp. 430 (1959).

[91] This would allow blacks to take their accrued seniority into white jobs as vacancies arose. It did not permit them to displace incumbent whites—the more radical doctrine known as "freedom now." See "Title VII, Seniority Discrimination, and the Incumbent Negro," *Harvard Law Review* 80 (1967): 1268.

[92] *Quarles v. Philip Morris Co.*, 279 F. Supp. 505 (1968), 516.

[93] The terms "disparate impact" and "disparate treatment" were coined in a 1976 legal treatise and adopted by the Supreme Court the next year. Michael Evan Gold, "Disparate Impact Is Not Unconstitutional," *Texas Journal on Civil Liberties and Civil Rights* 16 (2011): 173.

[94] See text at notes 59–61 above.

[95] 401 U.S. 424 (1971). The Court would later trim its deference to the Commission. Theodore W. Wern, "Judicial Deference to EEOC Interpretations of the Civil Rights Act, the ADA, and the ADEA: Is the EEOC a Second-Class Agency?" *Ohio State Law Journal* 60 (1999): Melissa Hart, "Skepticism and Expertise: The Supreme Court and the EEOC," *Fordham Law Review* 74 (2006).

[96] William B. Gould, *Black Workers in White Unions: Job Discrimination in the United States* (Ithaca, NY: Cornell University Press, 1977), 92.

[97] Robert Belton, *The Crusade for Equality in the Workplace: The* Griggs *v.* Duke Power *Story* (Lawrence: University Press of Kansas, 2014), 187.

Disparate impact was essentially another version of the "present effects" doctrine. Its rationale assumed that minorities were less able to perform on employment tests because of earlier discrimination, in educational background especially. Most employers abandoned testing, finding it less costly to hire less productive minorities than to defend their tests.[98] Just as collective bargaining had become part of corporate culture by the 1950s, affirmative action became part of American business culture in the 1970s, particularly after the Supreme Court accepted "voluntary" affirmative action programs and insulated employers from "reverse discrimination" suits by white workers.[99] The personnel (later "human resources") departments that had come to terms with organized labor now applied themselves to implementing affirmative action policies. While the American work force doubled in the 1960s, the number of personnel managers rose tenfold.[100]

This internalization of affirmative action became evident in the 1980s. Ronald Reagan had campaigned against racial preferences, and had the power to revoke the executive-order program "with the stroke of a pen." Once in office, the President yielded to business leaders who urged him to let it be.[101] Big business in both 1953 and 1981 sought to impose compliance costs on their small business competitors.[102] By the end of the decade, when Reagan's appointees to the Supreme Court began to moderate the disparate impact standard under Title VII, Congress wrote *Griggs* into the Civil Rights Act of 1991. But Congress still abjured quotas, providing in 1990 that nothing in it should be interpreted "to require or encourage an employer to adopt hiring or promotion quotas on the basis of race."[103] Despite this language President George H. W. Bush vetoed this as a "quota bill." The 1991 version that he signed did not contain this explicit anti-quota language.[104]

[98] C. Boyden Gray, "Disparate Impact: History and Consequences," *Louisiana Law Review* 54 (1994): 1491; Michael H. Gottesman, "Twelve Options to Consider Before Opting for Racial Quotas," *Georgetown Law Journal* 79 (1991): 1750. Unions continued to resist the present-effects doctrine in seniority cases and were able to get the Supreme Court to dilute it, just as they were able to extricate themselves from the Labor Department's Philadelphia Plan. Union seniority was "the only part of Title VII [that the Court] was inclined to interpret in accordance with the intent of Congress, and the only political value it was willing to assert against the rule of racial preference"—Belz, *Equality Transformed*, 212.

[99] *United Steelworkers v. Weber*, 443 U.S. 193 (1979). These quotas were not really "voluntary." Though not imposed by a court, they were adopted in legally enforceable "consent decrees."

[100] Jennifer Delton, *Racial Integration in Corporate America, 1940–90* (Cambridge: Cambridge University Press, 2009), 278; Dobbin, *Inventing Equal Opportunity.*

[101] Robert R. Detlefsen, "Affirmative Action and Business Deregulation: On the Reagan Administration's Failure to Revise Executive Order No. 11246," in *Presidential Leadership and Civil Rights Policy,* ed. James W. Riddlesperger, Jr. and Donald W. Jackson (Westport, CT: Greenwood, 1995); Hugh Davis Graham, "The Civil Rights Act and the American Regulatory State," in *Legacies of the 1964 Civil Rights Act*, ed. Bernard Grofman (Charlottesville: University of Virginia Press, 2000), 59.

[102] Moe, "Interests, Institutions, and Positive Theory," 282; Gray, "Disparate Impact," 1492; Detlefsen, "Affirmative Action and Business Deregulation," 68.

[103] S. 2014, section 13, *Congressional Record* 137 (October 22, 1990): 16457.

[104] 105 Stat. 1071 (1991)

VIII. Conclusion: Bureaucracy, Juristocracy, and Distrust

Affirmative action continues despite its origins in a "closed system of bureaucratic policymaking, one largely devoid not only of public testimony but even of public awareness that policy was being made."[105] The Civil Rights Act of 1991, codifying the disparate impact standard, was just about the only democratic mandate that the policy had ever received.[106] Between 1996 and 2012, six states approved popular referenda that forbade preferences in employment, contracting, and college admissions. Idaho has most recently done so in 2020, and Washington voters rejected a proposal to restore affirmative action in 2019. California voters overwhelmingly rejected a similar proposal in 2020.[107]

As one critic of the OFCC contracting program put it, "When public policy is a matter of national debate, various interest groups should air their conflicting views in the national legislative forum," where representatives can be held accountable by voters. "Unilateral executive action short-circuits the typical political dynamic of the legislative arena."[108] Affirmative action thus suffers from a "legitimacy problem" characteristic of the entire American administrative state.[109] One study concluded that "from its first appearance until the present, public opinion data show overwhelming and sustained opposition to special preferences as a remedy for problems of racial discrimination."[110] Another showed a continued decline in popular support, especially among African-Americans.[111]

The bureaucratic architects of affirmative action could not have succeeded without a newly emboldened federal judiciary in the 1960s and 1970s. The administrative state was baptized in the capitulation of the Court to the NLRA in 1937, which was followed by three decades of judicial "deference" to federal agencies. In the 1960s, courts began to reassert themselves, and often prod bureaucrats to take action. They turned themselves into the "high commission of the administrative state."[112] Political scientist Stephen Skowronek famously described pre-progressive America as a "regime of courts and parties." The post-New Deal state was one of courts

[105] Graham, "The Great Society's Civil Rights Legacy," 376.

[106] Some commentators claimed that Congress, by not repudiating disparate impact in 1972 amendments to the Civil Rights Act, had tacitly provided legislative consent—as if its failure to exercise a "legislative veto" validated bureaucratic policy. Congress also enacted racial set-asides for minorities in the 1977 Public Works Employment Act.

[107] Mayer, *With the Stroke of a Pen*, 213; "Voters Narrowly Reject Affirmative Action in Washington State," *New York Times*, November 13, 2019; Alexander Nieves, "California Voters Reject Affirmative Action Measure Despite Summer of Activism," *Politico*, November 4, 2020.

[108] Blumstein, "Doing Good the Wrong Way," 934.

[109] James O. Freedman, *Crisis and Legitimacy: The Administrative Process and American Government* (New York: Cambridge University Press, 1978); cf. Adrian Vermuele, "What Legitimacy Crisis?" *CATO Unbound*, May 9, 2016.

[110] Sharp, *The Sometime Connection*, 76.

[111] Le and Citrin, "Affirmative Action," 164–66.

[112] James R. Conde and Michael S. Greve, "*Yakus* and the Administrative State," *Harvard Journal of Law and Public Policy* 42 (2019): 816; Ran Hirschl, *Toward Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, MA: Harvard University Press, 2004).

and agencies.[113] Affirmative action guru Alfred W. Blumrosen described the modern state as "a law transmission system," in which Congress announced broad mandates like "nondiscrimination," left them to be fleshed out by agencies that would be overseen by the courts.[114] Historian Hugh Davis Graham noted that affirmative action showed how the courts had turned the old system of "iron triangles" (congressional committees, interest groups, and agencies) into "iron quadrilaterals."[115] Liberals had been chagrined that Title VII would rely on court, rather than commission, enforcement, but that conservative, Republican choice turned into a tremendous blessing.[116] As another affirmative action architect put it, "The administrative process debate seems to have been turned on its head," and a judicially-led system of providing race-based entitlements through litigation has concealed the true extent of the modern administrative state.[117]

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[113] *Building a New American State* (Cambridge: Cambridge University Press, 1982).
[114] Blumrosen, *Modern Law*, 102–107.
[115] Graham, *Civil Rights Era*, 469.
[116] Oppenheimer et al., "Be Careful What You Wish For"; Robert C. Lieberman, "Private Power and American Bureaucracy: The EEOC and Civil Rights Enforcement," American Political Science Association Address, 2006.
[117] Gould, "Title VII of the Civil Rights Act at Fifty," 399; Dobbin, *Inventing Equal Opportunity*, 227.