Public Regulation through Private Litigation:
The Regulatory Power of Private Lawsuits and the American Bureaucracy

Quinn Mulroy

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ABSTRACT

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Embedded within the notably constrained American state, how can regulatory agencies ensure that enforcement goals are met? Some analyses suggest that this is not so easily done; rather, constraints on agencies' formal administrative powers are said to threaten their capacity for effective regulation. But recent scholarship contends that such accounts underestimate the pivotal and oftentimes ‘hidden’ regulatory role played by less formal mechanisms of enforcement, such as private litigation. Building on this revisionist strain, this dissertation project closely examines the ways in which constrained agencies look outside themselves – and their formally granted administrative authority – for enforcement power by developing incentive structures that motivate private actors to engage in litigation that advances regulatory goals.

Through an historical analysis of the development of the regulatory capacity of three agencies – the Equal Employment Opportunity Commission, Environmental Protection Agency, and the Office of Equal Opportunity at HUD – this project uses qualitative and quantitative approaches to explore how and when regulatory agencies choose to focus their limited resources on mobilizing private enforcement of public policy. First, using a careful examination of agency and presidential archival materials, I specify the mechanisms by which agency actors promote private litigation and uncover the institutional and political conditions under which this legal enforcement strategy is employed over time. And then, from these archival observations, I construct original quantitative measures capturing the deployment of these legal enforcement
strategies, and conduct statistical analyses to confirm the success of agency efforts to encourage private litigation over time.

Ultimately, by reconsidering how to integrate informal mechanisms of enforcement, like agency-motivated private litigation, into theories of bureaucratic regulation, this research contributes to our practical understandings of day-to-day agency behavior and to our conceptions and assessments of state capacity, more broadly.
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This project began eight years ago when, as a recent college graduate trying my luck in New York City, I started a job as a legal assistant at an employment law firm. What I thought would be your run-of-the-mill first job out of college turned out to be a life-shaping experience that honed my professional and personal interests. In my daily work assisting attorneys at the firm with private employment discrimination suits, I was struck by the degree to which we worked in concert with attorneys and staff at the Equal Employment Opportunity Commission. From sharing discovery, intervening in and filing amicus briefs on one another's cases, and acting as co-counsel on trials, I came to work with staff at the EEOC almost as closely as with attorneys at my own firm. This experience informed the research questions posed in this project; a project which might not have come to fruition without the professional guidance of the inspiring group of attorneys I worked with – including former-plaintiffs' attorney Sean Farhang, whose own research has provided the motivation and direction for this project – who encouraged me to ditch my plans to attend law school and to instead pursue these research interests in a Ph.D. program. Those counseling sessions undeniably resulted in the research project contained herein.

When embarking on a project of this size for the first time, it can be hard to fully imagine its final form. But as any graduate student can attest, a supportive dissertation committee can make all the difference and provide insight and guidance to help transform even the most half-baked ideas into a comprehensive research project. For me, that guidance was provided by my dream-team committee consisting of Ira Katznelson (chair), Robert Lieberman, and Dorian Warren. Besides offering excellent advice and generous support as I wrote this dissertation, their approaches to using in-depth research to address large questions in political science have shaped
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Chapter 1

Introduction:
Private Litigation and Public Policy Enforcement in the American Bureaucracy

In remarks before the Washington Council of Lawyers, just eight short years after the Civil Rights Act of 1964 established and charged the Equal Employment Opportunity Commission ("EEOC") with the responsibility of reviewing, investigating, and resolving all charges of unlawful employment discrimination, EEOC Chairman William H. Brown III told his audience that while "we in the Government will do our part" to secure "equality of employment opportunity for all Americans…we need you, the members of the private bar, to carry a major share of the load." Continuing, Brown explained that, due to the Commission's lack of strong enforcement powers and adequate resources, "we have been able to reach a successful voluntary conciliation in only a small percentage of cases" and that "leaves many thousands of individuals who…are seeking relief for Title VII violations and…will be looking to you to be their advocates." 1

* * * * *

Testifying before the Senate Subcommittee on Clean Water, Fisheries, and Wildlife in 1993, the Environmental Protection Agency's ("EPA") Assistant Administrator of Enforcement, Steven Herman, took a moment to recognize "the crucial contributions made by citizens in enforcing against polluters." Acknowledging that "the Agency does not have the resources to

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enforce against every violator" of environmental protection statutes, and "not even against some serious violators," Herman noted positively that with a "vigorous citizen enforcement presence" in place, offending polluters have to contend with "an additional deterrent to noncompliance" in the form of the citizen environmental suit. Insisting that private litigation has "help[ed] to fill these gaps that the Agency…[has] been unable to fill," Herman pledged EPA "assistance in citizen enforcement actions," and urged the continuation of "a positive, mutually beneficial relationship with citizen enforcers."²

* * * * *

In an early memorandum from the Department of Housing and Urban Development's ("HUD") first Assistant Secretary of the Office of Equal Opportunity (now the Office of Fair Housing and Equal Opportunity), Samuel J. Simmons urged Department leadership to consider "an alternate enforcement procedure to the [agency's] cumbersome time-consuming administrative process" of housing discrimination enforcement, in the form of citizen suits. While the Civil Rights Act of 1968 added housing discrimination enforcement to HUD's already long list of competing – and often conflicting – regulatory responsibilities, the agency was statutorily granted little in the ways of effective fair housing administrative powers. Recognizing that "the promise of effective civil rights compliance cannot be realized without effective enforcement machinery," Simmons suggested that citizens be allowed to file "suits…without exhaustion of administrative remedies" in order to ensure that a "cumbersome…administrative

process” never comes between a victim of housing discrimination and the potential to secure direct relief through private litigation.³

*   *   *   *   *

These agency appeals to the private legal community to take on "a major share of the load" of enforcing regulatory policy might exemplify, for many, what has become the notorious administrative weakness of the American bureaucracy. Indeed, agency personnel at the EEOC, EPA, and Office of Equal Opportunity under HUD – even in the very early formative moments of their agencies – were conscious of their administrative limits in enforcing legislative mandates to combat unlawful employment discrimination, environmental degradation, and housing discrimination, respectively. Denied cease-and-desist powers by both Title VII of the Civil Rights Act of 1964⁴ and the Equal Employment Opportunity Act of 1972,⁵ and immediately burdened by a caseload of discrimination charges that it did not have the resources to adequately process, early commissioners at the EEOC described their administrative effort to enforce Title VII law as going "out to kill an elephant with a fly gun."⁶ Administrators at the EPA, while granted relatively stronger command-and-control administrative powers by environmental legislation,⁷ found themselves quickly buried by an avalanche of regulatory responsibilities

⁵ Pub. L. 92-261.
which they did not have the personnel or resources to carry out. And the staff at the Office of
Equal Opportunity at HUD, denied affirmative administrative authority by the Civil Rights Act
of 1968, would face its own uphill battle in regulating housing discrimination through an
ineffective and "toothless" conciliation system which lacked the force of law.

But while these appeals to the private legal community might read as the familiar story of
a weak American bureaucracy shirking its regulatory responsibilities in the face of administrative
and resource constraints, this would oversimplify what has in fact been a conscious and
coordinated strategy on the part of many regulatory agencies to develop administrative processes
and incentive structures that encourage private citizens to bring claims in court in order to fulfill
regulatory goals. Recognizing the degree to which private litigation can be integrated into the
fabric of regulatory policy implementation, early administrators at the EEOC, EPA, and the
Office of Equal Opportunity at HUD would attempt to develop and maintain an alternate
pathway for employment, environmental, and fair housing enforcement by making use of the
regulatory power inherent in the private right to sue.

At the center of this dissertation project, and at the center of these bureaucratic appeals to
private legal actors, are the choices state actors make with regard to how to implement regulatory
policy. I argue that this choice need not be limited to the menu of formal administrative powers

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93-523) (authorized EPA to create standards for quality of drinking water and to regulate state programs to protect
quality of underground water); Toxic Substances Control Act of 1976 (Pub. L. 94-469) (authorized EPA to ban the
use or sale of any chemical causing "unreasonable risk of injury to health or environment); Resource Conservation
And Recovery Act of 1976 (Pub. L. 94-580) (authorized EPA to set standards for treatment, storage, and disposal of
hazardous wastes); and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980
(Pub. L. 96-510) (authorized EPA to clean up hazardous waste sites and manage emergencies).

8 Pub. L. 91-284.

9 Memorandum, Robert B. Elliot (General Counsel) to Patricia Harris (Secretary-designate), 19 January 1977, Re:
Equal Opportunity and HUD, NARA, RG 207, Subject Correspondence, 1974-1978, Box 38, Rel 6 Racial Relations.
granted to regulatory agencies; rather, this choice can be, and in fact often is, expanded to include bureaucratically managed private mechanisms of enforcement. Through a comparative historical analysis of the development of the regulatory capacity of these three agencies – the Equal Employment Opportunity Commission, the Environmental Protection Agency, and the Office of Equal Opportunity under the Department of Housing and Urban Development – I examine how and why constrained regulatory agencies may choose to focus their limited resources on mobilizing private enforcement of state policy. In doing so, I seek to address three primary questions: 1) First, under what institutional and political conditions is a regulatory agency most likely to employ strategies which emphasize and utilize the enforcement power provided by private litigation? 2) Second, how, and through what mechanisms, can regulatory agencies influence the actions of members of civil society and encourage them to engage in private regulatory behavior like private litigation? 3) And lastly, do these agency strategies for encouraging private regulatory behavior work, and actually motivate private legal actions on agency-administered statutes?

I argue that by encouraging victims of public policy violations to pursue their claims through private litigation, regulatory agencies have cultivated and managed the utilization of an alternate source of regulatory power – that of ‘private litigation enforcement’ – and that the development of this alternate pathway of enforcement has given regulatory agencies enforcement capacity beyond that which is immediately apparent from a survey of their formal administrative powers. Secondly, I demonstrate that while institutional conditions determine whether administrators can institutionalize this pathway as an enforcement alternative that an agency can turn to for years to come, the character, scope, and activation of this pathway is also contingent upon political and temporal considerations. Even when the path is paved, in other words, it is not
always taken. This project, then, presents a story of bureaucratic capacity, which is not fixed by agencies' formally granted administrative powers, nor enduringly stable across changing historical and political conditions, but which relies on a conception of state capacity that is moving, malleable, and variable according to a periods of political change and a creative use regulatory tools.

I. What Constitutes Bureaucratic Regulation?

To discuss private litigation as a 'regulatory tool' of the American bureaucracy might come as some surprise. Indeed, bureaucratic and judicial approaches to regulation are more traditionally placed at odds with one another. Stephen Skowronek (1982) identified the rise of the administrative state as a turn away from the period of judicial politics that preceded it. And most political science literature examining the nexus of bureaucratic and judicial actions has focused on either how regulatory agencies can initiate state-sponsored litigation against members of civil society to enforce policy (e.g. Occhialino and Vail 2004; Winder and LaPlant 2000) or – pitting these two approaches against one another – how private citizens can use litigation as a 'fire alarm' to compel captured bureaucratic agencies to do their job and implement congressional policy through administrative means (McCubbins and Schwartz 1984; see also Coglianese 1996; Epp 2009).\(^\text{10}\) Under this rubric, litigation and more explicitly administrative implementation strategies are categorized into separate spheres of enforcement options, and envisioned not as complementary tools, but as parts of a regulatory process by which one option is invariably traded for the other.

\(^{10}\) This project, in contrast, exclusively considers litigation in which both the plaintiff and defendant are members of civil society, and not lawsuits brought by private citizens against the government, or governmental lawsuits filed against private citizens. Instead, this project is interested in exploring how regulatory agencies can coordinate the litigation behavior of members of civil society.
Much of this perceived – and arguably, misplaced – disjuncture between administrative and judicial approaches to regulation is rooted in our conceptions of what is considered to be a part of 'state' regulatory behavior. Traditional notions of state regulation rely upon a Weberian model of hierarchically controlled bureaucratic administration in which policies are carried out according to formal rules by professional bureaucrats, clearly distinct from private actions. Under this Weberian model, state regulatory actions do not rely upon private civic cooperation, but rather, are imposed by the bureaucracy upon the private sphere, delineating a clear separation between state and society. A state's capacity to regulate its society is measured according to these terms, leaving little room for the consideration of judicial approaches to policy implementation, especially those engaged in by private citizens.

This project suggests, however, that this traditional conception of administrative policy implementation discounts the role of regulatory collaborations between state and society. As Gerald Berk warns, scholarship has focused too narrowly on more traditional measures of "bureaucratic hierarchy and autonomy" to assess the regulatory effectiveness of the American bureaucracy, causing it to "overlook" the ways in which agencies can "cultivate" private-public collaborations in order to meet state regulatory goals (2009: 29). "Creative administrators," Berk suggests, "value different ends and organization features," and do not use "state autonomy" to impose bureaucratic will on society. Rather, bureaucratic agencies can consciously engage in strategic actions which – while often occurring behind the scenes and hidden from more traditional assessments of bureaucratic policy implementation – can manipulate private behavior such that members of civil society become agents, or "instruments" (Farhang 2010: 7-8), of the state. Joining a growing literature which seeks to revise our understanding of the relationship between the state and society (Lieberman 2005; Balogh 2009; Berk 2009; Farhang 2010), this
project examines the regulatory potential provided by bureaucratically motivated private litigation, with the hope of not only 'bringing the state back' into to our assessments of regulatory behavior within civil society, but also of bringing administratively cultivated private actions back into our conceptions of what constitutes state regulation.

If we view state capacity from this perspective, the potential power of state actors to achieve their policy goals and shape social outcomes may be much greater than we would come to believe from counting bureaucrats or summing budgets; but it also becomes more subtle, fluid, and harder to precisely identify without looking closely at agency case histories and the day-to-day strategies state actors employ to leverage vast private energies toward public ends. The origins of these strategies and their effects—which may ultimately entail the lion's share of policy enforcement—are not found in ledgers or laws, but in conscious, autonomous action on the part of agency officials to build, shape, and employ private power toward public ends. When agents of the state conceive of themselves not as isolated Weberian bureaucrats clearly delineated from society but as bridge-builders seeking to link the state and civil society in a common mission, this forces us to deeply reconsider the "weakness" of such a state. Even with a relatively small budget and staff, an agency that links itself to a broader network of private policy enforcers and that acts strategically to improve the chances of success for those private actors leverages an "infrastructural" power that is far more powerful than its formal resources would indicate.11

11 Michael Mann (1993, 2008) draws an analytical distinction between infrastructural and despotic power as hallmark types of state capacity. The Weberian state relies principally on despotic power, emanating from the center and autocratic and delineated from private action. Infrastructural power is derived from the institutional "capacity of the state to actually penetrate civil society and implement its actions across its territories" (Mann 2008: 355). The creation of private mechanisms of public policy enforcement is an example of infrastructural power, in which a state uses its "power through society" to "coordinat[e] social life through state institutions" (Mann 1993: 59).
II. Bureaucratic Regulation Through Litigation

The regulation of civil society through litigation is not a new phenomenon. The courts have long been used by private citizens as a venue for addressing wrongs and violations of public law. In his observant musings on American political life in the early nineteenth century, Alexis de Tocqueville noted the degree to which the judiciary holds a place of "great political importance" in the US, and is used as a powerful political organ (1847: 101). Many of us are familiar with the long road of legal activity in the courts that has touched both minor and major moments in the development of the American state. Indeed, many of us can can identify judicial cases that have marked turning points in American political history: Dred Scott helped to clarify ideological poles at the outset of the Civil War, Lochner defined an era of limited governmental interference in labor markets at the turn of the century, and Brown v. Board marked the development of massive administrative overhauls of public and private life to accommodate civil rights demands in the mid 20th Century (Kagan 2001: 35).12

Given this lively history of litigation in American politics, it is tempting to conclude that there is not much different or changed about contemporary approaches to the regulation of civil society through litigation. Litigation has always been part and parcel of the development of American politics, so what else is new? This longitudinal perspective on the pervasiveness of private litigation as a regulatory tool in America, however, clouds what has been a more recent and intense growth in the use of private litigation in civil society. In contrast to the nineteenth and early twentieth centuries, the last half of the twentieth century has been characterized by a heightened level of litigation activity popularly characterized as a "litigation explosion" (Olsen 1991). Between 1960 and 1970, rates of private civil litigation filed in the US District Courts

nearly doubled and have continued their exponential rise, more than quadrupling by 1990, and with contemporary private litigation rates now more than six times those in 1960 (see Figure 1.1). This staggering increase in private litigation activity has been mirrored by the growth a more highly professionalized legal industry. While there were 1.2 lawyers per 100,000 people in the US in 1960, this figure nearly tripled to 3.1 lawyers per 100,000 people by 1988 (Sander and Williams 1989: 432-5). Lawyers and lawsuits have grown hand-in-hand, defining a new legal landscape characterized by unprecedented levels of litigation activity.

These impressive trends have caught the critical eye of academic and nonacademic observers of American life alike, prompting Bayless Manning to declare that America suffers from a "national disease" leaving "our law libraries…swamped" and "our citizenry…confounded by the legal blizzard" plaguing the court system (1977: 767). Confronted with this growing cultural and political crisis, critics have contemplated the cause of this litigation explosion – an exploration that has led to considerable popular and academic debate. Members of the popular press and several scholars within the law and society discipline have pointed their finger at a rising and commanding litigious 'mood' that has taken the nation by storm (Fleming 1970; Ehrlich 1976; Tribe 1979). According to these accounts, our "litigation-prone society" (McGill 1978: 661) is governed by a public appetite to turn to the courts to redress wrongs, principally at the expense of settling disputes outside of the courts or through administrative mechanisms. Contending that "that the United States is the most litigious country in human history" (Galanter 1988: 18), these critics have chastised American citizens for pursuing and protecting their individual interests so strongly that "remedies for personal wrongs that were once considered the responsibility of institutions other than the courts are now boldly asserted as legal 'entitlements'"

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13 Marc Galanter critiques these American exceptionalist claims, but notes that their prominence within academia and popular culture have contributed to the formation of "a commonplace" perception of a distinctly American litigious society (1988: 18).
by private individuals (Burger 1982: 275, in Galanter 1983: 8). These alarmist accounts have produced pointed political responses – from congressional inquiries on how to curb the litigation explosion, to calls for tort reform legislation that continue to this day (Schwartz 1999; Burke 2002: Chapter 4; Kagan 2001: Chapter 11) – responses which are grounded in the assumption that litigious activity in America is a cultural disease that can be cured through common-sense legislative reform.

A competing explanation, however, suggests that this rise in litigation rates is due to institutional factors embedded in the fabric of the American system of government. This institutional explanation contends that litigation rates are not so much the product of infectious waves of cultural litigiousness, but rules and institutions which shape incentives for political actors (Kagan 2001; Burke 2002; Farhang 2010). Robert Kagan (2001), for instance, has argued that American citizens, in response to an enduring and constitutionally grounded distrust of an expansive and centralized government, turn to the judiciary to seek governmental action on social problems. During moments when civil society demands more governmental action on social issues, we are likely to see more litigation activity as a way of overcoming an inherited system of government characterized by weak, decentralized state authority.

But this constitutional tradition creates incentives, as well, for governmental actors to utilize the enforcement potential of private litigation. This is true for a number of reasons. First, elected officials are incentivized to take advantage of the cost-shifting potential of private litigation (Burke 2002: 15-6). While acting within a decentralized system impedes political

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14 As Sean Farhang has noted, some scholars have applauded, rather than lamented, this rising culture of litigiousness as an indication of the emergence of a 'rights conscious' citizenry that has learned from the legal successes of the civil rights movement – and also the Supreme Court's conferral of legal rights to individuals during this time – to demand rights through litigation (2010: 14; see also Walker 1998). Each of these normative perspectives, however, focuses on cultural (rather than institutional) explanations for the rise in litigation rates.
actors from engaging in costly, resource-intensive regulatory actions, by 'franchising' regulatory authority to private citizens through the conferral of additional legal rights, elected officials – particularly members of Congress, according to these accounts – can ensure that regulatory actions take place without considerable expenditures of limited resources. From this point of view, litigation-as-regulation is a form of lean, flexible state capacity that can be marshaled relatively quickly and cheaply (relative to the Weberian alternative), leveraging extant or latent private forces to help solve social problems.

America's decentralized system of government likewise creates opportunities for the obstruction of policy implementation by competing branches of government. In the separation of powers system, federal bureaucracies charged with implementing national policies might derail regulatory efforts at the behest of the Presidency. Sean Farhang (2010) suggests that this product of the American separation of powers system creates incentives for members of Congress to insulate policy implementation in the courts and in the hands of private individuals, where it cannot be dismantled by hostile administrations (see also Burke 2002: 14-5). According to this perspective, congressional attempts to promote and insulate policy implementation through statutorily created private litigation incentives – more so than cultural trends in litigation – define the fluctuations that we see in private litigation rates.

This research project joins this institutional explanation but challenges it to look beyond the actions of the legislature to locate other state actors who incentivize the use of judicial mechanisms of policy enforcement. While previous accounts have explored congressional responses to our constitutively weak and decentralized system of government, very little popular or scholarly attention has been devoted to the consideration of how our most-studied regulatory arm of the American state, the bureaucracy, has also responded to these constitutional limitations.
on an activist government by protecting and promoting private litigation on agency-administered statutes.

Attention to the bureaucracy will shed light on a whole new range of institutional and political factors that shape state utilization of private litigation enforcement. Through explorations of how the bureaucracy engages with would-be litigants, we can uncover the institutional factors specific to agencies which may inhibit or foster regulatory partnerships with members of civil society, and how these partnerships may wax and wane in intensity in political time. Current emphasis on legislation alone leaves us with too static a picture of how this important governance process works within the bureaucracy. Absent a change in the legislative status quo, we would expect bureaucratic approaches to private litigation enforcement to remain constant across agencies and time. But by looking beyond legislation, and into the daily specificities that characterize agency efforts to motivate private litigation, we can gain a more complete picture of the institutional and political conditions that shape a state's relationship to its society, and define the boundaries and potential for bureaucratically-motivated private litigation. In engaging this lacuna, I argue that regulatory agencies themselves have quietly contributed to the historical narrative on the growth of private litigation in the late twentieth century – a narrative which has thus far largely ignored the role of the bureaucracy, but which is very much defined by the concerted efforts of citizen groups, elected officials, and bureaucrats to promote and protect the regulatory benefits of private litigation.

III. Research Design and Methodological Choices: Archival and Statistical Analyses

To explore the development of this regulatory relationship between bureaucratic agencies and private litigants, I conduct studies of three regulatory agencies to compare how (through
what mechanisms) and *when* (under what institutional and political conditions) private litigation enforcement is utilized by agencies to achieve regulatory aims. Following Daniel Carpenter's work on the bureaucracy, this project offers an account of administrative development which seeks to move beyond analyses which "study bureaucracy only through the legislation that creates agencies, the presidents who govern them, or the court decisions that check or enable their decision making" and, instead, emphasizes the institutional changes and transitions which agencies undergo as they formulate partnerships within civil society (2001: 11). To do so, I consult a rich, but often overlooked, resource of primary sources on the American bureaucracy contained in the Agency Papers collections at the National Archives and examine agency memoranda, reports, administrative decisions, public speeches, and correspondence with political actors and the public. These records offer a critical perspective for understanding the processes of agency decisionmaking and transformation, and by underpinning them with a careful consultation of the Nixon Presidential Materials for information on the organizational decisions that marked the formation of each agency, I am able to achieve a first-hand look at the relationships that regulatory agencies develop with private litigants.

Using these archival sources, I develop and present three historical analyses of the EEOC, EPA, and the Office of Equal Opportunity at HUD from the end of the Great Society period and through much of the last half of the 20th Century. These comparative histories, in contrast to most works in political science, offer comparisons not only between cases, but also over the same time period (Carpenter 2001: 35). Giving credence to context and contingency, in comparative histories, "cases become names for analytically established categories that can be compared one to the other within a given epoch or at structurally equivalent times," where "each exists in a larger pattern of trends and processes of which it is a part" (Katznelson 1997: 99).
Comparative histories, in other words, provide an ideal means for exploring and understanding the contextually-specific processes which define administrative development, and for illuminating the political and institutional contingencies characterizing the development of private litigation enforcement. By immersing historical analyses of the EEOC, EPA, and HUD in the broader political and institutional processes and contexts defining the time period under consideration, we can gain a better understanding of not only why bureaucratic agencies developed private litigation enforcement as a regulatory tool, but why it developed at some moments in historical time, and not others.

In the case studies, I complement these in-depth, historical analyses with statistical work. Following the methodological guidance of Collier et al. (2004), I "combine the strengths" of qualitative and quantitative analyses and collect "causal-process" observations of context and mechanism to fill in the causal story of the utilization of private litigation enforcement, and use quantitative "data-set" observations to make systematic, statistical comparisons of agency behavior over time (255; Tarrow 2004). Given that private litigation enforcement is a largely unobserved (and to a great extent superficially unobservable) phenomenon, hidden from government records of more formal administrative enforcement actions, these historical analyses provide the context and thick, detailed analysis necessary to identify and examine the constellations of strategies and methods used by regulatory agencies to motivate private litigation on agency-administered statutes. Without these qualitative observations, we would have very little indication of how to identify or operationalize such informal and hidden agency actions, but with these archival examinations in hand, we gain insights into what types of large-n, quantitative data-set observations might capture informal agency enforcement actions for supplementary statistical analyses. Through this mixed-methods approach, therefore, we can
begin to uncover and qualitatively and quantitatively study 'hidden' state actions that have significant consequences for policy enforcement.

IV. Case Selection: Why the EEOC, EPA, and HUD?

I chose the three regulatory agencies examined in this project with an aim towards enriching our understanding of the development and use of agency-motivated private litigation as an enforcement strategy for different areas of domestic policy. Each of the selected agencies was formed within a five year period spanning the end of the Great Society era and the first Nixon administration, and coincided with the growth of a formidable attorneys' bar and the emergence of a new movement among citizen groups to turn to the courts for regulatory relief in the face of a limited enforcement apparatus within the federal government – commonalities which are critical to the development of comparative histories on these agencies. Seizing on the legal opportunities brewing at the time, Congress, likewise, created a citizen's right to sue on (at least a number of) the statutes administered by each of these agencies. As such, each regulatory agency included in this analysis has a baseline opportunity to direct agency resources towards the mobilization of individuals and citizen groups to prosecute policy violations in court.

While the EEOC, EPA, and Office of Equal Opportunity at HUD share some historical and institutional roots, they also offer points of variance that are useful to this analysis. Differences in the administrative authority, organization, and structure of each agency make divergences in their approaches to the utilization of private litigation enforcement all the more remarkable and illuminating. While the civil rights policies administered by the EEOC and HUD each had a strong legacy of citizen group activism in the courts, HUD, with its massive and diverse portfolio of responsibilities, lacked the clarity of mission and agency goals enjoyed by
the EEOC and EPA – missions behind which EEOC and EPA personnel could aggressively and creatively mobilize enforcement. A careful analysis of fair housing enforcement by HUD, therefore, will shed light on how conflicting agency objectives can impact, and in fact impede, the development of private litigation enforcement schemes.

The EPA and the EEOC, on the other hand, experienced considerable differences in their organization and administrative authority. While the EEOC was granted rather limited administrative powers, the EPA was given a full plate of administrative duties and was charged with monitoring, prosecuting, and setting standards for violations of a mounting volume of environmental protection statutes. What each of these agencies shared, however, were constraints – whether defined by resource levels, formal administrative authority, or organizational capacity – on their ability to fully prosecute violations of the statutes they administered. These constraints compelled the agencies to look outside themselves and their formal administrative authority for enforcement power.

But how each agency's unique organization and administrative authority came to translate into the development and maintenance of regulatory partnerships with private actors is a central puzzle of this project. What types of tools and incentives did each agency choose to develop to encourage private litigation on their administered policies? How insulated were these incentive structures from politically appointed agency leadership? Did the institutionalization or activation of these incentive structures fluctuate with time? By engaging in an in-depth historical analysis to tease out the effects of these agency characteristics, we can uncover a more rich and complex understanding of the institutional conditions which shape the boundaries of agency approaches to private litigation enforcement.
V. Outline of the Dissertation

In the chapters that follow, I develop this research project in greater detail, using a variety of social science methods to analyze primary data from several different sources. Chapter 2 establishes the theoretical framework for understanding the development and use of private litigation enforcement by regulatory agencies. While traditional accounts suggest that the progressive regulatory state that came into being over the course of the extended New Deal and Great Society periods is weak when compared to its counterparts abroad, this project joins a revisionist strain within the American political development literature which identifies the 'hidden' and more informal strategies by which a lean liberal state can achieve impressive regulatory results. Building upon studies that have focused on congressional attempts to achieve regulatory goals through the mobilization of private litigation, this project adopts an 'associational' perspective to explore the ways in which regulatory agencies, likewise, build regulatory partnerships with private litigants to enhance policy enforcement. In contrast to more traditional models of agency behavior (e.g. capture, interest group, or political control theory), an associational perspective emphasizes the reciprocal relationships that develop between regulatory agencies and civil society groups and the creative regulatory strategies that can result from such partnerships, providing a useful approach for understanding private litigation enforcement. Finally, this chapter uses a model of rational litigant behavior to provide a framework for exploring the mechanisms by which regulatory agencies can influence the individual decision to sue, while also paying careful attention to the institutional and political conditions under which agencies are more likely to develop and utilize private litigation enforcement strategies.
After discussing a theoretical framework from which to consider the development of bureaucratic regulatory strategies that motivate the use of private litigation, I delve into three empirical chapters on the EEOC, EPA, and the Office of Equal Opportunity under HUD (Chapters 3 through 5, respectively). These chapters present historical analyses that use a combination of qualitative and quantitative tools to trace the development of private litigation enforcement from each agency's formative moments through much of the last half of the 20th Century. An examination of agency and presidential archival materials provide accounts of the transformation of agency enforcement strategies, the formation of regulatory partnerships with citizen groups, and interactions with other political institutions in the development of regulatory policy and activities. While Chapter 5 ("A Missed Opportunity: Fair Housing Enforcement under the Department of Housing and Urban Development") provides a historical account of the institutional conditions under which an agency is less likely to effectively promote private litigation as an alternate pathway of public policy enforcement, the case studies on the EEOC and the EPA provide accounts of the successful implementation of private litigation strategies.

As such, in addition to the historical narratives presented on each case, Chapters 3 and 4 also provide statistical tests of the effectiveness of these bureaucratic strategies to determine whether they had the intended effect, and actually motivated private legal actions on agency-administered statutes. Using insights gained from archival research on the EEOC and EPA, I develop a quantitative measure of each agency's propensity to utilize private litigation enforcement, which I then use in statistical models to test the effectiveness of agency strategies to motivate private litigation over time. Findings resulting from this mixed-method approach contribute to conclusions which illuminate the political and institutional processes and conditions which define each agency's approach to private litigation enforcement.
In the final chapter, I briefly review and link the theoretical and empirical findings captured in the previous chapters. I address the implications of the findings for our understanding of the 'day-to-day' behavior of regulatory agencies, and also for our conceptions and assessments of state capacity more broadly. The chapter also offers a summary analysis, built upon the preceding case studies, of how institutional and political conditions shape the landscape for the development of private litigation enforcement schemes, and briefly discusses how the narrative on the evolution of private litigation in America is integrated into state decisionmaking over how to implement regulatory policy. And finally, in concluding remarks, I propose promising avenues for future research – especially those that consider creative bureaucratic approaches to regulation from a comparative perspective, both within the American bureaucracy and internationally.
References


Figure 1.1  Annual rates of private civil litigation filings in the US District Courts, 1900-2009. Source: Compiled by the Statistics Division of the Administrative Office of the US Courts and supplied to author.
Chapter 2

Theoretical Motivation:
Private Tools for Public Regulation

This project addresses and combines several important fields of research from several disciplines. Situated at the intersection of political science, law and society, and sociological perspectives on the regulatory capacity of bureaucratic agencies and the regulatory potential of private litigation, this chapter integrates these approaches to provide a theoretical underpinning for understanding how and under what institutional and political conditions regulatory agencies develop incentive structures to motivate private actors to engage in litigation on agency-administered statutes.

I. Conceptions of State Capacity in American Political Development

Conceiving of private mechanisms of enforcement as a regulatory tool of the American state is a perspective that has only recently been added to the discourse of American political development ("APD"). Traditionally, the capacity of the American state has been defined according to the formal ability of the bureaucracy to implement state policy (Skocpol 1985: 15). In the search to pinpoint the moment of American state formation, APD scholars have placed it with the growth of the Executive Branch, in particular the creation and development of the American bureaucracy (Skowronek 1982; Wilson 1989; Bensel 1990). In doing so, the APD literature has focused its assessments of state capacity on the set of administrative tools formally made available to regulatory agencies to carry out state policies: the number of personnel employed by the agency, the size of its budget, and the extent of bureaucratic discretion and regulatory authority conferred by legislative and executive mandates. As Skocpol suggests to
researchers wishing to 'bring the state back in,' "basic questions about a state's territorial
integrity, financial means, and staffing may be the place to start in any investigation of its
capacities to realize goals" (1985: 17). Through this resource-centered conceptualization of state
capacity, much of the APD literature has limited its assessment of state capacity to those powers
and resources that are formally granted to the bureaucracy.

But from within this body of literature there has developed more recent interest in how
state capacity can be differently conceived. Emphasizing the ways by which bureaucracies craft
informal and often privately-driven mechanisms of enforcement, recent APD studies have
explored the conditions under which state actors can implement policy through channels beyond
the regulatory purview of the formally-empowered bureaucracy. Indeed, in the absence of well-
staffed and adequately-financed bureaucracies, APD scholars have shown that agencies can forge
alliances with interest and clientele groups and "team-up" with private groups to advance public
policy goals (Carpenter 2001; Lieberman 2002, 2007). Likewise, studies have illustrated how
state actors can regulate and manage private provisions of social welfare benefits or the private
enforcement of state regulations through subsidizations or enticement schemes (Hacker 2002;

At the center of each of these studies is a conceptualization of state capacity that is quite
different from that traditionally offered, and with which this paper is aligned. Shifting away from
perspectives which focus on the state-as-the-enforcer of regulatory goals to those that consider
the state-as-manager or cultivator (Berk 2009) of private enforcement actions, state capacity can
be more broadly conceived in terms of both formal and informal mechanisms of enforcement.
A. Managing Private Power: Theoretical Foundations

While these studies have begun to recognize the regulatory promise of private power (and the ways in which state actors can tap into and manage that private power), political scientists are only beginning to develop theory that explains what this regulatory relationship between the state and private actors might look like, and why it develops. Tapping into an emerging scholarship in sociology, some studies have begun to traverse these theoretical grounds in an exploration of what might be best described as the reciprocal relationship that develops between the regulatory goals of bureaucratic agencies and the governing potential of private actors.

At the center of this discussion is the claim that state regulation exists to provide order and legitimacy to the marketplace primarily by eliminating the unfair competition that characterizes a market ruled by unregulated private governance. But between these two extreme models of governance – with unregulated private governance at one end, and absolute state regulation at the other – there is also a middle way: one in which the state can "intervene to counterbalance, rather than negate, private order, and can institute regulated private rule as third way between states and markets" (Scheinberg and Bartley 2001: 133, italics added; Lieberman 2007). In this conception, private power runs along a two-way street: it can be conferred by the state (e.g. legal interpretations and statutes that grant private citizens the standing to sue in court) or shaped by private actors themselves (e.g. using social networks and alliances to gain political standing), but with the result that the state can manage and utilize this private power to institute a quasi public-private system of governance that expands its regulatory capacity.

While this literature provides the foundation for a theory on the development of regulatory partnerships between state agencies and private governance, it has only recently been applied to answer questions in political science. Daniel Carpenter's (2001) exploration of 19th
century bureaucratic capacity points to the pivotal role played by public-private "coalitions" – coalitions that were forged and utilized by agency actors to achieve regulatory goals whose realization lay beyond the formally granted administrative abilities of the agency. Gerald Berk has highlighted the role of bureaucratic "cultivational administration," which develops and utilizes "public/private collaborations" to achieve regulatory aims, rather than more traditional impositions of "state autonomy" (2009: 29). And Robert Lieberman (2007) has employed an "associational perspective" that explores the relationship between private power and regulatory agencies – not in terms of the 'capture theories' that typically pervade political science literature – but as one characterized by 'public-private partnerships' that govern society.

As Robert Lieberman (2007) notes, one of the noteworthy aspects of this associational perspective is the degree to which it differs in its explanations of public-private relationships from those offered by some of the more dominant theories of regulation in the political science literature. Capture theory, for instance, posits that the regulatory relationship between agencies and private actors will be largely governed by the interests of those being regulated. Regulation, according to this perspective, does not develop outside of or beside the input of the interests to be regulated, but is developed by the regulated interests to insulate markets and reduce competition (Huntington 1952; Bernstein 1955; Stigler 1971; Lieberman 2007; Carpenter 2010: 40-43). Members of the regulated industry move in and out of agency positions through a 'revolving door' (Carpenter 2010: 40; Quirk 1981), and agencies themselves develop close relationships with industries which define their existence. Over time, the regulator cannot be separated from the regulated. Capture theory dictates, therefore, that regulation will, first and foremost, benefit the regulated interest.
A competing theory suggests that the regulatory activities of bureaucratic agencies are not controlled by networks of regulated interests, in particular, but are influenced by a wide range of interest groups, in general (Lowi 1969; Peltzman 1976; Moe 1987; Lieberman 2007). According to this pluralist perspective, the regulatory advantage of regulated interests is not monopolistic; rather broad-based coalitions and the political organization of interests opposed to those being regulated vie for political positioning and regulatory gain. In contrast to capture theory, this framework suggests that an agency such as the EPA not only hears the interests of the manufacturers and industries it regulates, but is likewise lobbied for stricter pollution standards by environmental interest groups and the general public. Exposed to a varied constellation of political movements and interest group politics, and yet driven by official agency missions and the need to assemble a broad coalition of interests behind policy initiatives, agencies, according to this perspective, incorporate the regulatory demands of a broad set of interests, rather than just those of the regulated group (Moe 1985).

The important difference between these two perspectives and that offered by an associational approach to bureaucratic politics is the direction of influence between private actors and regulatory agencies (Lieberman 2007). Under the capture and interest group approaches, civil society groups act as 'rent-seekers' (the 'rent' being regulatory protection by the government) competing for (or securing, in the case of capture theory) favorable regulatory rules from government agencies (Carpenter 2010: 41). In this setting, these private groups seek to influence the rulemaking of public agencies, and are then expected to abide by those rules. But as Robert Lieberman suggests, under an associational perspective, this influence "flow[s] both ways" (2007: 12). Policy actors, embedded in an institutional regime defined by the connections that develop between civil society and government, are not isolated in their policy implementation
and rule making. Rather, the true meaning of rules can be questioned and debated by those who must follow them, and moments of ambiguity create opportunities for an exchange between private groups and public agencies on both rule making and policy implementation. Under an associational perspective, the channels of interaction and influence open up in both directions, such that regulatory outcomes will not so much reflect the administrative authority of an agency, but its connections and interactions with private actors and groups.

B. Private Litigation and the Bureaucracy

While the associational perspective has begun to shed light on what a system of governance characterized by regulated private rule might look like, a complementary perspective – from which this project finds its focus – is offered by analyses which explore the enforcement power located in state-managed private litigation. Private litigation, with its potential to impose heavy financial damages for violations of state law and to, in turn, deter would-be violators from shirking compliance with public policy, can provide regulatory effects that are comparable to those produced by administrative functions granted to bureaucratic agencies. Research in the law and society literature has pointed to the strong, and perhaps even superior, deterrence effects provided by the threat of private litigation (Edelman 1992; Polinsky 1998; Farhang 2001, 2006), effects which encourage state actors to consider promoting private litigation if and when it can be used as an extension of public agency enforcement strategies.

Under this conception, legal mechanisms of enforcement provide yet one more set of tools for achieving the regulatory goals of the state (Skrentny 2006; Novak 2008: 786). Rather than being confined to more traditional notions of state capacity, which too often rely on measures of formal administrative capacity, this perspective suggests that when state actors
devise enforcement schemes for regulatory policy, they face a choice: to regulate state policy through traditional bureaucratic means, or to turn to mechanisms of enforcement provided through the legal system – depending, presumably, on which alternative proves to be the more effective or attractive option for enforcing policy (Fiorina 1982; Kagan 2001; Burke 2002). In an exploration of this choice, recent work by Sean Farhang (2008, 2010) finds that Congress creates "private enforcement regimes" through which it utilizes legal mechanisms of policy implementation and encourages private citizens to play a pivotal role in enforcing state regulatory statutes by legislatively increasing damages awards, reducing the costs of litigation, and making it more financially attractive for citizens to bring lawsuits against alleged violators.

But while studies have explored congressional utilizations of the regulatory power of private litigation, there has been relatively little attention devoted to the ways the American bureaucracy might tap into its associations with private groups and similarly enhance these private litigation enforcement strategies. Rather, central to the great majority of these previous explanations is that the choice between using bureaucratic and legal mechanisms of enforcement is one that is made by Congress despite and, indeed, sometimes in opposition to bureaucratic preferences. Robert Kagan (2001) and Thomas Burke (2002) share the observation that interbranch conflict in America's separation of powers system has so fragmented and limited the capacity of the American state that Congress must depend on private litigation for enforcement of its policy. Likening "a state with many independent power centers and a powerful desire to transform society…to a man with ardent appetites and poor instruments for their satisfaction," Kagan argues that Congress uses private litigation as a policy instrument to fill the gap left by a weak bureaucracy (43; quoting Damaska 1986: 13). Sean Farhang (2008, 2010), alternatively, demonstrates how Congress uses the enforcement powers of private litigation to surmount
principle-agent problems and insulate its policy preferences from a subversive bureaucracy. In order to ensure that policy is not enforced by regulatory agencies in ways that lie outside of congressional preferences, Congress will, under this model, displace enforcement powers from bureaucratic to legal processes.

In focusing on Congress, however, these studies fail to address the very real ways that regulatory agencies can also use private litigation to enforce policy according to their own political preferences. While these studies fashion private litigation as a congressional response to rebellious or impotent regulatory agencies, little is known about how regulatory agencies can, in turn, strategically employ the policy enforcement benefits of private litigation toward their own regulatory ends. More recent scholarly interest on this topic is reforming conceptions of how and by whom the choice between bureaucratic and legal enforcement is made. Not always embedded in the statutes and structures established by Congress, this choice is also strategically forged by bureaucrats as they create alliances with private enforcers in the legal community to supplement their constrained administrative powers (Lieberman 2002, 2007; Frymer 2003). Following these studies, this project explores the ways through which regulatory agencies manage the enforcement power provided by private litigation to achieve their regulatory goals, paying careful attention to demonstrate how and under what conditions these agencies create incentive structures to mobilize private litigation.

II. The When: Periodized Expansions of State Capacity: Under What Conditions Are Regulatory Agencies Most Likely to Utilize Private Litigation Enforcement?

If legal mechanisms provide one way by which state capacity can be expanded by bureaucratic actors, the question remains: under what conditions might we expect regulatory
agencies to turn to private litigation enforcement over more traditional administrative mechanisms of policy enforcement? Additionally, do these legal mechanisms of enforcement act as permanent, static solutions to weak administrative powers? Or is the regulatory choice between administrative and legal mechanisms more variable, dynamic, and temporally linked to moments of periodized growth (or contraction) of state capacity?

More traditionally concerned with the historical weakness of the American state, APD studies have typically focused on the enduring factors that lead state actors to turn to legal mechanisms of enforcement. Driven by a "longstanding…mistrust of government," Robert Kagan argues that the American state has been purposefully limited and is, therefore, dependent on "nonpolitical, nonstatist mechanisms" of enforcement like private litigation (2001: 15-16). Because this limitation is so "deeply rooted in the American system of government and in American political culture," Kagan suggests that the use of private litigation enforcement is an entrenched and consistent part of policy implementation in America (230).

Other studies, however, offer a more dynamic interpretation of the use of private litigation for policy implementation. Sean Farhang (2008, 2010), for instance, has demonstrated that the capacity of the American state, and state actors' use and management of auxiliary mechanisms of policy enforcement, are dynamic political features that reflect fluctuations in interbranch ideological conflict. In moments of divided government, when Congress finds the realization of its regulatory goals most threatened, Farhang finds that Congress will statutorily encourage private litigation to ensure that regulation occurs through the legal system. Under this perspective, the capacity of the state to see that its policy is enforced is not permanently frozen, nor even stagnated into elongated periods of strength and weakness (as is most typically suggested by the comparisons of 19th and 20th Century American state capacity which pervade
the APD literature; see Skowronek 1982). Rather, the choice to turn to legal mechanisms of enforcement to expand state capacity is one that is moving, dynamic, and contextually situated.

As this dissertation proceeds, I will argue that the choice between these two perspectives is a false one. The story of state capacity expansion need not be confined to explanations based solely on enduring institutional features, nor variable political conditions, but is found in a nexus of the two (Pedriana and Stryker 2004). Through a historical analysis of the decision making and regulatory policies of the EEOC, EPA, and the Office of Equal Opportunity under HUD, this project will explain, first, how institutional structures and constraints become catalysts for (and define the boundaries of) the development of agency enforcement strategies focused on creating incentives for private litigation. But, it will also explore the more malleable and variable features of this strategy, which adjust in response to changing political conditions like those caused by ideological shifts in the Executive Branch, the introduction of new legislation by Congress, and evolving court opinions on equal employment opportunity, environmental, and fair housing laws.

A. Enduring Factors of Institutional Development

Factors related to the historical formation and internal structures of regulatory agencies determine the degree to which an agency will be more or less capable of successfully pursuing alternate strategies of policy enforcement in general, and utilizing the regulatory potential of public-private partnerships, in particular. The degree of specification defining the powers granted to an agency provides one such factor. According to more traditional models of enforcement, weak specifications of agency regulatory powers or ill-defined rules provide severe limitations for the regulatory capacity of an agency; if an agency is not granted clear directives or strong enforcement powers, it is thought to have little institutional authority to work with, and very
limited capacity for policy enforcement. But under a model of enforcement that recognizes the
degree to which regulatory outcomes are a product of interactions and connections between
agencies and private groups, it is understood that ill-defined and weak specifications of agency
regulatory powers actually provide both the need for, and the institutional freedom to, utilize
alternate mechanisms of policy enforcement. In an analysis of the EEOC's regulation of civil
rights policy, Robert Lieberman finds that the "very same institutional constraints" that
weakened the formal administrative powers of the agency "created a great deal of slack in its
political and administrative environment," allowing it to "seek other means of influence" (2002:
146). Loosely defined administrative powers can provide agency personnel with the flexibility
necessary to engage in regulatory behavior outside of the boundaries of their formally granted
powers. Such flexibility is critical for an agency to be able to develop the institutional structures
and incentives necessary to shift from administrative to legal mechanisms of enforcement.

An 'institutional homes' approach, proposed by Christopher Bonastia (2006), offers a
slightly different perspective on the relevance of internal structure to agency regulatory behavior.
Bonastia suggests that agencies with singular, uncompromised missions develop stronger
institutional cultures that give their personnel the impetus to find creative ways to enforce policy
despite constraints on their formal regulatory powers. As Bonastia illustrates, while the EEOC
had "no direct policy legacy [and was given] weak enforcement powers," he credits the EEOC's
strong mission and unity of purpose with establishing the institutional basis that would motivate
its personnel to search for ways to "develop aggressive…approaches to fighting discrimination"
(2000: 539, 2006). A clear mission statement established at the formation of an agency allows its
personnel to foster and develop a strong and consistent agency agenda that compels its
employees to work creatively, effectively, and with united purpose toward achieving the agency's
regulatory goals. Without such clear, singularized missions – a condition which Bonastia illustrates with a case study of fair housing enforcement at HUD – agency personnel do not have the institutional authority or directives to redefine tasks or reallocate resources to more effectively achieve administrative goals. Where the conflict caused by multiple agency mission statements can give mixed, and often competing, signals to agency personnel, the institutional homes approach suggests that the internal structure of an agency can have profound effects on the degree to which its personnel has the institutional license to aggressively pursue enforcement through alternate means, like private litigation.

Research suggests that another set of factors, particularly those that define an agency's relationship to outside actors and public policy, also acts as a defining feature of agency regulatory behavior. A historical pattern of coalition-building with private actors (Carpenter 2001; Lieberman 2002) and a tradition of working within the legal system (Frymer 2003) are two important characteristics that define the way policy implementation is integrated into an agency's regulatory decisionmaking and enforcement behavior. Of consideration to this project is whether a regulatory agency routinely looks inward for regulatory action, or whether it has developed a pattern of working with outside private actors to enforce policy. As an associational perspective suggests, the interactions and connections between government agencies and civil society groups come to define the rulemaking and enforcement outcomes of public policy issues. Public agencies whose enforcement strategies are more generally colored by coalition-building with private groups may be, by extension, more likely to develop regulatory relationships with litigants in the private sphere.

Likewise, an agency that forges strong relationships with outside actors working in the legal system might be more likely to turn to private litigation enforcement as a regulatory
strategy. The origin of this legal relationship can stem from a 'legacy' of litigant activism on a policy issue – a legacy which may even pre-date the development of public regulatory agencies charged with administering the policy. For example, civil rights issues enjoyed a history of enforcement in the courts well before the formation of many of the federal civil rights agencies that exist today. During the formation of the EEOC following the passage of Title VII of the Civil Rights Act of 1964 and HUD's Office of Equal Opportunity following the passage of Title VIII of the Civil Rights Act of 1968, civil rights attorneys and interest groups contributed to the debates and discussions surrounding the creation of the agencies, and then populated the ranks of agency personnel once they were organized. These legal actors brought with them a legacy of working within the courts, including their knowledge of the legal ideas and institutions relevant to civil rights enforcement. Consequently, early administrators were well-versed in navigating and utilizing the legal system for civil rights enforcement, and held already established ties with legal actors.

B. Periodized State Capacity: Political Factors

The utilization of private litigation enforcement by regulatory agencies, however, is not only determined by factors related to their internal structure and institutional formation, but also according to the boundaries and opportunities posed by the political environment in which agencies operate and by their interactions with external political institutions. Regulatory agencies, in other words, do not exist in a political vacuum as they manage and develop public-private partnerships that promote private litigation enforcement; to suggest as much would belie the complexities and interconnected nature of America's separation of powers system.
The influence of congressional policymaking on citizen suits, for instance, can define some of the most basic opportunities for agency-motivated private litigation enforcement (Kagan 2001; Burke 2002; Farhang 2010). Regulatory statutes can, as a precondition, designate whether private citizens have standing to bring complaints in court, but they can also influence the appeal of private litigation for citizens by increasing the limits on damage awards, allowing for the recovery of attorneys’ fees, or legislatively reversing court opinions that are hostile to private litigation claims on particular policies. As regulatory agencies develop and employ their own tools for managing and utilizing the regulatory effects of private litigation, therefore, they operate within a legislative landscape that shapes the opportunities for private litigation enforcement. How agencies navigate this landscape and seize on legislative opportunities to champion private litigation can tell us much about the creativity and adaptability of agencies' strategies of policy implementation – as it also can vis-à-vis investigations of congressional responses to agency enforcement (Kagan 2001; Burke 2002; Farhang 2010). Indeed, to segregate investigations of legislative and bureaucratic private enforcement schemes from one another grants access to only small, isolated pieces of a larger puzzle which seeks to understand state development of private litigation enforcement. Rather, it is important to understand how these bureaucratic and congressional strategies coincide and work together at different moments to form an evolving narrative of private litigation in America.

The courts are also a major player in the development and scope of private litigation enforcement. Court opinions, which may be more or less hostile to policy enforcement goals given justices' own ideological positions (Segal and Spaeth 1993; Epstein and Knight 1998) can facilitate or complicate the success of private litigation enforcement. Courts might, for instance, issue decisions which either defer to or overrule the legal interpretations and guidelines issued by
regulatory agencies, alter opportunities for attorneys' fees recovery, adjust the statute of limitations for filing legal actions on violations, or expand or constrict the range of evidence plaintiffs or defendants may use in justifying their claims. How agencies adapt to these changes and shifts in the legal environment of agency-administered statutes is of interest to this project. As the historical analyses presented herein will illustrate, as courts shape the scope and potential for private litigation enforcement, agencies can simultaneously shape legal reasoning by issuing legal guidelines, arguing formative cases before the court, filing amicus curiae briefs on private suits, and intervening in potential precedent-setting citizen suits. At the intersection of regulatory agencies, private legal actors, and the courts, then, we reach a more nuanced understanding of the terms shaping private litigation enforcement.

Presidential objectives, likewise, can shape the opportunities for bureaucratically-motivated private litigation enforcement. Through the presidential appointment power, Presidents can fill upper-level positions in executive agencies with appointees who might empower or impede agency administrative processes in order to bring regulatory outcomes in line with presidential state-building objectives (Moe 1982; Wood 1990). For instance, as administrations come to recognize the effectiveness and utility of private litigation as an enforcement strategy over time, administration appointees who are hostile to the enforcement goals of an agency can attempt to identify and derail the systems and processes for encouraging private litigation enforcement that are more centrally located within the agency's administrative process (the success of which likely depends on the extent of the agency leadership's political control over its personnel). But while the implementation of this strategy is more straightforward

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1 See Udall v. Tallman, 380 U.S. 1, 16 (1965) ("When faced with a problem of statutory construction, the Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration").
with regard to an agency's formal administrative powers, it is more complex with regard to enforcement strategies that are rooted in longstanding partnerships with civil society groups. Depending on the hierarchical organization of an agency, middle-level managers, for instance, may form lasting connections and associations with outside private actors, producing hidden and insulated regulatory results that endure even when they conflict with the directives of agency leadership (Carpenter 2001: 21; Ringquist 1995; Wood 1988). The degree of executive political control over the bureaucracy, in other words, can vary from agency to agency – but how an agency responds to and navigates this constraint (e.g. by insulating informal regulatory strategies from the control of political appointees, or through the disregard of Administration directives by middle-level personnel) is a central interest of this project which will be explored in the following empirical chapters.

That bureaucratic politics is not isolated from the influence of external political factors is not a novel concept. Rather, a considerable portion of the literature on the bureaucracy is devoted to the study of the control and management of agencies by enacting coalitions of politicians (Weingast and Moran 1983; Calvert, Moran, and Weingast 1987; Ferejohn and Shipan 1990; Huber and Shipan 2002). These "procedural politics" theories suggest that outside elected officials can use administrative procedures to compel agencies to engage in behavior in line with their preferences and that agency regulatory actions are hard-wired by the methods and procedures that politicians enumerate for them. But to study administrative outcomes only through the lens of administrative procedures and the politicians who constrain them misses an important perspective on bureaucratic politics. As Carpenter notes, such a perspective "reduces political development to institutional creation, to the neglect of institutional transformation" and
tells us little about the fabric of the relationships that develop between civil society and bureaucratic agencies (2001: 11).

As the following cases will demonstrate, while administrative procedures have much to say about the strength and breadth of the formal authority granted to regulatory agencies, they explain little in terms of the partnership-formation and coalition-building that agencies engage in to foster private litigation enforcement. This project is concerned, however, with the ways in which outside political actors, in an ongoing exchange with regulatory agencies, engage with and help shape the scope and boundaries of the regulatory landscape of private litigation. It is through an examination of the ongoing interaction between politicians, citizens, and bureaucrats – rather than through the one-way influence of rules and procedures on government agencies – that we can come to understand the evolution of the availability and utilization of private litigation enforcement.

Incorporating these enduring and temporally-linked elements, I offer an argument on the development of regulatory capacity which incorporates a more 'situated' concept of state capacity (Pedriana and Stryker 2004) that is shaped by both institutional and political factors. Rather than an agency's capacity being 'locked in' after its first formative years, as we will see, regulatory agencies, under some institutional and political conditions, may aggressively pursue private litigation enforcement as a viable and effective tool for regulation, and at other moments retreat back from this path, confining their actions to carrying out their formal administrative powers. State capacity, under such a rubric, is not a static indicator of regulatory strength, but a moving measure that expands and contracts over periods of time. By incorporating these notions of temporality into our conceptions and assessments of capacity, we achieve a more full and encompassing understanding of the periodized and variable nature of regulatory capacity.
In this project, I focus on the combination of factors, both those more endurably institutional and those more short-lived and temporally linked, that together build a picture of the political development of the regulatory capacity of the EEOC, EPA, and HUD's Office of Equal Opportunity that is, on the one hand, dependent and constrained by earlier, institutionalized decisions made by political actors, and on the other, malleable and shifting as new political conditions change the political environment in which agencies operate.

III. The How: Agency Mobilization of Private Litigation

A. A Rational Economic Model of the Decision to Sue

To understand how, exactly, an agency might be able to influence and 'manage' the decision of individuals and citizen groups to pursue litigation, I turn to a model of rational litigant behavior provided in the law and economics literature which sets out the economic conditions under which a private actor is likely to pursue litigation (Posner 1973; Farhang 2008, 2010). 'Private actors,' for this analysis, will include individuals with 'rights of action' or 'standing' to sue in court (e.g. an employee who has been discriminatorily terminated from his position), or interest groups which sue on the behalf of individuals or the public good (e.g. environmental interest groups that sue manufacturers for exceeding legal water pollution emission standards). As I will demonstrate shortly, the costs and benefits associated with the decision to sue by private individuals and groups can, quite importantly, be altered by state actors. By employing this model, therefore, we can get a better picture of how regulatory agencies can enter into the decision to sue and motivate private groups and individuals to pursue litigation.
The use of a model of rational litigant behavior to explore the individual decision to sue, as Farhang (2010: 22) notes, comes with several assumptions. Primarily, a model of rational behavior focuses on an assessment of the expected economic costs and benefits to a potential litigant at the exclusion of more psychological explanations for why individuals decide to sue. These psychological explanations consider the emotional benefits that can result from suing an offender, with the assumption that victims sue in order to fulfill a desire to 'settle the score' or for the knowledge that justice is served and that offenders will be held accountable (Bumiller 1987; Vincent, Young and Phillips 1995). Likewise, these explanations maintain that the decision to sue comes with psychological costs. For instance, Marc Galanter notes that "pursuing a discrimination claim is an extremely painful process, exposing the claimant to social discreditation and self doubt" (1988: 22; see also Bumiller 1987), amounting to real psychological costs that might deter a person from choosing to engage in litigation.

But as the law and economics literature suggests, there are several reasons why we should focus on economic rather than psychological reasons for pursuing private litigation (Farhang 2010). First, the decision to engage in litigation is an economically costly one that is not always financially feasible. That a private actor might pursue litigation in order to gain a feeling of 'justice served' or to achieve emotional retribution assumes that that individual is able to incur the financial costs associated with litigation in the first place. There are, in other words, real economic costs associated with the choice to sue that dominate private actors' decision making. Additionally, the decision to pursue claims is often one based on recovering financial loss. Employment discrimination, environmental harm, or discriminatory housing practices have economic repercussions for the victim(s): employment discrimination can result in an individual being fired, denied a promotion or a raise, or demoted to a less sufficiently compensated
position; environmental violations can lead to costly adverse health effects in individuals and entire communities; and fair housing violations can result in the loss of potential property or the denial of home ownership. Lastly, because this project wishes to explore the ways in which regulatory agencies influence a person's decision to sue, a rational economic model more appropriately speaks to how agencies can shape individual decisionmaking and behavior (Farhang 2010). While there is less evidence that regulatory agencies can seek out potential litigants on emotional grounds and counsel them to seek legal gratification, or that they are able to protect potential litigants from the self doubt and social stigma that follows from filing of a private lawsuit, regulatory agencies can, as I will demonstrate, influence the expected economic outcomes of private litigation.

According to a model of rational litigant behavior, a person has an incentive to pursue a claim through private litigation if the expected benefits of the lawsuit outweigh its expected costs. In other words, we might expect a private actor to sue an individual or corporation if he or she believes the expected net value of pursuing a claim in court is positive. This expected value is composed of several components that interact to make up the decision to sue:

\[
\text{Litigate} = \begin{cases} 
1 & \text{if } Bp > C \\
0 & \text{if } Bp < C 
\end{cases}
\]

where: 
- \(B\) = expected benefits
- \(C\) = expected costs
- \(p\) = probability the lawsuit will prevail

The first component is the expected benefits, \(B\), that a litigant may gain from filing a suit. This includes the monetary value the claimant expects to receive if the lawsuit successfully results in a financial award. This award might take the form of damages and the recovery of economic losses for a private actor who has undergone specified harm or, in the case of interest groups that
bring suits on behalf of the public good, in the form of an increase in membership, donations, or foundation support that the group receives from bringing a successful lawsuit (Naysnerski and Tietenberg 1992).

The expected benefits that result from engaging in litigation, however, are only gained if the lawsuit successfully prevails. If not, the claimant receives a value of zero for $B$. As such, a potential litigant's assessment of $B$ depends on the probability that the claimant's lawsuit will successfully prevail, $p$. Assessments of the probability of success hinge on the merits of the evidence and discovery recovered by plaintiffs in a particular case, but are also more systematically affected by the standards and burdens of proof that apply to a population of cases (Farhang 2010). If a private actor must, for instance, prove that a defendant engaged in intentional behavior to cause particularized harm, rather than a pattern and practice of behavior that resulted in systemic harm, this dictates that the plaintiff must assemble more elusive pieces of evidence demonstrating intent, and thereby diminishes the likelihood of success for the lawsuit and, in turn, its expected economic value.

Lastly, plaintiffs must consider the financial costs, $C$, associated with the pursuit of a legal claim. A plaintiff may be responsible for all or part of their attorney's fees, the filing fee, and the costs of conducting discovery (which might include depositions, administrative costs, expert witness fees, interviews, the collection and analysis of data and documents, and scientific testing) (Farhang 2010). The magnitude of these costs may vary from case to case depending on the evidence that needs to be assembled, but it can also vary more systematically according to the burden of proof and type of evidence that is required to show a violation under a particular policy. Environmental litigation, for instance, often requires costly scientific testing of pollution levels to prove violations of environmental standards in court. Under such conditions, where the
costs of discovery are so great as to possibly outweigh the value of \( Bp \), private actors are more likely to be deterred from engaging in litigation.

**B. How Agencies Can Motivate Private Litigation**

The decision of an individual or civil society group to pursue a private cause of action in court is a considerable one that involves serious economic considerations. The primary consideration for the potential litigant becomes, therefore, through what course of action will the greatest expected value for one's claim be obtained? The least costly option for potential litigants is, of course, the enforcement of policy through an agency's administrative process. Regulatory agencies can grant relief through a variety of means. Depending on the administrative powers granted to an agency by Congress, an agency can, for instance, exercise cease-and-desist powers, impose fines, or mediate claims brought by private actors through administrative processes.

But as we will see in the following chapters of this project, many American regulatory agencies, encumbered by limited budgets or constraints on their administrative authority, do not have the capacity to provide these direct administrative remedies. Given such bureaucratic constraints, how can a regulatory agency still ensure that policy enforcement is carried out? And how might we expect private actors to respond? If an agency has few resources and is unable to provide bureaucratic remedies, we might expect it to strategically respond by making alternative mechanisms of enforcement more appealing to claimants; this means altering the course of regulation from administrative to private enforcement channels and encouraging victims to engage in private litigation. Under this alternate strategy of enforcement, an agency is no longer primarily concerned with administering bureaucratic resolutions. Rather, since a private actor's decision making is guided by the rational litigant model, the 'enforcement' role of the agency
must change to remain relevant. Under this strategy of enforcement, the agency directs attention and resources toward facilitating the process of private litigation to make it in the interest of private actors to bring a suit in court, or in other words, to help ensure that $Bp > C$.

In the following chapters, I will outline the methods and mechanisms by which regulatory agencies can affect the expected value of a private actor or group's decision to sue. These mechanisms fall under several categories of agency action which, importantly, exist and endure quite outside the boundaries of formally granted administrative authority. The first strategy involves organizing internal administrative processes to protect and promote the private right of action in courts. While outside political institutions – like Congress and the President – can shape the enforcement efforts of agencies by drafting rules, shaping operating budgets, or offering regulatory objectives, agencies – particularly those with vaguely-defined powers – often possess the institutional capacity to shape and organize their own internal administrative processes. For a particularly resource-constrained agency, this might mean shifting agency objectives, manpower, and resources away from traditional command-and-control administrative enforcement, and toward the establishment of administrative processes and procedures which make private litigation a more economically viable alternative for private actors. The agency might, for instance, enhance the value of $p$ – the probability that a lawsuit will successfully prevail – by issuing agency decisions and findings that support claimants’ cases, ensuring that regulatory reporting requirements are met by regulated interests, or streamlining the administrative complaint process so as to not unnecessarily delay litigation activity. Likewise, the agency might decrease the expected costs ($C$) of litigation by directing resources toward the collection and dissemination of data and information on statute violations by regulated entities. Such data can be used as evidence in private citizen suits at little or no cost to the litigant,
thereby supplementing the expense of discovery and significantly reducing the costs of engaging in private litigation.

The second course by which agencies can enhance the expected value of private litigation is by adopting an active role in the construction of a body of law that will benefit citizen suits. While Congress stipulates the provisions of regulatory policy, ambiguity in these provisions can be exploited, especially when subjected to judicial interpretation by the courts. An agency can pave the way for successful private litigation by actively working within the legal system to lobby courts to issue legal opinions that create favorable legal precedent for plaintiffs. An agency can help construct a body of law that enhances the expected value of private litigation, for instance, by issuing guidelines and regulations offering agency legal interpretations that favor plaintiff cases. Throughout the mid to late 20th Century, courts have displayed a varying degree of deference to agency interpretations of the policy under their regulatory purview. Especially at times of heightened deference, therefore, agency-issued opinions and guidelines can shape the legal opinions issued by the courts, directly affecting the probability of whether plaintiff lawsuits will prevail. An agency can also enter into the legal process by filing amicus curiae briefs or intervening in ongoing private litigation on formative cases. Such actions not only reduce the costs of private litigation by transferring some of the expense of discovery and court filings to the regulatory agency, but they can also enhance the probability that a lawsuit (and many future lawsuits) will prevail if they are carried out on significant, frontier cases that establish legal precedent favorable to plaintiffs.

While agencies do not always have explicit power to file amicus briefs and intervene in private lawsuits, there are instances in which regulatory agencies have creatively carved out a role for themselves in these legal activities. The EEOC, for instance, asserted its authority to issue amicus briefs in private lawsuits – actions which the Department of Justice considered to be its exclusive authority. This role was ultimately ratified by court opinions sympathetic to the legal role of the EEOC in shaping Title VII law.
Lastly, regulatory agencies can motivate private litigation enforcement by assisting with the development of a private bar that can take on cases not settled through the agency’s administrative process. The success of private litigation enforcement hinges on the presence of a trained and formidable private bar that can litigate a large volume of cases with expertise. Yet, when private rights of action are first statutorily created, there is typically little to speak of in terms of an organized or specialized private bar to bring lawsuits on these new legal claims. Attorneys must be quickly recruited and trained in these new policies and then kept abreast of changes to regulations, rules, and legal precedent over time. Regulatory agencies, however, can facilitate the development and maintenance of an effective private bar through a series of creative actions. Agencies, for instance, can develop programs to offer direct economic incentives such as financial support for private litigation. Litigation funding not only enhances the probability of a lawsuit prevailing by providing attorneys – wary of fronting firm money and resources – with an incentive to give attention to risky, and possibly formative, cases, but it also reduces the costs of litigation, and enhances the expected value of a lawsuit. Agencies can also develop training programs for members of the private bar. These training programs offer strategic advice to attorneys on how to bring cases under particular laws, and keep attorneys apprised of the legal changes that have occurred in recent cases, enhancing the probability of a successful lawsuit. And lastly, agencies may ‘partner up’ with private attorneys during the litigation process by remaining in close communication with members of the private bar and offering direct litigation support. By supplying evidence or information recovered through administrative processes or offering agency opinion on how to proceed with a case, an agency can help ensure the viability of a lawsuit.
Employing a combination of these tools at different moments, regulatory agencies can develop incentive structures that make private litigation a more attractive enforcement option for private individuals and groups. In doing so, agencies become pivotal actors in the expansion of their own capacity to regulate public policy and develop pathways for securing the regulatory role of private litigation enforcement.

IV. Conclusion

This chapter outlined theoretical approaches to understanding how and under what conditions regulatory agencies might develop incentive structures to enhance the viability of private litigation on agency-administered statutes. In contrast to traditional approaches to the study of regulatory behavior, this project adopts an associational perspective that emphasizes the regulatory partnerships that agencies develop with individuals and civil society groups to explore the alternate mechanisms of enforcement found in bureaucratic strategies to motivate private litigation. In the following empirical chapters, I use the theoretical guidance provided by the rational litigant model to identify the mechanisms by which different regulatory agencies have developed incentives that encourage private individuals and groups to engage in litigation and to develop a quantitative measure of private litigation enforcement for an agency. Bearing in mind a more situated concept of regulatory capacity, I likewise identify the institutional and political conditions that not only allow, but compel, regulatory agencies to develop strategies for private litigation enforcement.
References


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Chapter 3

The Toothless Tiger Finds Its Bite:  
Private Litigation and the Equal Employment Opportunity Commission

"When I went to Washington, I shared the 'liberal view' that the [Equal Employment Opportunity] Commission was weak and had no power. We called it a toothless tiger. I later realized that there are many sources of power, and that...creative administration requires as wide a view of alternatives as legal limits permit and judgments between alternatives which are fitted to the task before the agency."
– Alfred Blumrosen, first Chief of Conciliations at the EEOC (1970: 698, 703).


The passage of Title VII marked the culmination of a prolonged battle by civil rights advocates to establish and implement clear federal policy on employment discrimination. In the twenty years preceding Title VII, the regulation of employment discrimination was left to a scattered hodge-podge of largely ineffective Executive Orders, state and local efforts, and private litigation (Belton 1978). At the federal level, this regulation was largely focused on eliminating discrimination in government contracts through the establishment of committees that lacked direct enforcement power and had limited impact on the continued presence of employment discrimination.¹ No private right of action to sue in the courts existed under these federal orders, and the state and local agencies, while often more formally powerful than federal efforts (some of these local agencies were granted cease-and-desist powers), failed to effectively utilize their

¹ Executive Order 8802 (3 C.F.R. 957) of 1941 established the Fair Employment Practices Commission to regulate employment discrimination in defense contracts; Executive Order 10,925 (3 C.F.R. 448) of 1961 (superseded by Executive Order 11,246 of 1965) created the Office of Federal Contract Compliance in the Department of Labor to enforce equal employment policy in government contracts.
authority. With no clear national mandate or program to eliminate employment discrimination, enforcement efforts were disconnected and administratively ineffective.

Title VII of the 1964 Civil Rights Act represented the first federal effort to implement national equal employment policy. The legislation created the Equal Employment Opportunity Commission ("EEOC") and charged it with regulating widespread employment discrimination across the country. Civil rights advocates viewed the creation of an administratively empowered agency as critical to the enforcement of employment discrimination policy and lobbied aggressively for the provision of strong enforcement authority in the form of either cease-and-desist powers like those held by the National Labor Relations Board, or the power to bring lawsuits in court against employers engaged in acts of unlawful employment discrimination. But during the congressional debates on the bill, it became clear that this vision of an empowered EEOC would not come to fruition. Southern Democrats, whose regional concerns centered on preserving southern racial hierarchies in the labor market (Lieberman 2002; Katznelson 2005; Farhang and Katznelson 2005; Katznelson and Mulroy 2012), were staunchly opposed to the provision of a strong federal enforcement agency. After a lengthy (fifty-seven day) filibuster in the Senate, a compromise was reached which limited the formal administrative powers of the EEOC. In lieu of the cease-and-desist powers that the civil rights community supported, the EEOC was granted the power to investigate and conciliate charges of employment discrimination through an internal process that – since the EEOC was given no coercive powers to enforce conciliations, nor to bring a lawsuit on behalf of the complainant if the conciliation effort failed – turned out to be rather ineffectual. Rather, the Department of Justice was granted the sole authority to bring 'pattern and practice' suits in court and individuals were granted a private right of action to bring lawsuits in court on their own behalf.
With more coercive enforcement powers resting squarely in the courts, the EEOC was, instead, assigned a 'management' role over potential future private equal employment opportunity litigation; a role which the EEOC has carefully expanded over the years beyond the original statutory provisions. Pursuant to Title VII (and subsequently, the Age Discrimination in Employment Act ("ADEA") and the Americans with Disabilities Act ("ADA")), a victim of employment discrimination is required to file a charge with the EEOC before a lawsuit can be brought in court. After the charge is filed, the EEOC has a specified period of time to process the charge, investigate the claim, help the parties reach a settlement, and issue a determination of whether there is "reasonable cause" to believe that discrimination occurred. If the EEOC finds that there is "reasonable cause" during its investigation, it attempts to mediate the matter and reach conciliation between the two parties. If the conciliation effort fails, or if the Commission issues a determination of "no cause," the claimant is issued a "right to sue" notice that allows him/her to sue in court. If the EEOC fails to process the charge within the specified time period,

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2 This prerequisite for suing an employer in court only extends to Title VII (42 U.S.C. § 2000e-5 (1988)), age discrimination (29 U.S.C. § 626(d) (1994) (ADEA)), and disability discrimination claims (42 U.S.C. § 12117(a) (1988 & Supp. V 1993) (ADA)). Claims made under 42 U.S.C. §1981 (1988 & Supp. V 1993) (applying to national origin and race discrimination claims) and the Equal Pay Act (which applies to gender discrimination in wages) do not need to be first processed by the EEOC. According to Selmi, however, these claims make up a minority of employment discrimination litigation filed in the courts (1996: 1, fn 1). Claims made pursuant to §1981 usually also include a Title VII claim and are therefore subject to the EEOC's charge process. Likewise, Equal Pay Act claims "comprise an insignificant amount of discrimination claims." In other words, the EEOC processes, investigates, and manages the vast majority of EEO claims before they reach the courts.

3 This period of time has changed over the course of the EEOC's existence. While the EEOC was originally given 30 days to investigate and resolve complaints under the Civil Rights Act of 1964 (Pub. L. No. 88-352, tit. VII. § 706(b)), it soon became clear that the EEOC would not be able to meet the standard, and the time limit was extended to 60 days in 1967 (29 C.F.R. § 1601.25a). The EEOC now has 180 days to process the charge – a limit that the EEOC still largely fails to meet.

4 As will be explained in more detail in the analysis section, in 1972, the authority of the EEOC was formally extended to allow it to directly sue an employer for employment discrimination. This lawsuit can be on behalf of a claimant who has filed a charge with the EEOC, or can be brought independently of a claimant, on behalf of the EEOC (Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, §§ 1-3, 86 Stat. 103). Prior to this, the EEOC could not litigate complaints of employment discrimination in court but could only manage charges of discrimination within the confines of the EEOC's bureaucratic process.
the claimant can request a "right to sue" notice, but then relinquishes access to the investigatory and conciliation work that can be performed by the EEOC.

A. How the EEOC Can Mobilize Private EEO Litigation

The decision to pursue a complaint of employment discrimination, therefore, can be split into two possible courses of enforcement. The first course comprises the enforcement of Title VII discrimination law through the EEOC's mediation process. Under this option, the claimant places her complaint in the hands of the EEOC's administrative charge process with the expectation that the agency will effectively mediate an agreement between the claimant and her employer. The second course of enforcement is activated by the decision to file a lawsuit in court once the charging party has been granted notice of a right to sue. This decision to pursue litigation on an EEO charge, however, is contingent upon whether the EEOC is more or less likely to be able to provide bureaucratic means of resolving the complaint.5

While the EEOC was statutorily charged with the responsibility of providing an administrative investigatory and conciliation process that would redress complaints of employment discrimination, as many studies have since found, the EEOC has been famously incapable of providing these bureaucratic remedies (Hill 1977; Lieberman 2002, 2007; Frymer 2003). Under budget and personnel constraints that have characterized the agency's capacity from the very beginning, the EEOC's ability to deliver real economic benefits to its claimants has

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5 This does not mean that the decision to sue must come after the claimant exhausts all possible courses within the EEOC system. Indeed, the decision to sue can be made at multiple points in the process: after the EEOC’s conciliation process has failed, after the EEOC has issued a determination of no cause, after the charge has been in review at the EEOC for over 180 days, or even prior to filing a charge with the agency. Rather, the decision must be made after a claimant has made a judgment as to the ability of the EEOC to properly process their claim. This judgment can be based on the claimant’s own observations as her individual claim has traveled through the EEOC’s administrative process, or on past records or reputations of EEOC effectiveness and efficiency. In other words, the decision (or intention) to sue can come before or after a claim is filed with the EEOC.
faltered. Working with a historically small budget, the EEOC has successfully conciliated an annual average of only 27 percent of the charges for which it has issued a determination of 'reasonable cause,' leaving a substantial population of charges – for which there is a reasonable expectation that unlawful employment discrimination occurred – unresolved by its administrative processes.

But as we will see, the EEOC, in response to these administrative constraints, has crafted an alternative regulatory strategy for equal employment opportunity enforcement. Given the insufficient resource levels and weak formal powers with which the EEOC has had to provide bureaucratic remedies for employment discrimination charges, the Commission has strategically responded by making alternative mechanisms of EEO enforcement more appealing to claimants – or, in other words, altering the course of the claimant's charge of discrimination from administrative to private legal enforcement channels and encouraging the claimant to engage in private litigation.

In this chapter, we will see how from the very beginning of its formation, the EEOC set out to establish methods and means by which it could affect the expected value of the decision to sue, primarily by shaping \( p \) (the probability that employment discrimination lawsuits prevail) and \( C \) (the expected costs associated with employment discrimination suits) (see Table 3.1). In a bold move of bureaucratic creativity, the EEOC, first, organized its internal administrative processes to protect and promote the private right of action in the courts (e.g. by ensuring that annual regulatory reporting requirements were met; providing litigant access to its data collections; issuing agency decisions and findings that supported claimants' cases; and streamlining its administrative processing of charges so as to not unnecessarily delay litigation activity). Second, the EEOC assumed an active role in the construction of a body of law that benefited private
litigants (e.g. by filing *amicus curiae* briefs in ongoing private litigation; intervening in significant, frontier cases that established legal precedence; and issuing guidelines and regulations that help construct a body of discrimination law). And lastly, the EEOC assisted and helped with the development of a private employment bar to take on cases not settled through the agency’s administrative process (e.g. by offering direct litigation support; developing training programs for private employment discrimination bar; and funding private litigation efforts). Utilizing a combination of these tools at different moments, the EEOC expanded its capacity to regulate EEO law, developing a pathway by which it might become a pivotal player in private litigation enforcement.

II. **Historical Analysis: A Periodized Account of EEOC Capacity**

A. **Formative Acts: Developing the Pathway for Private Litigation Enforcement**

After the passage of Title VII, the EEOC faced an uphill battle in crafting an effective regulatory role for itself. By denying the EEOC cease-and-desist powers and the authority to bring lawsuits in court, Title VII statutorily rendered the EEOC a "toothless tiger" – an agency established to oversee the implementation of equal employment law, but without the requisite administrative tools to do so (Blumrosen 1970: 703). But the EEOC faced obstacles beyond those contained in the provisions of Title VII. It would be eleven months into its first year – which was set aside to allow for the bureaucratic organization of the agency – before President Johnson appointed the Commissioners for the agency (700) and in its first five years, the EEOC

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experienced a revolving door in its leadership positions, with four Chairmen each serving terms shorter than two years (Peck 1976: 847).

Once the Commission's organization was under way, however, it became very clear that the EEOC would have trouble carrying out its most basic operations even despite its leadership problems. Within its first year, the EEOC developed a backlog of 2,114 charges – these were complaints that were filed with the EEOC, but had yet to be resolved by the agency.  

Without adequate personnel and funding, the EEOC was unable to process charges as quickly as they filtered into the agency, and in its first year, began to request help from outside agencies in the form of "loaned" employees who could be trained as EEO complaint investigators. The EEOC's conciliation efforts, likewise, produced disappointing returns. Citing its restricted reliance on persuasion as an ineffective tool for securing negotiated resolutions (Peck 1976), by its second year, the Commission reported a meager success rate: out of the 890 conciliations that it completed in 1967, 306 were successful compared to a full 507 that were unsuccessfully conciliated and ended with the charging party being issued a notice of a right to sue (EEOC Second Annual Report 1967).

Yet, in the face of these weak administrative powers, the EEOC would craft a critical role for itself during these formative years that would expand its reach over the enforcement of employment law. Despite the fact that it did not itself have the authority to bring lawsuits in the

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7 Memorandum, Alfred W. Blumrosen (Chief of Conciliations) to Steven Shulman (Chairman), 26 January 1967, NARA, RG 403, Compliance Division, Compliance Correspondence, 1968, Box 1, Conciliation - Inter-Office Memos; Memorandum, Kenneth F. Holbert (Acting Director of Compliance) to Steven Shulman via Roger Lewis (Executive Assistant), Re: Status Report on Backlog, NARA, RG 403, Office of the Chairman, Chronological Files, 1969-1979, Box 1, Admin – Backlog.

8 Memorandum, Aileen Hernandez and Samuel Jackson (Commissioners) to Stephen Shulman and Luthur Holcomb (Vice-Chairman), 25 October 1966, Re: Commission's Backlog and Use of Other Federal Agencies to Assist in Eliminating Same, NARA, RG 403, Office of the Chairman, Records of Chairman Stephen Shulman, 1966-1968, Box 6, Comm. Hernandez.
courts, the EEOC exploited its lack of clear, statutorily enumerated directives, and focused its energy on securing the viability of the private right of legal action for EEO enforcement.

Confronted with the lack of administrative powers granted to the agency, Alfred Blumrosen, the first Chief of Conciliations at the Commission, came to "realize that there are many sources of power, and that the weakness of the Commission might, itself, become a strong point in solving employment discrimination problems" (Blumrosen 1970: 703). Though the broad language in which the substantive provisions of Title VII were written left the EEOC little formal abilities, the EEOC took advantage of its "openness" and used "administrative creativity" to "maximize the effect of the statute on employment discrimination without going back to the Congress for more substantive legislation" (697, 702).

The EEOC did this, first and foremost, by securing and enhancing the viability of private EEO litigation. The EEOC came into existence at a historical juncture when the courts, civil rights advocates, and elected officials were paving the way for an effective legal means of remedying employment discrimination (Frymer 2003). Leading up to the passage of Title VII, the courts were famously sympathetic to civil rights claims and became a major vehicle for securing civil rights in general (Melnick 1994), but also employment discrimination relief, in particular.9 Turning to the courts, civil rights advocates came to view the courts as an ally in their struggle to protect the civil rights of their clients – long before the creation of federal administrative solutions for the problem of discrimination. But also quite importantly, elected officials and the legal community were taking great strides to expand the professional reach of

9 Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944) (under the Railway Labor Act, union has duty to give equal representation to its members without regard to race); Brown v. Board of Education, 347 U.S. 483 (1954) (the practice of establishing separate but equal public education facilities is unconstitutional); Syres v. Local 23, Oil Workers, 223 F.2d 739 (5th Cir. 1955) (extending Steele decision to unions whose activities were subject to the National Labor Relations Act).
the legal community at this historical moment. By advocating and lobbying for reforms to the federal civil procedures, for instance, the legal community expanded the capacity of the courts to offer relief for civil rights claims by making it more likely for civil rights groups to gain standing in court, making it easier for plaintiffs to 'discover' evidence of discriminatory behavior on the part of employers, and giving judges more discretion over the remedies that might be awarded to plaintiffs.

Acting within the legal-centric environment that had developed around civil right enforcement at this moment, the EEOC came to frame its own duties in terms of securing and facilitating the success of the private right of action in court. The individual right to sue came to "permeate th[e] entire process" of charge handling by the EEOC,\(^\text{10}\) where each stage – including those, like conciliation, that represented the greater part of the EEOC's administrative abilities – was viewed as part of the litigation process (Blumrosen 1970: 739). In formulating its charge processing procedure, the EEOC was resolved to inform the complainant of his or her eventual right to sue, "direct[ing] its conciliators to make very clear to the charging parties that there was no certainty that conciliation would work, and that the alternative was litigation" (Blumrosen 1970: 742), and that when charges were not settled, to give instructions to the claimant on how a case might be brought in court.\(^\text{11}\)

The centrality of the goal of protecting the individual right to sue was extended to agency decisions on the organization and legal significance of the administrative charge process itself. As the EEOC's backlog of cases grew, and administrative relief became less available,


\(^{11}\) Stephen Shulman to Ellis H. Pettaway, 1 March 1967, NARA, RG 403, Office of the Chairman, Records of Chairman Stephen Shulman, 1966-1968, Box 5, Signer's Copies - Mr. Shulman.
administrators began to question whether the EEOC's investigation and conciliation processes were mandatory for the conferral of a private right of action under Title VII. In response, the EEOC made a provision in its procedural rules that allowed claimants to file for a notice to sue if the EEOC was not able to obtain relief or voluntary compliance with the law within the time limit allotted by Title VII. By effectively declaring its administrative process dispensable in the face of potential legal enforcement, the EEOC addressed its greater fear that "private enforcement efforts could have been delayed or frustrated" by the pending workload at the EEOC if claimants had to wait for their charge to be fully processed by the agency before being able to bring their case to court (Belton 1978: 932).

At the expense of its administrative reputation, the EEOC also made several decisions concerning its settlement process – decisions that threatened to restrict the number of settlements achieved through its administrative process (reflecting poorly on the effectiveness of the EEOC's conciliation process), but which ultimately preserved the individual right to sue under Title VII. The EEOC decided, first, that it would ensure that charging parties would not settle for less than the full measure of their statutory rights (Blumrosen 1970: 736, 740-1; Peck 1976: 853). In doing so, the EEOC assumed a paternalistic role as the protector of its claimants' right to secure full relief through the litigation process if necessary. EEOC leadership also made the decision that the Commission would not have the authority to settle a claim on behalf of the claimant, but that the claimant's signature would be required for any settlement (Blumrosen 1970: 745). Though, as Alfred Blumrosen, the first Director of Compliance at the EEOC, conceded, the provisions of Title VII could have been interpreted to stipulate that the Commission was not to issue a notice to sue if it deemed that a conciliation proposal was "acceptable and constituted voluntary

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12 See fn 3 for changes in the length of this allotted time period.
compliance" (1970: 748), the EEOC made the determination that since "the individual's right to sue is the legal foundation for his right to settle his case," a claimant would need to be involved in and decide whether to accept any settlement in order to stay true to the intent of Title VII's retention of the individual right to sue.13

The EEOC was equally conscious of its role in affecting the viability of private litigation in its deliberation over what would constitute a finding of "reasonable cause" by the Commission. The EEOC, first, stipulated that the reasonable cause determination would not be informally made by an investigator at the scene, but would be "elevated…to a high policy level" and defined by the Washington office (Blumrosen 1970: 733). Reasonable cause determinations were granted this "elevated" position because they would not only arm the conciliator with a factual basis of a finding of discrimination in the conciliation process, but would also provide a major source of encouragement for litigation if the conciliation process failed (Peck 1976: 849). A favorable determination would give the claimant confidence that her unresolved charge had merit, but it would also act as a signal to attorneys that this case was worthy of legal representation (Selmi 1996: 44). As such, the Commission was careful to stipulate a set of criteria for reasonable cause determinations that would not be held to the strict standards of preponderance of evidence that a lawsuit would require (Belton 1978: 918). Rather, in an effort to ensure that this Commission 'stamp of approval' was not too conservatively applied, the Commission held the charges to less strict standards, encouraging future litigation should the conciliation process prove unsuccessful.

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The Commission was also aware of the possibility, however, that its opinions on reasonable cause would be used to establish a working legal definition of discrimination in the courts (Peck 1976: 849; Lieberman 2007). In response to the anticipation that the federal courts would soon offer interpretations on what types of conditions constituted reasonable cause, the agency developed its own interpretations of reasonable cause with the intent of "mak[ing] a body of law regarding what constitutes discrimination" (Blumrosen 1970: 733). While the EEOC was never certain that its interpretations would be accepted by the courts in the end, working within this favorable legal environment, the courts proved to be quite deferential to the legal interpretations offered by the EEOC (Blumrosen 1970; Peck 1976; Belton 1978; Lieberman 2007).¹⁴ At this early stage in the formulation of employment law and its enforcement, the courts deferred to the agency for proper interpretations of Title VII, giving the EEOC the freedom to develop an effective and efficient enforcement strategy:

"The Equal Employment Opportunity Commission, having enforcement responsibility, has issued guidelines… [and] the administrative interpretation of the Act by the enforcing agency is entitled to great deference. Since the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress."¹⁵

The courts' deference to the EEOC's legal interpretations afforded the EEOC a powerful tool to develop a plan for enforcement – a plan that would reach beyond the structure of the

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¹⁴ As Peck observes, due in part to the fact that the EEOC was statutorily constrained to act more as an adjudicating body than as an enforcement body, the courts accorded the EEOC high deference with the expectation that as an adjudicating body, the EEOC would feel the obligation to make decisions that were 'fair' or 'right' in developing a body of employment law (1976: 844). Seeing the EEOC's lack of strong administrative powers as a 'blessing in disguise,' Peck argues that the EEOC would not have been afforded as much deference by the courts had it been granted more formal enforcement powers.

¹⁵ *Griggs v. Duke Power Co.* 401 U.S. 424, 433-4 (1971). The opinion cites *Udall v. Tallman*, 380 U.S. 1, 16 (1965), in which Chief Justice Earl Warren wrote: "When faced with a problem of statutory construction, the Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration…Particularly in this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly when they are yet untried and new.'"
administrative process at the EEOC, to the construction of a body of employment law that would give teeth to the arguments of individual lawsuits coming before the courts.

This tactic constituted a second enforcement strategy for the EEOC during its formative years: in addition to shaping its complaint process to protect the private right of action, the EEOC issued legal interpretations and guidelines that enhanced the prospects of private litigation. To ensure their accessibility to the legal community, the EEOC published its guidelines and legal interpretations in bound booklets, complete with explanations of its legal reasoning (Belton 1978; Lieberman 2007). These guidelines were critical to the development of legal arguments by plaintiffs and their attorneys, giving them a set of decisions on a wide range of legal employment discrimination issues that they could bring before the courts as agency-sanctioned legal interpretation. The guidelines proved useful for settling legal disputes in court, but the scope of their effect on employment litigation did not end there. Much like its decisions on defining the proper standards of reasonable cause, the EEOC used these guidelines to craft a body of law – one that, arguably, expanded the scope of Title VII law.

In its first couple of years, the EEOC developed guidelines on seniority and testing that would come to redefine what constituted a violation of lawful employment practices. With the passage of Title VII, previously segregated workplaces were forced to integrate their departments, but did so by moving black workers into newly integrated departments that stripped them of the seniority they had accrued in their previous positions. While Title VII language required proof of intent to discriminate to demonstrate a violation of the law, civil rights advocates argued that past discriminatory actions still had a *present effect* on the employment

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status of black workers, and therefore were subject to Title VII. The question of whether employment tests might be regulated under Title VII presented a similar quandary. Employment tests which were administered without a clear discriminatory motive had a "disproportionate impact" according to several studies that found that black workers were far less likely to pass the tests than white workers. But rather than stand behind the strict interpretation of Title VII's intent requirement, the EEOC embarked on an uphill legal battle to endorse the more liberal present-effects and disproportionate-impact interpretations of Title VII – interpretations that, at the time, the EEOC had little expectation the courts would uphold (Pedriana and Stryker 2004).

Arming plaintiffs and civil rights attorneys with more liberal interpretations of Title VII, the EEOC enhanced the enforcement capacity of Title VII private litigation. Underlying these guidelines was a reconceptualization of the types of discrimination that the EEOC and private litigation would address. The language of Title VII gave the EEOC the authority to process individual complaints on a case-by-case basis, giving the Department of Justice jurisdiction over the enforcement of pattern and practice discrimination. But the Department of Justice waged an unimpressive legal battle using its pattern and practice authority, filing only ten suits in the first three years after it was granted the responsibility (Lieberman 2007: 23). At a White House Conference on Equal Employment Opportunity, it became apparent, however, that pattern and

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17 For EEOC guidelines on testing, see: Memorandum, Kenneth F. Holbert (Acting Director of Compliance) to Executive Director, 9 November 1966, NARA, RG 403, Compliance Division, Compliance Correspondence, 1968, Box 1, Testing Issues in Olin Mathieson Chemical Company; Digest of Legal Interpretations Issued or Adopted by the Commission, 9 October 1965 through 31 December 1965, NARA, RG 403, Office of the Chairman, Records of Chairman Stephen Shulman, 1966-1968, Box 3, Rules and Regulations – EEOC; "Guidelines on Employment Testing Procedures," 24 August 1966, NARA, RG 403, Office of the Chairman, Records of Chairman Stephen Shulman, 1966-1968, Box 3, Rules and Regulations – EEOC.
practice discrimination would become a major focus for the EEOC.\textsuperscript{18} The Commissioners, staff, and civil rights advocates attending the conference "agreed that discrimination should be defined as patterns of social and economic disadvantage caused by employment practices and social institutions in general, in relation to which complaint processing and case-by-case litigation were irrelevant" (Belz 1991: 28). In its First Annual Report, the EEOC formalized its position on discrimination, claiming that "by its very nature, discrimination is often not personal but generalized, often not as an act of individual malice, but more an element of a pattern of customary conduct" (1966: 15).

With its 'generalized' interpretation of discriminatory conduct, the EEOC forged the way for the emergence of 'private attorneys general' demanding group rights in the courts through the certification of class action lawsuits. While Attorney General pattern and practice suits were the only class action cases authorized by Title VII, the courts quickly approved the standing of private groups in court (Peck 1976: 840; Belton 1978: 933). In line with its own groups-rights definition of discrimination, the EEOC did its part to provide these class action suits with the evidentiary ammo they needed to succeed in court. Again, through a liberal construction of Title VII,\textsuperscript{19} the EEOC creatively crafted a uniform national reporting system that would require employers to provide statistics on the racial composition of their workforce (Blumrosen 1970: 718; Lieberman 2007).\textsuperscript{20} In a statement before a public hearing on the EEOC's Employer


\textsuperscript{19} Memorandum, Franklin D. Roosevelt, Jr. (Chairman) to Charles T. Duncan (General Counsel), 12 October 1965, Re: Title VII, Section 709 – Need for Uniform National Reporting System, NARA, RG 403, Office of the Chairman, Records of Chairman Stephen Shulman, 1966-1968, Box 2, General Counsel: Inter-Office Memos.

\textsuperscript{20} Memorandum, Charles B. Markham to Vice Chairman Holcomb, Commissioners Hernandez, Graham, and Jackson, 29 September 1965, Re: Employer Report Form, NARA, RG 403, Office of the Chairman, Records of Chairman Franklin Roosevelt, 1965-1966, Box 1, Markham, Charles Acting Director of Research and Reporting.
Reporting System, Chairman Franklin Roosevelt declared that in creating this data reporting system the Commission had "chosen not to bind ourselves exclusively to the processing of complaints," believing instead that "implicit in our task is the responsibility to encourage affirmative action beyond the bar prohibitions of the statute."\textsuperscript{21} The creation of a national reporting system would aid the EEOC in locating patterns of discrimination, and would prove critical to making a case of generalized discriminatory patterns in class action suits.

Class actions, which could achieve legal relief for a large group of workers at one time, were critical to the success of private litigation enforcement efforts and provided an appropriate solution to the concern that "implementation of [employment law] on an individual-by-individual basis soon would have dissipated the limited resources of the private plaintiffs' bar" (Belton 1978: 934). But class actions posed another set of difficulties for the taxed plaintiffs' bar. As the legal focus of Title VII litigation expanded from proving intentional, individual-level discriminatory acts, to developing cases of systemic discrimination, litigation required much more technical and organizational analysis of company employment practices that strained the private bar (Belton 1978: 928). In what became known as a "David-Goliath confrontation" against defendants who had the resources to mount strong defenses (\textit{Jenkins v. United Gas Corp.}, 400 F.2d 28, 33 (5\textsuperscript{th} Cir. 1977), reprinted in Belton 1978: 928), representing workers in discrimination cases proved an unattractive endeavor for attorneys. In response, the EEOC not only enhanced the prospect for private litigation through the creation of guidelines, legal interpretations, a statistical reporting system, and a complaint process that favored and worked to

benefit discrimination lawsuits brought by employees, but also offered direct litigation help and coordination with plaintiffs' attorneys.

The EEOC coordinated heavily with attorneys at civil rights organizations on matters concerning both broad affirmative action strategy and litigation particulars. Civil rights organizations, particularly the NAACP, were critical players in the early enforcement efforts of Title VII, locating workers with discrimination grievances, helping them file complaints with the EEOC, and litigating cases on their behalf (Belton 1978; Lieberman 2007). While formulating its enforcement strategy, the EEOC convened fairly regular meetings with representatives from civil rights organizations to discuss, as NAACP Director Jack Greenberg described it, "not only…specific complaints filed pursuant to [EEOC] regulations" but also their "mutual concern to develop affirmative programs to attack patterns of discrimination." The EEOC held informational meetings with civil rights representatives to keep their attorneys abreast of new rules and legal interpretations formulated by the EEOC and attended conventions with civil rights organizations in order to "sell the EEOC story" to attorneys.

Establishing a quasi-enforcement alliance with civil rights organizations, the EEOC also provided direct charge processing and litigation support. To facilitate NAACP efforts to amass a

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22 Jack Greenberg (Director-Counsel NAACP Legal Defense and Educational Fund) to Franklin D. Roosevelt, Jr., 22 March 1966, NARA, RG 403, Office of the Chairman, Records of Chairman Stephen Shulman, 1966-1968, Box 2, Correspondence: Civil Rights Leaders.

clientele of Title VII litigants, the EEOC sent charge forms to the organizations with instruction sheets on how they were to be filled out (Lieberman 2007), prompting Commissioners to express concerns that their efforts could "embarrass the Commission by appearing to stimulate charges." But, recognizing that its participation and assistance was crucial to the success of private suits, the EEOC continued to offer direct litigation support. The EEOC, first, fought for the right to file amicus briefs to support private litigants – a legal action which the Department of Justice originally considered to be its exclusive authority (Belton 1978: 922). Though the EEOC could not represent cases in court, this was one way the EEOC could prove an influential player within the legal system, filing amicus briefs on critical and difficult legal issues (Lieberman 2007). By 1970, the EEOC had filed 70 amicus briefs on behalf of private litigants, developing and utilizing a tool with which it could support private litigation. The EEOC, additionally, supplied civil rights attorneys with technical information that might aid their litigation efforts. The EEOC decided to provide statistical reports and investigation information from the charge

24 Memorandum, Richard Graham (Commissioner) to Commissioners and Executive Director, 17 March 1966, NARA, RG 403, Office of the Chairman, Records of Chairman Franklin Roosevelt, 1965-1966, Box 2, Graham, Richard Commissioner; Memorandum, Kenneth F. Holbert (Acting Director of Compliance) to Steven Shulman via Roger Lewis (Executive Assistant), Re: Status Report on Backlog, NARA, RG 403, Office of the Chairman, Records of Chairman Stephen Shulman, 1966-1968, Box 8, Office of Compliance; Franklin D. Roosevelt, Jr. to Charles Evers (Field Director, NAACP), 24 September 1965, NARA, RG 403, Compliance Division Files, Box 2, Compliance: Cases Pending.

25 Memorandum, Commissioner Graham to Commissioners, 12 May 1966, Re: Cover Letter for Charge Forms, NARA, RG 403, Office of the Chairman, Records of Chairman Franklin Roosevelt, 1965-1966, Box 2, Graham, Richard Commissioner.
process to the NAACP, and indicated that it remained "in constant touch" with attorneys at the NAACP's Legal Defense Fund concerning lawsuits going to court.

But in addition to providing support for ongoing litigation, the EEOC directed efforts at training and developing a new cadre of employment lawyers that could take on the cases that were not settled through the administrative process (Peck 1976: 860; Belton 1978: 951). In order to forcefully pursue this strategy of private litigation enforcement, it was necessary for the Commission to develop and motivate a band of private attorneys outside of civil rights organizations (which could not represent the entire growing population of charges of unlawful employment discrimination) to pursue employment litigation. The EEOC provided funding for law school summer internships which trained law students to write reasonable cause decisions and which offered "a program of seminars and other instruction to give the interns a general introduction to the professional field of equal employment opportunity." The EEOC also targeted current members of the bar, instructing its own field attorneys to "develop and communicat[e] with panels of lawyers who are interested in becoming engaged in fair employment practice litigation under Title VII" with the hopes of "attracting new lawyers to

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26 Kenneth F. Holbert (Acting Director of Compliance to Executive Director, 13 January 1967, NARA, RG 403, Compliance Division, Compliance Correspondence, 1968, Box 1, Inter-Office Memos; George L. Holland (Director of Compliance) to General Counsel, 12 October 1965, Re: Providing Information to NAACP, NARA, RG 403, Compliance Division Files, Box 1, Compliance: Inter-Office Memos; Charles T. Duncan (General Counsel) to Mr. Edelsberg (Executive Director), 9 November 1965, Re: Access to Investigators' Reports, NARA, RG 403, Office of the Chairman, Records of Chairman Stephen Shulman, 1966-1968, Box 2, General Counsel: Inter-Office Memos.


this…expanding field" of law.\textsuperscript{29} Largely due to these efforts, and the development of a body of employment discrimination law favorable to plaintiffs, Robert Belton notes that "the unpopular status of employment discrimination cases [was reduced]…encourag[ing] attorneys who were not associated with law reform organizations to represent Title VII plaintiffs" (1978: 951). By training and recruiting new attorneys to practice employment law, the EEOC made considerable contributions to the development of a more effective and robust professional field ready to represent victims of discrimination.

Despite its lack of strong, formalized administrative powers, the EEOC took advantage of its institutional freedom and a favorable political climate in the courts to develop an alternate pathway for enforcement. Early decisions by the EEOC to make its charge process amenable to the possibility of private litigation, issue broad interpretations of Title VII law, and provide direct support to early Title VII litigation strengthened the potential for effective private litigation tackling employment discrimination. These actions would institutionalize this "private-public attack on discrimination" as a viable and effective strategy for enforcement of Title VII law.\textsuperscript{30} But, as even key actors at the EEOC recognized, though "the political processes…[gave] us a period of time in which to conduct this examination" of the implementation of Title VII law, this moment would, quite easily, prove fleeting.\textsuperscript{31} This legal pathway for Title VII enforcement, now institutionalized, would still meet future roadblocks linked to changing political tides.

\textsuperscript{29} Stephen Shulman to Edward W. Hummers, Jr. (Chairman, Washington Liaison Committee, American Bar Association), 1 December 1970, NARA, RG 403, Office of the Chairman, Chronological Files, 1969-1979, Box 1, Chron December 1970.


B. The 'Proper Place' for Title VII Enforcement: Strengthening EEOC Enforcement Powers in the Courts and Bolstering Private Litigation

While the EEOC used its formative years to forge an alternate pathway for enforcement through the private right of action in the courts, civil rights activists continued the struggle to legislatively strengthen the administrative powers of the EEOC. Despite its efforts to develop a "private-public attack on discrimination," the Commission was still concerned that "the remedy of the private suit…is extremely time-consuming,"\(^{32}\) especially in light of the fact that the EEOC's own administrative enforcement efforts were an embarrassing failure. In 1967, the EEOC employed only five conciliators who were responsible for getting through a conciliation caseload of 1,823 cases (Graham 1990: 235; EEOC Second Annual Report 1967). With such limited manpower to meet the soaring demand of new charges filed with the EEOC each year, the EEOC's conciliation effort faltered. While the EEOC received 15,058 new charges in 1968, it successfully conciliated only 513 cases; a 3.4 percent success rate that was further reduced in 1969 when the EEOC successfully conciliated only 2.2 percent of its caseload (achieving successful conciliation in 376 out of 17,272 of its cases) (EEOC Third Annual Report 1968; EEOC Fourth Annual Report 1969). Meanwhile, it took the EEOC an average of 18 months to process claims, a rate that was growing longer each year (Graham 1990: 422; Lieberman 2002: 146). Combine these figures with the fact that the Attorney General filed only 22 pattern-and-practice lawsuits in 1968, and this created a dismal picture for the administrative enforcement of Title VII.

\(^{32}\) Roger Lewis (Executive Assistant to the Chairman) to Stephen J. Pollack (Civil Rights Division, Department of Justice), 19 October 1966, NARA, RG 403, Office of the Chairman, Records of Chairman Franklin Roosevelt, 1965-1966, Box 2, Legislation.
Civil rights advocates used the EEOC's staggering inability to meet its enforcement responsibilities as further evidence that it was time to finish the business they started in 1964 and secure real enforcement powers for the EEOC. For civil rights advocates, the push for cease-and-desist powers had "become a test of seriousness" in the commitment to implement a policy of equal employment (Graham 1990: 420; Belz 1991: 73). Joining calls for reform from the civil rights community, the EEOC argued that "it has always been recognized that the Commission's present enforcement authority – devised as a compromise to obtain sufficient support for the cloture vote on the Civil Rights Act – is inadequate" and saw the struggle to procure cease-and-desist powers for the Commission as "fundamental to...achieving the credibility and stature that are essential to its marking progress in this important area of national policy." As civil rights advocates and the EEOC convened around this effort, several bills were proposed in Congress that contained cease-and-desist provisions for the EEOC. In 1966, a cease-and-desist bill passed in the House but was met by a filibuster in the Senate. And after the Johnson administration proposed a cease-and-desist bill in 1968 that Congress did not act on, a third cease-and-desist bill passed the Senate in 1970, but died before the House could act (Greene 1989: 46; Belz 1991: 72; Lieberman 2002: 145).

In response to the cease-and-desist bills, the Nixon administration developed a position on EEOC enforcement that was rooted in court enforcement. With an eye towards courting

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support among black voters and civil rights advocates, but without alienating the party's more conservative base, nor writing-off Republican strategies to attract support among white southern voters, the Nixon administration gingerly proposed opposition bills that would grant the EEOC the authority to bring Title VII lawsuits in court in lieu of cease-and-desist powers (Belz 1991: 70; Lieberman 2002: 145). The Administration defended itself against media attacks that it was


37 The Nixon administration debated the merits of the two proposals at length (Memorandum, Leonard Garment to John Ehrlichman, 18 January 1971, Re: EEOC: Cease and Desist Authority, NPM, WHCF: SMOF: Bradley H. Patterson, Jr., Box 29, WHCF: SMOF: Subject Files, EEOC [2 of 5]; List of Cease and Desist Pros and Cons, n.d., NPM, WHCF: SMOF: Bradley H. Patterson, Jr., Box 29, WHCF: SMOF: Subject Files, EEOC [2 of 5]). While some advisors within and outside the Administration supported granting the EEOC cease-and-desist powers early in the legislative process (Memorandum, Jerris Leonard (Assistant Attorney General, Civil Rights Division) to Deputy Attorney General, 22 February 1969, Re: Legislation to Give EEOC Cease-and-Desist Authority; NPM, WHSF: SMOF: John W. Dean III, Box 33, WHSF, Subject File, John W. Dean III, EEOC; Memorandum. Steve Hess to John Ehrlichman, 2 May 1969, Re: Equal Employment Opportunity Act, NPM, WHCF: SMOF: Bradley H. Patterson, Jr., Box 29, WHCF: SMOF: Subject Files, EEOC [3 of 5]), the tone within the Administration changed and it eventually submitted a court enforcement bill to Congress (Memorandum, Arthur F. Burns to the President, 8 August 1969; Re: Amendment to Title VII of the Civil Rights Act of 1964 (Equal Employment Opportunity), NPM, WHCF: Subject Files, HU (Human Rights), Box 17, WHCF: [EX] HU 2-2 Employment [8/8/69]; Testimony before Subcommittee, 14 October 1971, NPM, WHCF: Subject Files, HU (Human Rights), Box 17, WHCF: [EX] HU 2-2 Employment [1/1/71-2/28/72]; Memorandum. Richard T. Burruss to John D. Ehrlichman, et al., 31 July 1969, Re: Amendment to Title VII of the Civil Rights Act of 1964 (Equal Employment Opportunity), NPM, WHSF: SMOF: John W. Dean III, Box 33, WHSF, Subject File, John W. Dean III, EEOC; William H. Brown III to Leonard Garment, 24 September 1970, NPM, WHCF: SMOF: Bradley H. Patterson, Jr., Box 28, WHCF: SMOF: Subject Files, EEOC [1 of 5]). When the court enforcement proposal began to fail in the Senate and it looked like a cease-and-desist provision would prevail, the Nixon administration was cautious about publicly denouncing the cease-and-desist legislation (Memorandum, Leonard Garment to John Ehrlichman, 16 January 1971, Re: Legislative Resubmittals: EEOC, NPM, WHCF: SMOF: Bradley H. Patterson, Jr., Box 28, WHCF: SMOF: Subject Files, EEOC [1 of 5]; William H. Brown III to Leonard Garment, 24 September 1970, NPM, WHCF: SMOF: Bradley H. Patterson, Jr., Box 28, WHCF: SMOF: Subject Files, EEOC [1 of 5]; William H. Brown III to Leonard Garment, 5 February 1971, NPM, WHCF: SMOF: Bradley H. Patterson, Jr., Box 29, WHCF: SMOF: Subject Files, EEOC [2 of 5]; Memorandum, William H. Brown III to Leonard Garment, 5 November 1970, NPM, WHCF: SMOF: Bradley H. Patterson, Jr., Box 29, WHCF: SMOF: Subject Files, EEOC [3 of 5]), but internally, remained opposed to the
"opposed to EEOC enforcement legislation," claiming that its preference was based on "what we regarded as the stronger measure."\textsuperscript{38} Citing a "historical hangover that gives the cease and desist approach its aura of effectiveness," EEOC Chairman William Brown III toed the Administration line and characterized "granting quasi-judicial powers to administrative agencies" as a bygone product of the New Deal Era, "when the courts were generally hostile to the social problems of the time."\textsuperscript{39} Invoking a philosophy on policy enforcement espoused by conservatives at the time,

\textsuperscript{38} William H. Brown III to Leonard Garment, 13 November 1970, NARA, RG 403, Office of the Chairman, Chronological Files, 1969-1979, Box 1, Chron November 1970. By the time both bills reached the Senate, however, Brown agreed that the cease-and-desist bill (S. 2453) was "clearly stronger" than the court enforcement bill (S. 2806) (William H. Brown III to Leonard Garment, 5 February 1971, NPM, WHCF: SMOF: Bradley H. Patterson, Jr., Box 29, WHCF: SMOF: Subject Files, EEOC [2 of 5]).

Brown insisted that "the Administration continues to believe that the procedural safeguards of the court enforcement approach are desirable means of preserving the proper relationship between the federal government and the private sector and between the federal government and state and local governments."  

Along these lines, Chairman Brown strenuously supported the retention of the private right to sue in the courts. Stressing that "the importance of individual efforts in the area of civil rights is the very essence of the progress which has been made in this vital area," Brown insisted that "while it is undesirable to provide the costly and time-consuming individual law-suit as the only means available for redressing these rights, it is equally undesirable to pre-empt this right by the interposition of an exclusive administrative remedy." Invoking rhetoric that expressed a disdain for and distrust of the federal bureaucracy, Brown continued that "particularly in light of the...inevitability of administrative delays...and the frequent insensitivity of administrative agencies to individual problems, I feel that the protection offered by an alternative to mandatory administrative remedies should be retained." What began as a creative effort on the part of the EEOC and civil rights advocates to promote and enhance the prospects of litigation as an alternate means of Title VII enforcement, was now – particularly when juxtaposed with the option of granting the EEOC strong cease-and-desist powers – sanctioned by 1970s conservative right of action point to his efforts to continue to enforce Title VII law under conditions of constrained administrative powers, and in ways that were in accordance with the Administration's conservative doctrine.

40 William H. Brown III to George P. Shultz (Director, Office of Management and Budget, Executive Office of the President), 6 May 1971, NARA, RG 403, Office of the Chairman, Chronological Files, 1969-1979, Box 1, Chron May 1971.


philosophy on the proper role of the federal government in individuals' private lives. That the
courtroom, not the bureaucracy, was the place for Title VII regulation had already become a
firmly entrenched strategy of civil rights enforcement in the absence of administrative remedies,
but it was also now, in the face of proposals to enhance the EEOC's administrative powers, in
harmony with "Republicans' vintage judicial strategy of maximizing the role of adversary
proceedings in court so as to minimize the judgmental discretion of New Deal regulatory
agencies" (Graham 1990: 426-7).

Yet, it would soon become quite clear that even with this new enforcement power in the
courts, the EEOC would still remain a "poor, enfeebled thing" (Sovern 1966: 205). The 1972 Act
established a General Counsel's office that was organizationally separated from the EEOC's
charge process, and that was charged with the responsibility of bringing lawsuits on charges that
were not successfully conciliated in the charge process. But within the first year of being granted
the authority to bring lawsuits in court, the EEOC filed a mere 116 suits out of the almost 49,000
charges received by the agency that year (Eighth Annual Report 1973), a paltry litigation rate
that would continue to characterize EEOC direct litigation efforts to the present day (see Figure
3.1). Consulting members of the Senate on how the EEOC might envision a more powerful role
for itself as a litigator, Chairman Brown noted that "the General Counsel of this agency believe
that the authority of this office has somehow been lessened – not enhanced – by the 1972
amendments."

In this weakened condition, the EEOC continued its strategy of encouraging private
litigation, assuring the private bar that their "role is complementary to that of the EEOC."

Speaking to an audience of the private bar, Chairman Brown warned that "even if Congress gives

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43 John H. Powell, Jr. to Senator Javits, 20 February 1975, NARA, RG 403, Office of the Chairman, Chronological
Files, 1969-1979, Box 2, Chron Feb 1975.
us everything we have asked for," the Commission would not be able to "file suit in all of [the] cases" received by the agency each year. Since this "leaves many thousands of individuals who have a valid cause of action and who cannot reach a satisfactory settlement," Chairman Brown insisted that "this is…where you[, the private bar,] come in." Calling upon attorneys to "serve as the guarantor for equal employment opportunity for all Americans," the EEOC made it a "high priority" to keep close communication with the private bar, attending private bar conferences and establishing a liaison with the American Bar Association in the effort to mobilize a forceful employment bar.46

Even though it now had its own litigation docket to deal with, the EEOC continued to offer direct support to private suits. Using its new enforcement power in the courts, the EEOC worked with private organizations to select particularly important "frontier" cases to litigate in order to establish legal precedent that would be helpful to future cases brought by the private bar.47 And even though it could now file its own lawsuits, the EEOC filed amicus briefs in


46 Lowell W. Perry (Chairman) to Peter M. Anderson (Co-Chairman, Special Subcommittee, Bogle and Yates, The Bank of California Center, 2 January 1976, NARA, RG 403, Chairman's Chronological File 1976-1999, Box 1, Chron Jan 1976; John H. Powell to John A. Morsell (Assistant Executive Director, NAACP), 26 July 1974, NARA, RG 403, Office of the Chairman, Chronological Files, 1969-1979, Box 2, Chron Jul 1974; Peter M. Anderson to Lowell W. Perry, 19 September 1975, NARA, RG 403, Chairman's Chronological File 1976-1999, Box 1, Chron Jan 1976, Memorandum, John H. Powell, Jr. to William A. Carey (General Counsel), Eduardo Pena (Director, Office of Compliance), and Horace Bussell (Director, Office of Voluntary Programs, 10 September 1974, Re: Liaison with the American Bar Association, NARA, RG 403, Office of the Chairman, Chronological Files, 1969-1979, Box 2, Chron Sept 1974.

47 Eleanor Holmes Norton (Chairman) to Eliza M. Carney (Council Chair, National Advisory Council on Woman's Educational Programs, 20 May 1980, NARA, RG 403, Chairman's Chronological File 1976-1999, Box 2, Chron May 1980; Eliza M. Carney to Eleanor Holmes Norton, 28 April 1980, NARA, RG 403, Chairman's Chronological File 1976-1999, Box 2, Chron May 1980.
support of private lawsuits at its greatest rate yet (see Figure 3.5). While these briefs were
typically used to establish agency opinion on a matter of law, they also often addressed topics of
legal representation for private suits. In an amicus brief on a case before the 5th Circuit (Caston v.
Sears Roebuck & Co., 556 F2d 1305 (5th Cir. 1977)), the EEOC argued that a Commission
decision of no reasonable cause was not grounds for the denial of an appointment of counsel for
the charging party. Emphasizing in a letter pertaining to the brief that "it is difficult for private
plaintiffs generally to secure appointment of counsel in employment discrimination cases in
some district courts of that Circuit," the EEOC urged the Fifth Circuit to "articulate standards for
the appointment of counsel" in order to ensure that plaintiffs would be able to find legal
representation.48 In addition, the development of a referral system that would link qualified
attorneys with charging parties who were interested in litigation became a major internal effort at
the EEOC, as it sought to help plaintiffs secure legal representation.49

Through much of the 1970s, the EEOC also developed new programs that provided
attorney training, and in a bold move, funding for private bar projects. The EEOC continued to
fund training programs for attorneys in employment law "designed to keep them abreast of the
most current developments in the law"50 – which had the dual benefit of helping to develop a

48 Lowell W. Perry, Chairman to Senator Trent Lott, 3 March 1976, Re: Caston v. Sears, Roebuck & Co., NARA,
RG 403, Chairman's Chronological File 1976-1999, Box 1, Chron March 1976.

49 Address by John H. Powell, Jr. before the Labor Relations Law Section, American Bar Association, 9 May 1974,
NARA, RG 403, Office of the Chairman, Chronological Files, 1969-1979, Box 5, AAB, Labor Relations Law

50 Jack Greenberg (Director-Counsel, NAACP), 12 July 1977, NARA, RG 403, Chairman's Chronological File
1976-1999, Box 1, Chron Aug 1977; 8th Annual Report 1973; Eleanor Holmes Norton to Jack Greenberg (Director-
Counsel, NAACP), 11 August 1977, NARA, RG 403, Chairman's Chronological File 1976-1999, Box 1, Chron Aug
1977; John H. Powell, Jr. to Commissioners Lewis, Walsh, and Telles, and General Counsel Carey, 14 February
1975, NARA, RG 403, Office of the Chairman, Chronological Files, 1969-1979, Box 2, Chron Feb 1975; Lowell W.
Perry to Augustus F. Hawkins (Chairman, Subcommittee on Equal Opportunities, Committee on Education and
Labor, House of Representatives), 27 August 1975, NARA, RG 403, Office of the Chairman, Chronological Files,
1969-1979, Box 2, Chron Aug 1975; Lowell W. Perry to Richard Fulton (House of Representatives), 7 August 1975,
NARA, RG 403, Office of the Chairman, Chronological Files, 1969-1979, Box 2, Chron Aug 1975; Lowell W.
roster of trained attorneys for the EEOC's referral system – but it also established a Private Bar Loan Fund that provided funds to lawyers and legal organizations to take on Title VII cases, with the hopes that such funds might provide "a means of litigating a substantial number of backlog cases."\textsuperscript{51} Citing the Commission's "commitment to supporting programs that were designated to improve the access of the aggrieved to the courts," Chairwoman Eleanor Holmes Norton envisioned a "revolving fund for lawyers willing to take cases" as the "most realistic existing vehicle for getting at pattern and practice discrimination in state and local government."\textsuperscript{52} The EEOC even extended this effort to encourage Title VII litigation by issuing interim regulations that allowed the EEOC to award attorney's fees to complainants – creating an incentive for charging parties to retain counsel during the administrative charge process, and readying their charge for possible litigation.

But perhaps the greatest deterrent to private litigation that the EEOC felt compelled to address was that created by the EEOC's own backlog of pending charges in its investigation and conciliation processes. As the EEOC's backlog continued to grow with each year, by 1977, it had over 99,000 charges in its pending inventory, nearly twice the amount of new charges the Commission received annually (see Figures 3.3 and 3.4). Noting that "Commission procedures have consistently exceeded the time limits prescribed" by Title VII, the EEOC found that its


backlog "contributed to the slow progress of litigation." The delay caused by backlogs of complaints weakened lawsuits (and hindered EEOC cause findings), making it more difficult to retrieve evidence and old records, find credible testimony, and locate witnesses during the litigation phase. Worried that it might lose its working relationship with civil rights organizations and attorneys, the EEOC cautioned that the "strength and vitality of...[its programs] may well be diluted if a lack of confidence in the Commission's ability to perform its statutory compliance function develops."55

In order to combat the adverse effects that the Commission's backlog was having on Title VII enforcement efforts, Chairwoman Eleanor Holmes Norton instituted a Rapid Charge Processing System in 1978. The new system placed emphasis on "timely processing and early settlement," condensing many of the stages of intake and investigation that existed under the previous system, and establishing 'check-points' for rerouting certain charges based on interest (EEOC Twelfth and Thirteenth Annual Report 1977-1978: 16-7). Under the Rapid Charge Processing System, for instance, potential litigation for the agency was identified and flagged early in the investigation process, and systemic cases were rerouted to a new Systemic Charge Processing System.

Reducing the processing time for new charges down to three to six months from an average of two years, the EEOC celebrated the success of the new system, but one change, in

53 Memorandum, Roger F. Lewis (Executive Assistant to the Chairman) to Stephen Pollack (Civil Rights Division, Department of Justice), 21 October 1966, NARA, RG 403, Office of the Chairman, Records of Chairman Franklin Roosevelt, 1965-1966, Box 2, Legislation.


55 Kenneth F. Holbert (Acting Director of Compliance) to Chairman Shulman via Roger Lewis (Executive Assistant), Re: Status Report on Backlog, NARA, RG 403, Office of the Chairman, Records of Chairman Stephen Shulman, 1966-1968, Box 8, Office of Compliance.
particular, was lamented by the private bar.\textsuperscript{56} In the effort to streamline its charge processing and quickly identify potential cases for litigation, the EEOC changed its standards for issuing reasonable cause decisions, doing so only for charges "worthy of litigation" (Lehr 1983: 252; Belton 1978: 960).\textsuperscript{57} Holding charge determinations to a higher standard of evidentiary finding, the plaintiffs' bar worried what this might do to the viability of their own cases. After the implementation of this new policy, the percentage of charges issued reasonable cause decisions by the Commission dropped dramatically (see Figure 3.6). But given the agency's growing backlog, meager budget, and inadequate staffing, and in the face of an effort to effectively carry out the new enforcement activities granted by Congress, the leadership at the Commission saw little other option under these constrained conditions. Caught between the dual roles of supporting and facilitating private litigation efforts, but also making changes that would reduce burdens on the agency and simplify the process of identifying potential litigation for the EEOC to bring to court, the EEOC "recognize[d] the urgent need for reform of the Commission's...processes, even if they occasionally benefited private attorneys in the past."\textsuperscript{58}

But as the Commission was making its own tough decisions, shifts in the political climate outside of the EEOC threatened the viability of private litigation enforcement efforts. Much to the chagrin of the EEOC and the private bar, by the late 1970s, the courts began retreating from their previous position of deference to EEOC interpretations and guidelines (Pedriana and Stryker 2004: 740-2). New court decisions jeopardized litigation incentives like attorney fee

\textsuperscript{56} Eleanor Holmes Norton to Mark T. McDonald (President, National Bar Association), 15 May 1978, NARA, RG 403, Chairman's Chronological File 1976-1999, Box 1, Chron May 1978.


\textsuperscript{58} Eleanor Holmes Norton to Mark T. McDonald (President, National Bar Association), 15 May 1978, NARA, RG 403, Chairman's Chronological File 1976-1999, Box 1, Chron May 1978.
awards,\textsuperscript{59} weakened disparate-impact doctrine (Culp 1985; Freeman 1990),\textsuperscript{60} and reduced EEOC interpretative authority\textsuperscript{61} (Pedriana and Stryker 2004). At the same time, stricter, and more critical, scrutiny by outside political actors of the "novel undertakings" of the EEOC's efforts to train attorneys and fund private litigation efforts led to their termination. By 1982, both the Private Bar Loan Fund Project and the Private Bar Program were closed down due to questions surrounding their legality and new budget concerns.\textsuperscript{62} Under these shifting political tides, some of the EEOC's most basic tools for encouraging and supporting private litigation came under jeopardy; and with them, so did the capacity of the agency to achieve Title VII enforcement.

\textbf{C. Contracting Private Power: Retreating from the Pathway of Private Litigation Enforcement under the Reagan Administration}

Though the EEOC forcefully pursued its public-private civil rights enforcement strategy under the Carter administration – reducing its backlog of charges, training and funding private litigation efforts, and working with charging parties to secure legal counsel – the 1980 presidential election whisked in a new administration and a shift in political conditions that


\textsuperscript{62} Eleanor Holmes Norton to Drew S. Days III (Assistant Attorney General, Civil Rights Division, Department of Justice), 15 August 1980, NARA, RG 403, Chairman's Chronological File 1976-1999, Box 2, Chron Aug 1980; Memorandum, Eleanor Holmes Norton to Vice Chair Daniel E. Leach and Commissioners Ethel Bent Walsh, Armando M. Rodriguez, and J. Clay Smith, 2 June 1980, Re: Loan Fund Phase-Out Required, NARA, RG 403, Chairman's Chronological File 1976-1999, Box 2, Chron Aug 1980; Memorandum, J. Clay Smith (Acting Chairman) to Daniel E. Leach (Vice Chairman), Armando Rodriguez (Commissioner), and Leroy D. Clark (General Counsel), 26 May 1981, NARA, RG 403, Chairman's Chronological File 1976-1999, Box 2, Chron Mar 1981.
posed the greatest threat yet to civil rights enforcement at the EEOC. In the months leading up to Ronald Reagan's appointment of Chairman Clarence Thomas, warnings streamed in from the Carter-era EEOC Commissioners. In a year-end report to the civil rights and business community in 1981, acting Chairman J. Clay Smith, Jr. cautioned that "the Equal Employment Opportunity Commission is alive and well at this time, but I kid you not when I say that we are in a desperate fight for survival…there is an underlying perception, fear and apprehension that things are not the same and there will not be continued vigorous enforcement of civil rights laws."\(^63\)

Challenging the Reagan-era EEOC, in a speech before affirmative action advocates, to develop "a policy which clarifies the role of affirmative action," including that of "goals, timetables and quotas," "as a critical process in equal employment opportunity," Carter-appointee Commissioner Armando Rodriguez cautioned that while the "principle of equal employment opportunity is firmly entrenched as a legal and judicial reality in our country[, it] is imperative that we all make sure that these legal and judicial principles are not chipped away by legislative and executive actions."\(^64\)

In a few short years, as the Reagan era appointees took their places at the EEOC, these initial warnings transformed into scathing critiques of the agency's civil rights enforcement efforts. Given an immediate and dramatic reduction in enforcement activity, NAACP Executive Director Benjamin Hooks accused the Reagan administration of trying to "eliminate" the

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\(^63\) Year-End (FY '81) Report on EEOC Activities, 8 October 1981, NARA, RG 403, Chron File, Box 3, Report to the Civil Rights and Business Community.

EEOC. Noting that 43 percent of new charges resulted in a settlement at the beginning of the Reagan administration, civil rights advocates grew worried that by the end of 1982, only one-third came to a settlement. One of Reagan's appointees for General Counsel, Michael Connolly, became so notorious for his announcement that he would no longer be pursuing but, indeed, discouraging age discrimination, sexual harassment, equal pay, and class action suits at the EEOC, that his resignation was tendered after only a little more than a year in office (Wood 1990: 509). Engaging in a "political housecleaning" that ushered in a new cadre of employer-sympathetic EEOC officers, critics charged the Reagan administration with "conducting an assault on enforcement programs…[that] combined with agency policy changes and budget cuts threaten[ed] to dismantle the entire federal enforcement apparatus." 

Behind this "assault" on the EEOC's enforcement programs was a new governing philosophy on the very nature of discrimination that had serious consequences for not only the administrative enforcement of Title VII, but also for the viability of private Title VII litigation. In a total reversal of the focus on 'generalized,' systemic discrimination that was carefully crafted during the agency's founding years, the Reagan-era EEOC appointees redefined discrimination in terms of the individual. Noting that "Title VII uses the term 'individual' no less that twenty-seven times," Chairman Thomas rejected the broad group-based interpretation of Title VII that the

65 Patrick D. Patterson (Assistant Counsel, NAACP Legal Defense Fund) to Augustus F. Hawkins (Chairman, Committee on Education and Labor) and Matthew G. Martinez (Chairman, Subcommittee on Employment Opportunities), 29 April 1988, NARA, RG 403, Chairman's Chronological Files, 1980-1990, Box 2, Correspondence June 1988.


67 Ibid.
EEOC had upheld and argued for in the courts nearly twenty years before, maintaining that "Title VII of the Civil Rights Act of 1964 asserts the national policy that the individual has a right to be free of discrimination in employment" (emphasis added).\footnote{Speech by Clarence Thomas (Chairman) at Oral Roberts University, 14 April 1983, NARA, RG 403, Speeches, 1969-1988, Box 1, Ch. Clarence Thomas Speeches Vol.1(06/82-11/82).} Making clear that he "abhor[red] any effort to twist, bend or distort [the law] for any reasons," Thomas warned that "no one should be permitted to turn these laws on their heads just because they have good intentions."\footnote{Speech by Clarence Thomas before the Equal Employment Educational Programs Third Annual Litigation Programs Conference, 13 January 1983, NARA, RG 403, Speeches, 1969-1988, Box 1, Ch. Clarence Thomas Speeches Vol.1 (06/82-11/82).} Thomas assured the public that under this narrow interpretation of what constitutes unlawful employment practices according to Title VII, the EEOC would no longer concern itself with securing "remedies that seek to place groups in their rightful place."\footnote{Speech by Clarence Thomas (Chairman) at Oral Roberts University, 14 April 1983, NARA, RG 403, Speeches, 1969-1988, Box 1, Ch. Clarence Thomas Speeches Vol.1(06/82-11/82).} but would focus on providing relief for individual victims of discrimination (Greene: 54; Belz: 188-91).

The embrace of this individual-based interpretation of discrimination by the leadership at the EEOC had some practical implications for the enforcement of Title VII law, both administratively, and through the private right of action. First, the focus on securing relief for individual victims of discrimination implied the abandonment of the EEOC's carefully crafted affirmative action strategy for securing equal results (as opposed to equal opportunity) for groups of workers. In a move that was "inconsistent with the Commission's own Affirmative Action Guidelines,"\footnote{29 C.F.R. Sec. 1608.4(c)(1)(1985); Clarence Thomas to Representative Augustus F. Hawkins, 31 January 1986, NARA, RG 403, Chron File, Box 1; Representative Augustus F. Hawkins, et al. to Clarence Thomas, 6 December 1985, NARA, RG 403, Chron File, Box 1.} the EEOC publicly announced in 1985 that it would no longer use goals and timetables to remedy the effects of past discrimination (Belz: 189). Reports that the Acting
General Counsel, Johnny Butler, told regional attorneys not to use goals and timetables as a remedial device alarmed members of the Democratic majority in Congress, prompting them to send a letter of concern to Chairman Thomas warning that "the Commission [was] forfeiting the most effective tool to combat centuries of discrimination against women and minorities."\(^72\)

Rejecting the use of statistics for securing remedies for discriminatory effects, the EEOC reviewed and drafted new guidelines that reversed agency opinion on foundational issues like employer testing.\(^73\)

Second, in order to administratively implement an enforcement strategy based on this individualized conception of discrimination, the EEOC developed a new "full processing" system for its charges. Under this new system, the EEOC would not prioritize charges according to their potential for litigation by the agency, but would seek "full and effective relief" for all victims of discrimination and consider "all unlawful discrimination to be 'litigation-worthy.'"\(^74\)

Disagreeing with complaints from civil right advocates that "pattern or practices cases or other class actions 'constitute the single most important deterrent to the continuance of discriminatory employment practices,'" the EEOC eliminated the separate systemic processing system established in 1978, vowing to now focus on "vindicating the rights of any person who suffers unlawful employment discrimination."\(^75\)

\(^{72}\) Ibid.


\(^{74}\) Ibid.

This new system of thoroughly investigating and pursuing relief for each individual claim, however, required the attention of an enormous amount of resources that the EEOC did not have at its disposal, essentially stalling charges in the EEOC's processing system. Chairman Thomas noted the effect this new system might have on the productivity of the EEOC's charge processing, instructing field offices that "every case brought to the EEOC, no matter how small, should be fully investigated and litigated, if necessary, even at the cost of boosting the backlog" (GAO Report 1987: 10). Undoing the massive reduction of backlog that was achieved by the Rapid Charge Processing System — which reduced the pending inventory at the EEOC from a high of 99,000 charges in 1977 to 20,000 charges in 1981 — the EEOC more than tripled its backlog of pending charges by 1987, ending the fiscal year with over 61,000 pending charges. This delay frustrated private litigation efforts, as the statute of limitations for filing lawsuits matured and expired on a staggering number of charges trapped within the EEOC's charge processing system, with no notice to claimants.76 This left a number of claimants with no means for achieving relief, either through the EEOC's administrative process, or in the courts, and resulted in a massive congressional investigation into how these "charging party private suit rights were lost."77 Overburdened by (practically) conflicting instructions to "thoroughly"

76 Clarence Thomas to Senator John Melcher (Chairman, Special Committee on Aging), 25 January 1988, NARA, RG 403, Chron File, Box 2; Memorandum, Clarence Thomas to All District, Area and Local Directors, 21 December 1987, Re: ADEA Statute of Limitations, NARA, RG 403, Chron File, Box 2; John Melcher to Clarence Thomas, 27 January 1988, NARA, RG 403, Chron File, Box 2; Clarence Thomas to John Melcher, 1 February 1988, NARA, RG 403, Chron File, Box 2; Memorandum, Jacquelyn J. Shelton (Director, Field Management Programs – West) to Lynn Bruner (Director, St. Louis District Office), 9 May 1988, Re: ADEA Case Processing, NARA, RG 403, Chron File, Box 3; Memorandum, Jacquelyn J. Shelton to Richard Schramm (Investigator, San Jose Area Office), 13 May 1988, Re: Timely Processing of ADEA Claims, NARA, RG 403, Chron File, Box 3; Memorandum, James H. Troy (Director, Office of Program Operations) to District Directors, 9 February 1988, Re: District Directors Memo #3-88, NARA, RG 403, Chron File, Box 3.

77 During its foundational period, the EEOC frequently cited the importance of the private right to sue to the effectiveness of the conciliation process (Essay by Alfred Blumrosen, "The Individual Right to Eliminate Employment Discrimination by Litigation," NARA, RG 403, Office of the Chairman, Records of Chairman Stephen Shulman, 1966-1968, Box 8, Office of Compliance). The private right to sue, looming as a potential threat to employers, gives the agency leverage with which to compel an agreement from employers during the conciliation
process charges in a "timely" manner, reports also began to surface that field offices were issuing no reasonable cause decisions to cases without completing investigations in order to meet year-end production goals (GAO Report 1987, 1988).

These practices effectively disabled the prospects of private litigation enforcement. With the delay that was caused by the EEOC's new full charge processing system, many potential cases of private litigation were rendered 'dead in the water' with lapsed statutes of limitations, missed opportunities to collect fresh evidence and testimony from witnesses, and unfavorable cause determinations that marked the charging parties as the "least attractive group of clients" to the private bar (Selmi 1996: 44). Defending the new charge processing system against critics, Chairman Thomas reasoned that while under past administrations, "the Commission placed the burden and the costs of law enforcement…on the private citizen's shoulders," the EEOC was now "determined to return these costs and burdens to where they belong: the shoulder of the EEOC." Under its new enforcement policy of pursuing litigation for all charges receiving a reasonable cause determination, the EEOC did, indeed, ramp up EEOC litigation efforts, filing over 400 lawsuits in some years – the greatest annual number of suit filings until that point – but these efforts could not compare to the potential relief offered by the private bar, which filed close to 10,000 suits per year during the Reagan administration (see Figures 3.1 and 3.2). While the Commission leadership under the Carter administration acknowledged the limits of the EEOC's process. Once the statute of limitations for filing a lawsuit on a charge of unlawful employment discrimination has passed, however, the EEOC is deprived of one of its most important bargaining chips.

78 Memorandum, Clarence Thomas to District, Area and Local Office Directors, 12 January 1988, Re: Case Management Initiatives, NARA, RG 403, Chairman's Chronological Files, 1980-1990, Box 1, Correspondence January 1988.

79 Clarence Thomas to Bill Clinger (Chairman, The House Wednesday Group) and Olympia Snowe (Research Chair, The House Wednesday Group), 20 December 1985, NARA, RG 403, Chairman's Chronological Files, 1980-1990, Box 1, Correspondence December 1985.
litigation power and called upon private litigation to take on a major portion of the Title VII enforcement effort, Reagan appointees at the EEOC stressed efforts to keep Title VII enforcement efforts in-house. In the face of severe budget constraints and a historical lack of administrative power and resources to take on such a heavy burden, however, these efforts to internalize enforcement efforts and to promote administrative over private enforcement mechanisms were disingenuous at best. The EEOC under the Reagan administration was systematically undermining one its most important tools for the regulation of unlawful employment discrimination: private litigation.

In a departure from previous Commission commitments to offer support to private litigation efforts, the EEOC created roadblocks that served to undercut efforts to mount successful private suits. In response to what it considered to be the frivolous practice of "members of the private bar…look[ing] for litigation cases in open Title VII investigative files," the agency adopted a new disclosure policy that refused attorney access to investigation files until after the charging party submitted a request for the right to sue. While under previous policy, charging parties and their attorneys were allowed to review the investigation material of pending charges, this new policy limited access to investigation files to the mere 90 day period in which a charging party was required to file a lawsuit after requesting a right to sue. Civil rights advocates and the private bar condemned the new policy for reducing the amount of time in which charging parties and their attorneys might formulate their case. The EEOC also scaled

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80 Clarence Thomas to Representatives Augustus Hawkins and Matthew G. Martinez (Committee on Education and Labor), 7 June 1988, NARA, RG 403, Chairman's Chronological Files, 1980-1990, Box 2, Correspondence June 1988.

81 Clarence Thomas to Paul H. Tobias (Executive Director, Plaintiff Employment Lawyers Association), 2 August 1988, NARA, RG 403, Chairman's Chronological Files, 1980-1990, Box 2, Correspondence August 1988; Representatives Augustus Hawkins and Matthew G. Martinez to Clarence Thomas, 6 May 1988, NARA, RG 403, Chairman's Chronological Files, 1980-1990, Box 2, Correspondence May 1988; Patrick D. Patterson (Assistant Counsel, NAACP Legal Defense Fund) to Representatives Augustus Hawkins and Matthew G. Martinez, 29 April 1988.
back the use of one its most valuable tools for supporting private litigation, filing amicus briefs at its lowest rate since its first few years of organization, when it was still crafting its authority and strategy for the use of the briefs to advance Title VII enforcement (see Figure 4.5).

This lack of support for private litigation efforts remained consistent with the EEOC’s new policy of keeping the regulation of unlawful employment discrimination in-house, where it could be controlled and monitored, and away from the over-reaching hand of private litigants and the courts. Under the leadership of Chairman Thomas, the EEOC would make clear that any policymaking on employment discrimination would "have [its] place in the halls of Congress, not in the courts of law," and that the EEOC would resist "any effort to twist, bend or distort [the law] for any reasons, whether such distortions are said to help or hurt minorities or women." Soon, however, Congress would have its say – undoing years of assault on private employment litigation efforts and statutorily securing an enforcement role for private litigation that, under different political conditions, the EEOC would come to rely on and utilize to enforce employment discrimination law once again.


Under the Reagan administration, the viability of both administrative and legal civil rights enforcement efforts was considerably threatened. In a coordinated effort to deregulate civil rights enforcement, the Reagan administration's civil rights agenda would reach well beyond the

1988, Re: EEOC Compliance Manual §83 (Nondisclosure to Charging Parties and their Attorneys of Information in Open Title VII Case Files), NARA, RG 403, Chairman's Chronological Files, 1980-1990, Box 2, Correspondence April 1988.

82 Speech by Clarence Thomas before the Equal Employment Educational Programs Third Annual Litigation Programs Conference, 13 January 1983, NARA, RG 403, Speeches, 1969-1988, Box 1, Ch. Clarence Thomas Speeches Vol.1 (06/82-11/82).
EEOC, disassembling an expansive federal system of civil rights protection that had been erected twenty years prior. An essential component of this deregulation strategy, however, involved reshaping the courts through the appointment of conservative judges who were opposed to the judicial activism that supported the creation of many of these civil rights protections (Farhang 2010). With a keen eye towards "screen[ing] his nominees for ideological purity," Reagan's appointments would redefine civil rights policy, creating a hostile environment for civil rights enforcement through private litigation (Wines 1994: 646). In 1989 alone, the Supreme Court (led by a majority that consisted of Reagan's appointees) would issue a series of decisions that severely "constricted Title VII's private enforcement regime," limiting opportunities for attorney fee recovery, restricting statutes of limitations on seniority cases, expanding defenses available to respondents, denying damages for cases of discriminatory harassment, and constricting the range of evidence plaintiffs could use in discrimination claims (Farhang 2010: 180-1; Belton 1990; Freeman 1990; Gould 1990: 1151; see also Getman 1990).

Combined with the EEOC's own unsupportive stance toward private EEO litigation, the construction of an adverse legal terrain that made litigation success less certain and the award of attorney fees more difficult created a suboptimal market for the business of bringing employment discrimination suits. In the face of these unwelcoming conditions, retaining counsel and, in turn, bringing employment discrimination suits became more a difficult venture for charging parties (Farhang 2010). Rates of private employment discrimination litigation, which had begun to steadily increase through the early 1980s, suddenly plateaued at the height of this hostile bureaucratic and judicial environment (see Figure 4.2). Private employment discrimination

litigation, once heralded as an important tool in the civil rights enforcement effort, was effectively limited under these adverse political conditions.

This combined assault on both the EEOC’s administrative enforcement activities and on private litigation enforcement efforts, however, did not go unnoticed by civil rights advocates and a critical Democratic Congress. In an effort to override the adverse opinions that had been issued by the courts, civil rights advocates and congressional leaders drafted legislation that would more effectively secure the private right of action in the courts by protecting plaintiffs’ economic recoveries and enhancing the prospects for successful outcomes of employment discrimination suits (Gould 1991; Burke 2002: 33; Farhang 2010). Unlike previous legislative efforts to reform and enhance the protection of civil rights laws, however, this bill would not focus on securing cease-and-desist powers for the Commission. Burned by the years of reduced EEOC enforcement activity under the Reagan administration, civil rights advocates and members of Congress opted to protect the critical role played by private employment litigation rather than embolden the administrative capabilities of the EEOC. 88 Portraying the Reagan-era Commission not only as ineffective, but as an impediment to the process of civil rights enforcement, advocates of the bill considered private litigation incentives to be the most secure and effective means by which to redress complaints of unlawful employment discrimination (Farhang 2010). Passing the House and Senate with firm Democratic majorities, the Civil Rights Act of 1991 reversed the Reagan-court opinions, restoring the favorable evidentiary, statute of limitations, and standing conditions that existed for private Title VII litigation enforcement prior to the

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88 As Sean Farhang (2010) discusses, ironically, this latter alternative became the rallying cry of the Republican opposition. Arguing that the creation of incentives for private litigation would encourage charging parties to hold out for their day in court rather than agree to any settlement the EEOC’s administrative process might provide, Republican members of Congress proposed legislative alternatives that would have strengthened the agency’s settlement process or given the EEOC the power to administer binding arbitration.
decisions by the Reagan courts, and also created additional incentives in the form of punitive and compensatory damages and rights to trial by jury.\textsuperscript{89}

With the passage of the Civil Rights Act of 1991, plaintiff employment attorneys flooded the market, eager to bring this now statutorily protected and potentially lucrative litigation. Following the passage of the Act, employment discrimination litigation rates skyrocketed, nearly doubling by 1994 (see Figure 4.2). But this sudden increase of interest in employment litigation also had the consequence of very rapidly, and considerably, flooding the EEOC’s complaint process, right as a new administration was assuming control of the EEOC and its enforcement efforts (see Figure 4.4).\textsuperscript{90} With the inauguration of President Clinton in 1993, new Democratic-appointees assumed leadership positions at the EEOC just as it was on the brink of administrative collapse. Writing in 1996, Chairman Casellas linked the passage of the 1991 Civil Rights Act with an "explosion of the Commission’s caseload," which increased 30 percent between 1991 and 1996.\textsuperscript{91} Under this new overwhelming inundation of claims, the EEOC’s backlog reached 98,000 claims in 1996, the highest in nearly two decades.

By 1995, the Commission was met with a Republican Congress which – hostile as it was to the goals of the agency and especially to the ideological positions of its new appointees – failed to bring the EEOC’s budget (adjusted for inflation) above levels from the early 1980s despite its increased workload (see Figure 4.7). Rather, in an effort to exert some control over the administrative enforcement efforts of the Commission, the Republican Congress tied the

\textsuperscript{89} Pub. L. No. 102-166.

\textsuperscript{90} That more complaints were filed with the EEOC directly after the passage of the Civil Rights Act of 1991 provides support for claims that the EEOC’s reputation for insufficient enforcement efforts during the 1980s "caused potential claimants to reconsider whether they wanted to file [a charge with the EEOC] at all" (Wines 1994: 713).

\textsuperscript{91} Article, Gilbert F. Casellas (Chairman) in The American Management Association Magazine, "Get a Grip," October 1996, NARA, RG 403, Commission Records (Commissioner Paul Miller/Chair Gilbert Casellas), 1993-2005, Box 4, Articles (PSM).
Commission's budget to the elimination or curtailment of EEOC enforcement strategies. Speaker of the House, Newt Gingrich, for instance, declared that increases in the EEOC's budget would be contingent upon its elimination of a program that provided funds for the use of testers – pairs of individuals who are sent to apply for the same job in order to uncover whether the applicants' race, gender, disability, or national origin affected the hiring decisions of an employer – arguing that the EEOC "should focus more on helping individual victims." Likewise, the Republican Congress subjected the EEOC to a battery of inquiries in its House and Senate Budget reports regarding the use of Commission resources for the purposes of 'intervening' in private litigation cases. Interventions in private suits, a practice which the EEOC began well before it was granted the authority to bring its own lawsuits in 1972, provided the Commission with the means to become a party "in a small handful of…private lawsuits [through which] the EEOC has an important contribution to make on behalf of the larger public interest." Though the EEOC had only engaged in one or two interventions a year since the 1980s – down from annual rates in the 20's and 30's in the 1970s – Congress now dubbed these interventions "duplications of private litigation," condemning them as "questionable allocation[s] of precious, limited resources."


93 Gilbert Casellas to Representative Harris W. Fawell (Chairman, Subcommittee on Employer-Employee Relations), 28 April 1997, NARA, RG 403, Commission Records (Commissioner Paul Miller/Chair Gilbert Casellas), 1993-2005, Box 2, House Oversight - Mar. '98.

94 Senator Connie Mack to Gilbert F. Casellas, 24 August 1995, NARA, RG 403, Commission Records (Commissioner Paul Miller/Chair Gilbert Casellas), 1993-2005, Box 2, House Oversight - Mar. '98. See also: Memorandum, C. Gregory Stewart (General Counsel) to Paul Steven Miller (Commissioner), 31 December 1997,
Despite, and indeed, in response to, these constraints that the Republican Congress imposed on the Commission's budget and enforcement activities, however, the EEOC used its authority to define and shape several enforcement matters that would help shape the Commission's effectiveness, both administratively, and with regard to the growing private litigation enforcement efforts. Arguing that the EEOC's complaint processing system, for instance, "does not require legislative restructuring and can be accomplished by the agency's own action," civil rights advocates urged Congress to allow the EEOC the leverage to develop a sorely needed reorganization of its overburdened complaint processing system. Learning from the mistakes of the Reagan-era EEOC, and despite congressional insistences that the Commission continue its focus on conducting "full" investigations of all individual charges, the EEOC rescinded the "full charge" processing system, and in its place instituted the Priority Charge Handling Process that would prioritize and streamline charges at intake according their likelihood that discrimination occurred. The EEOC also established a National Enforcement Plan that, in identifying priority issues, would "place more emphasis on systemic, class-wide and

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95 Article, Darlene Superville, Associate Press, "Gingrich supports EEOC spending increase, but not search for new cases," 3 March 1998, NARA, RG 403, Commission Records (Commissioner Paul Miller/Chair Gilbert Casellas), 1993-2005, Box 2, House Oversight – Mar. '98.

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pattern and practice litigation." \(^{96}\) Lastly, the EEOC decided to test and implement a strategy to incorporate Alternative Dispute Resolution into its conciliation process. But, while the EEOC extolled the efficiencies and benefits that ADR would bring to its taxed charge processing system, \(^{97}\) the Commission remained firm in its protection of claimants' right to sue, condemning employer practices that made forced arbitration a condition of employment. \(^{98}\)

Commission changes to its reasonable cause determination process, however, offered the most direct incentives for private litigation efforts. Reversing the standards for finding reasonable cause that were in place since the late 1970s, the EEOC, first, decided that it would distinguish between findings of reasonable cause and determinations that the charge was litigation worthy. Cause determinations would now indicate "that it is more likely than not that the charging party...[was] discriminated against," and would "not require a determination that a charging party would likely prevail in litigation (as did the old standard), nor should it be construed as a formal preponderance of the evidence standard." \(^{99}\)

\(^{96}\) Memorandum, Paul Steven Miller (Commissioner) to Maria Borrero (Executive Director), 13 November 1995, Re: Update on the 1996 Budget and the Strategies for Closing the Agency's Deficit, NARA, RG 403, Commission Records (Commissioner Paul Miller/Chair Gilbert Casellas), 1993-2005, Box 4, 1996-97 Budget.


\(^{99}\) Memorandum from Gilbert F. Casellas to District, Area and Local Office Directors and Regional Attorneys, 10 April 1997, Re: Clarification of Standard for Finding Cause and Relation of Cause Findings to Litigation Decisions, NARA, RG 403, Commission Records (Commissioner Paul Miller/Chair Gilbert Casellas), 1993-2005, Box 4, Hill
annual reasonable cause determination rates gradually rose to their highest level since the mid-1970s, providing more charges with stamps of the Commission's 'approval' as they entered the courts. But in a drastic turn from past procedure, the EEOC also proposed eliminating the issuance of no cause determinations. Rather than issuing substantive no cause determinations with detailed statements of the factual findings and rationale for the decision, the letters to claimants would simply convey that the investigation failed to disclose a violation, and remind the claimant of their option to sue. Aware that "no cause findings create[s] a bias against the charging party" in court and in the effort to secure legal representation, leadership at the Commission was clear that it did not want its decisions to "prejudice charging parties who wish to continue their claims on their own with private attorneys or pro se."101

While the Commission, recognizing the enhanced potential for civil rights enforcement through private litigation, took steps to 'ready' Commission charges for their potential next step as private litigation, the EEOC also took a hands-on approach to supporting and crafting a role for itself in private litigation efforts. Under the leadership of the Clinton appointees, the number of annual amicus brief filings by the Commission increased rapidly and considerably, more than doubling by 1994. And the Commission continued its liaison program with the Employment Law Sections of the American Bar Association, offering itself as a source for support, information,
and guidance on bringing litigation under the civil rights statutes.\textsuperscript{102} But, as internal strategizing memos at the EEOC indicate, the Commission would also envision a role for itself in private litigation efforts that extended well beyond the confines of its administrative functions.

Fashioning a co-counsel arrangement between the EEOC and the private bar, Commissioner Paul Miller outlined a strategy for using the "vast untapped resources in the private bar" to conquer systemic and class action cases. Given that such "cases are expensive to litigate" for the private litigants, Miller suggested that the Commission "explore cooperative arrangements with members of the private bar who are interested in working on significant impact cases," and in exchange, the EEOC could "assist with resources" by "making available the federal government's network of experts and information."\textsuperscript{103} This vision of a cooperative partnership between the EEOC and the private bar extended to the earliest stages of systemic litigation, suggesting coordination between the EEOC and the private bar in targeting key impact cases for litigation in each region of the country.

Miller would also make suggestions that indicated Commission flexibility in determining the proper role of the EEOC in civil rights enforcement in this post Civil Rights Act of 1991-era.

Proposing that the Commission "devise a means to allow those complainants with private


counsel to pursue appropriate redress on their own," Miller discounted the regulatory significance of the EEOC's own charge processing system, suggesting that "we should get those cases out of the EEOC system as quickly and fairly as possible" by granting them an automatic notice to sue. After the passage of the Civil Rights Act of 1991, agency administrators devised a number of strategies for helping private litigation, whether by simply transferring charges from the administrative intake process to the courts as quickly and efficiently as possible, or assuming a more active role in private legal efforts by forging a cooperative arrangement with the increasingly empowered private bar to tackle unlawful employment discrimination together. In the aftermath of the Civil Rights Act of 1991, the Commission would experiment with these roles, laying out a bold strategy for protecting and better incorporating the enhanced powers of private litigation enforcement into the regular enforcement activities of the Commission.

III. Assessing the Effectiveness of the EEOC's Private Litigation Enforcement Strategies

As a final perspective on the utilization of private litigation enforcement by the EEOC, this section assesses the effectiveness of this regulatory strategy in motivating private equal employment opportunity litigation. That the EEOC considered private employment litigation to be an important component of its enforcement strategy is evident from the historical record. In lieu of strong, command-and-control administrative authority, the agency sought to fashion an alternate tool by which it could promote and enhance the possibilities for the enforcement of employment discrimination statutes. At different historical moments, the agency organized its administrative procedures to better facilitate the process of bringing EEO lawsuits, assumed an active role in shaping legal guidelines and precedent to enhance the viability of employment

104 Ibid.
discrimination legal claims, and devoted agency resources to developing and building a formidable private bar capable of successfully litigating EEO claims. But whether these actions by the Commission had the intended effect and motivated private employment discrimination litigation is of paramount importance to this analysis. In order to link the regulatory contribution of private enforcement litigation to broader claims about the capacity of the lean, liberal American state, it is necessary to determine that this agency regulatory strategy actually translated into an enhanced role for private enforcement actions.

Using an original set of annual aggregate data that measures the EEOC's efforts to mobilize private litigation, this section tests whether these efforts resulted in greater legal activity among private individuals. That the effectiveness of such informal mechanisms of enforcement at the EEOC has not yet been statistically explored is not surprising. How to operationalize and measure largely 'hidden' and informal enforcement actions that fall outside the realm of agency enforcement statistics on more formal administrative activities poses a difficult challenge for the researcher of public-private regulatory partnerships. But through the use of in-depth archival explorations of this agency behavior, we can begin to identify and capture the constellation of strategies used by the EEOC to motivate individuals to engage in private litigation. As Collier et al. (2004) advise, through a careful examination of archival sources we can gain insight into the historically and politically contingent causal processes – such as those governing public-private regulatory partnership formation – which can, in turn, inform what types of quantitative "data-set observations" should be collected for statistical analyses. Findings garnered from archival research, in other words, can help researchers of more informal government activities identify and devise measurements for largely unobserved agency actions that are not captured by formal enforcement statistics.
A. Measurement of the Variables

Using the findings uncovered by the historical analysis section of this case study, therefore, I devise an original measure of my main variable of interest, EEOC-motivated 'private litigation enforcement.' As revealed by the archival evidence discussed in the previous section, the EEOC employed a wide-range of tools, aimed at enhancing the viability of different facets of employment discrimination lawsuits. The EEOC sought to reduce the costs and enhance the probability of the success of EEO lawsuits through a three-pronged approach which utilized a variety of strategies to organize the agency's administrative processes, contribute to the development of employment law, and build and assist an active employment bar so as to empower plaintiffs' suits and motivate victims of employment discrimination to sue. Given the multi-faceted nature of this enforcement strategy, which cannot be observed and measured directly, I employ factor analysis to develop a single measure of EEOC private litigation enforcement ("PLE") from data on several different agency strategies. Factor analysis searches for joint variation among several observed variables and describes it in terms of a reduced number of (or a single) unobserved variable(s). In this case, I used factor analysis to reduce data on several observed variables – annual data on the percent of reasonable cause determinations issued by the EEOC, a dichotomous measure indicating the efficiency of the agency's charge processing system, a measure indicating whether agency guidelines defined discrimination in terms of individual or systemic violations, and the number of amicus briefs filed by the agency each year – into a single measure of EEOC private litigation enforcement. As we can see in Figure 4.8, this variable – which captures the EEOC's mixed strategy for securing private

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105 The measurements of the percent of reasonable cause determinations issued by the EEOC and the number of amicus briefs filed each year were normalized.

106 The factor analysis produced one factor with a Cronbach's alpha reliability score of 0.76.
litigation enforcement – varies over time, with greater values indicating a greater deployment of strategies to enhance private EEO legal actions.

The dependent variable for this analysis – the prevalence of private employment discrimination legal efforts – is measured in two ways: as the number of charges received by the agency each year and the annual number of EEO lawsuits filed in the US District Courts. There are practical, as well as theoretical, reasons for using charge receipt data in addition to data on litigation rates to capture this legal activity. The Administrative Office of the US Courts provides annual data on the number of lawsuits filed in the U.S. District Courts each year according to the "nature of the suit," but does not identify and segregate 'civil rights employment' suits until 1970 – missing the first four years of the EEOC's existence, a formative period in which the agency first developed and utilized many of the strategies for motivating private litigation that it continues to employ today. Likewise, a count of the annual number of charges filed with the EEOC may pick up important data that a count of the number of EEO lawsuits filed in the district courts will not. For instance, a victim of discrimination might file a charge with the EEOC with the intention of filing a lawsuit, seek private representation, but then privately settle the case before it is filed in court. As such, this person may have been motivated by the EEOC's incentive structures to engage in private employment discrimination litigation, but this would not be captured by an annual count of the number of EEO lawsuits filed each year. This analysis, therefore, considers two models to capture the range of private actions that might result from EEOC efforts to enhance the viability of private litigation: one that uses a count of the agency's annual charge receipts as its dependent variable (Model 1) and another that defines its dependent
I also include several control variables which, theoretically, have an influence on the propensity for individuals to engage in private EEO litigation. Given that external political institutions also shape the landscape for private litigation enforcement of employment discrimination claims, I include variables measuring the influence of congressional and judicial actions on private legal actions. While congressional input on private EEO litigation stayed largely consistent since its provisions in the 1964 Civil Rights Act, Farhang (2006) finds that the Civil Rights Act of 1991 had a positive effect on the rate of gender, religion, Title VII, and retaliation charges filed with the EEOC. In order to account for the effect of the 1991 CRA over the time period of this study, I include a dichotomous variable that assumes a value of 1 after the enactment of the Act.

Judicial opinions can likewise influence the landscape for private EEO legal actions, either opening or closing opportunities for citizen suits. Given that attitudinalist arguments within the courts literature suggest that the ideology of justices is strongly correlated with how they rule in decisions (Segal and Spaeth 1993; Epstein and Knight 1998), we might expect courts populated with more conservative justices to proffer more hostile opinions on employment discrimination suits, establishing judicial precedent that diminishes the likelihood of success for EEO lawsuits. As such, we might expect potential litigants to take the "tone" or ideological position of the judiciary into account when formulating their decision to sue. I control for this possibility by including a measure of the annual common space score (Poole and Rosenthal

\footnote{Using a measure of the annual charge receipts also facilitates comparison with Farhang's (2006) study, which uses charge receipt data in an analysis of the effect of the Civil Rights Act of 1991 on the rates of private legal actions. Trends in the annual rates of charge receipts largely follow those of private EEO litigation rates; the two variables are fairly considerably correlated at 0.68.}
1997; Poole 1998) of the US District Courts and US Court of Appeals, compiled by the author as the average common space score of the appointing President of each justice or judge sitting on the US Courts of Appeals or Federal District Courts that year.

Characteristics of the litigation process, itself, and national changes in the workforce might also affect the propensity for individuals to engage in private employment discrimination litigation (Farhang 2006). Research in the legal and law and society disciplines suggests that litigation activity in America comes in waves of "litigiousness" that are triggered by entrepreneurial lawyers, activist judges, and a culture of "sue-crazy" citizens (Glazer 1976; Manning 1977; Kagan 1996). In order to control for any effect that general fluctuations in the national litigation rates might have on private EEO legal actions, I include a variable which measures the number of civil suits filed in the US District Courts each year. Judicial delay within the court systems might also influence the individual decision to sue. If a case is likely to become mired in the court system before a resolution is reached, potential litigants might be less inclined in participate in a lawsuit. To control for this, I include an annual measure of the median time it takes for a federal civil suit to reach trial from the time of its filing date.\textsuperscript{108} And given that rates of employment discrimination litigation might also rise due to increases in the size of the workforce and unemployment rates, I include control variables for the annual average of the non-farm workforce (seasonally-adjusted, in the thousands), and an annual measure of the seasonally-adjusted unemployment rate.\textsuperscript{109}

\textsuperscript{108} Measurements of litigiousness and judicial delay were both provided by the Statistics Division of the Administrative Office of the US Courts.

\textsuperscript{109} Data on the workforce size and unemployment rates are provided by the US Department of Labor.
B. Empirical Results and Analysis

Since the dependent variables in this analysis contain times series data on the annual number of charges received by the agency each year and EEO lawsuits filed each year, an assumption of no autocorrelation in the error term would be inappropriate for estimating this model. In times series data, disturbances are serially correlated; in other words, the error term at one time, $\epsilon_t$, is not independent of the error term of another time, $\epsilon_t'$, i.e. $E[\epsilon_t \epsilon_t'] \neq 0, i \neq j$. In data exhibiting serial correlation, OLS is consistent but inefficient and produces standard errors which may be biased upward or downward (i.e. improperly leading the analyst to reject the null hypothesis that there is no relationship between independent and dependent variables). While a Durbin-Watson test indicated inconclusive evidence for the presence of serial correlation in the data, the Breusch-Godfrey test detected serial correlation, making standard least squares linear regression unsuitable for estimating the model. Accordingly, I estimated the models using Newey-West (1987) autocorrelation- and heteroskedasticity-consistent standard errors in order to avoid inferential errors.

The results from both Models 1 and 2 suggest that the effect of the EEOC's mixed strategy for securing private litigation enforcement on rates of charges filed with the EEOC (Model 1) and rates of EEO litigation filed in the US District Courts (Model 2) is significant at $p<0.003$ and $p<0.001$, respectively, and in the hypothesized direction (see Tables 3.2 and 3.3).

The Newey-West standard errors, therefore, offer a conservative approach to evaluating the possibility of a relationship between the variables of interest. I also tested for stationarity in the data. A Dickey-Fuller test indicated the presence of nonstationarity in my variables. The traditional method for removing nonstationarity from a times series is to run the regression on the first differences of the variables, but there are major drawbacks to using this method to correct for nonstationarity. First, using first differences "changes the inherent theoretical meaning of the differenced variable," and second, it "discards information about the long-run trend in that variable," information which is theoretically important to my inquiry (Studenmund 1996: 491). As an alternative, we can test for cointegration which matches the trend, or nonstationarity, of the variables in a model so that the residuals of the entire model are stationary, "rid[ding] the model of spurious regression results." Running a Dickey-Fuller test in order to detect nonstationarity on the model's residuals, I found the residuals to be stationary, indicating that the nonstationary variables in the model move together, and that there is not a need to use the first-differenced terms.
The findings indicate that if EEOC-motivated private litigation enforcement increases from a low value to a high one (as it did between 1985, when Reagan appointees controlled the Commission, and 1997, well into the Clinton appointees' terms), this increases the predicted rate of private actions by about 18,000 EEOC charge filings and 6,000 EEO lawsuits – fairly substantial amounts considering that those figures accounted for about a third of the average annual EEOC charge filings and about half of the average civil rights employment lawsuits filed each year.\footnote{111}

The coefficients on most of the control variables were also in the predicted direction for both models. General litigiousness (as reflected in overall court filings), rates of unemployment, workforce size, judicial delay, judicial ideology, and the Civil Rights Act of 1991 were all positively associated with rates of EEO charge filings, though only the coefficients on litigiousness, judicial ideology, and unemployment achieved levels of statistical significance in Model 1. In Model 2, the coefficients on all variables but judicial delay, judicial ideology, and unemployment indicated a positive effect on the rates of private EEO litigation filings, though only the coefficients on litigiousness and workforce size achieved statistical significance.

In the end, the results suggest that, even after controlling for congressional legislation, the ideological 'tone' of the judiciary, and other workforce and litigation process factors that might affect the annual rate of EEO legal actions, EEOC strategies to motivate private legal efforts to enforce equal employment opportunity law matter to this story and matter in a way consistent with the predictions supplied by the historical analyses provided in this chapter.

\footnote{111 I also evaluated the model using a variety of other specifications and the results (particularly the magnitude and significance on the coefficient on "PLE") were on the whole robust to changes in the model.}
IV. Discussion and Conclusion

Recognizing the degree to which "the individual [fulfilling his right to sue] under Title VII is rarely alone and unorganized, [but]…part of a formal or informal organization set up to assert Title VII claims,"¹¹² early administrators at the EEOC would develop and maintain an alternate pathway for Title VII enforcement that would make use of the regulatory power inherent in the private right to sue. As we consider the EEOC's distinctive history of supporting private litigation enforcement efforts, we uncover a set of tools: by working with attorneys on the development of cases, filing amicus briefs, intervening in cases on behalf of plaintiffs, supporting the standing of class action lawsuits, providing funds to private bar projects, and advocating for the recovery of attorney fees for plaintiffs, the EEOC was able to reduce the expected costs, \( C \), associated with private equal employment opportunity litigation; in addition, by issuing liberal guidelines and interpretations of civil rights law, reducing its backlog of complaints, loosening reasonable cause standards, linking claimants with trained legal representation, training and facilitating the development of a cadre of plaintiffs' attorneys, and providing litigants and their attorneys with access to investigation materials, the EEOC was able to enhance the prospects for the successful outcome of private litigation, \( p \) (see Table 3.1).

But, while early administrators developed this alternate pathway of enforcement through the motivation of private EEO litigation, as the archival and statistical analyses presented in this chapter have demonstrated, the EEOC was not locked into engaging in this enforcement strategy at every historical moment. Rather, as private employment litigation became a more formidable and effective tool for combating employment discrimination, the EEOC would engage in or

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retreat from this pathway of enforcement given the ideological commitment of appointed agency leadership to civil rights enforcement. With EEOC private litigation strategies located squarely in the daily administrative activities of the agency, agency leadership was able to shape how and when private litigation enforcement would be utilized by the agency to enforce equal employment policy.

In the next chapter, I will explore the private litigation strategies developed and institutionalized by the Environmental Protection Agency. While the EPA was conferred relatively strong administrative enforcement powers when compared to the EEOC, it was still charged with carrying out expansive statutory responsibilities under severe resource constraints – a combination which threatened its ability to fully address violations of pollution controls. In response, the EPA has also focused its resources on developing incentives to motivate private individuals and groups to engage in environmental litigation, but through a set of tools and under institutional and political conditions that are specific to the agency's hierarchical organization and the litigation needs of the private legal community it interacts with. As we begin to uncover these variations in the development and utilization of these legal strategies, we can reach a more full understanding of the process by which and the conditions under which regulatory agencies are likely to utilize private litigation enforcement.
References


Cases Cited

Jenkins v. United Gas Corp., 400 F.2d 28, 33 (5th Cir. 1977).
L.A. Department of Water v. Manhart 435 U.S. 702 (1978);
Syres v. Local 23, Oil Workers, 223 F.2d 739 (5th Cir. 1955).
List of Figures

Note: In each figure, vertical dotted lines mark the periodization scheme outlined in this chapter. The foundational period runs until the passage of the Equal Employment Opportunities Act in 1972, after which the EEOC gained new enforcement strategies in the court, but also faced more heightened resource constraints. This is followed by a period defined by the Reagan administration starting in 1982 (when the bulk of Reagan appointees came to office), which is subsequently followed by a period of congressional protection for private employment litigation and Democratically-appointed agency leadership starting in 1993. For comparison, I include data for years (2001-2008) that extend past the temporal scope of the historical analysis of this chapter. I reserve comment on these years for now, except to include them as a preliminary look at the EEOC under a Republican administration in the post-CRA 1991 period.

Figure 3.1 Equal employment opportunity litigation filed by EEOC in US District Courts, 1973-2008. Source: EEOC Annual Reports.

Figure 3.2 Private equal employment opportunity litigation filed in US District Courts, 1970-2008 (provided by the thick line with solid points). For comparison, the annual number of equal employment opportunity lawsuits filed by the EEOC, 1973-2008, is provided by the thin line with hollow points running along the bottom of the figure. Source: Annual Reports of the Director of the Administrative Office of the US Courts, Tables C-2A and C-2 and the 'Federal Court Cases: Integrated Database' available from the Inter-University Consortium for Political and Social Research.

Figure 3.3 Pending inventory of charges at the EEOC, 1966-2008. Source: Compiled by the EEOC's Office of Research, Information, and Planning at the request of the author.

Figure 3.4 Charges filed with the EEOC, 1966-2008. Source: Compiled by the author from the EEOC Annual Reports.

Figure 3.5 Amicus curiae briefs filed by the EEOC, 1966-2008. Source: EEOC Annual Reports and compiled by the Litigation Department at the EEOC at the request of the author. For the years 1996-2002, the annual number of cases on which the EEOC filed amicus briefs is reported. The figures for these years are likely to be underestimated, but not too far off from the measurements provided in the remaining years.

Figure 3.6 Percentage of charges issued reasonable cause determinations by the EEOC, 1966-2008. Source: Compiled by the EEOC's Office of Research, Information, and Planning at the request of the author.

Figure 3.7 Annual budget of the EEOC, adjusted to Year 2000 dollars, 1966-2008. Source: EEOC Annual Reports.

Figure 3.8 Measure of EEOC private litigation enforcement ("PLE"), 1966-2008. Source: Created by the author.
Table 3.1 Tools Used by the EEOC to Promote Private Employment Discrimination Litigation

<table>
<thead>
<tr>
<th>Administrative Process</th>
<th>Shape Body of Law</th>
<th>Assist Plaintiffs’ Bar</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Formative Period (1964-71)</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Inform claimant of right to sue</td>
<td>Use cause findings to create legal definition of discrimination</td>
<td>Offer direct litigation help</td>
</tr>
<tr>
<td>Allow claimant to sue at any point</td>
<td>Issue legal guidelines</td>
<td>File amicus briefs</td>
</tr>
<tr>
<td>Settlement process informed by private right to sue</td>
<td>Defend class actions</td>
<td>Intervene in private suits</td>
</tr>
<tr>
<td>Preponderance of evidence not needed for reasonable cause</td>
<td>Define discrimination in terms of pattern and practice</td>
<td>Supply attorneys with technical information</td>
</tr>
<tr>
<td>Develop employer reporting system</td>
<td></td>
<td>Recruit current members of bar to EEO law</td>
</tr>
<tr>
<td><strong>Court Enforcement Period (1972-81)</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rapid Charge Processing System decreases backlog</td>
<td>Litigate frontier cases to establish precedent</td>
<td>Developed attorney referral system</td>
</tr>
<tr>
<td>Systemic Charge Processing System focuses on class, systemic cases</td>
<td>Increase in amicus brief filings</td>
<td>Created Private Bar Loan Fund</td>
</tr>
<tr>
<td><strong>Contraction of Private Power (1982-1992)</strong></td>
<td></td>
<td></td>
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<tr>
<td>Discourage class action suits</td>
<td>Redefine discrimination in terms of the individual</td>
<td>Private Bar Loan Fund terminated</td>
</tr>
<tr>
<td>Eliminate use of goals and timetables in admin process</td>
<td>Reject use of goals and timetables in court</td>
<td>Attorney training program terminated</td>
</tr>
<tr>
<td>Develop full processing system that delays charges; statute of limitations on suits expire</td>
<td>File fewer amicus briefs; end expansions of definition of discrimination</td>
<td>Refuse claimant access to investigation files until request right to sue</td>
</tr>
<tr>
<td>Issue rash no reasonable cause decisions to meet caseload goals</td>
<td></td>
<td>Few amicus briefs filed</td>
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<tr>
<td>Keep Title VII enforcement in-house</td>
<td></td>
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<tr>
<td>Priority Charge Handling Process reduces backlog</td>
<td>Increase in amicus brief filings</td>
<td>Co-counsel with private bar on systemic, class action cases</td>
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<tr>
<td>National Enforcement Plan focuses on systemic, class suits</td>
<td></td>
<td>Allow claimants with counsel to sue immediately, bypass admin process</td>
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<tr>
<td>Loosen standards for finding reasonable cause</td>
<td></td>
<td>Increase in amicus brief filings</td>
</tr>
<tr>
<td>Annual rates of reasonable cause findings increase</td>
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</tbody>
</table>
Table 3.2 Table of standardized coefficients (solid circles) and confidence intervals based on Newey-West autocorrelation-consistent standard errors (lines) for EEOC Model 1 (top) and Model 2 (bottom). The interpretation of standardized coefficients is not always straightforward, but they can be useful in interpreting the relative magnitude of the effects of the independent variables. The scale on the top of the table indicates that a one standard deviation increase in the independent variables will lead to an increase in the dependent variable equal to the product of the coefficient on the independent variable and the standard deviation of the dependent variable. Diagnostics: Model 1: $N=43$, $p(F)=0.00$; Model 2: $N=39$, $p(F)=0.00$.
Table 3.3 Table of (unstandardized) coefficients and Newey-West autocorrelation-consistent standard errors for EEOC models.

<table>
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<tr>
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<tbody>
<tr>
<td>EEOC PLE</td>
<td>9096.0** (2805.7)</td>
<td>2945.8** (823.5)</td>
</tr>
<tr>
<td>CRA 1991</td>
<td>2545.6 (4718.1)</td>
<td>2250.0 (1885.8)</td>
</tr>
<tr>
<td>Litigiousness</td>
<td>0.150* (0.057)</td>
<td>0.060** (0.013)</td>
</tr>
<tr>
<td>Judicial Ideology</td>
<td>45745.7** (13999.2)</td>
<td>-11816.6 (6037.5)</td>
</tr>
<tr>
<td>Judicial Delay</td>
<td>132.42 (486.81)</td>
<td>-275.13 (180.66)</td>
</tr>
<tr>
<td>Workforce (in 1000s)</td>
<td>0.425 (0.21)</td>
<td>0.230** (0.077)</td>
</tr>
<tr>
<td>Unemployment</td>
<td>4844.53** (751.1)</td>
<td>-12.88 (246.79)</td>
</tr>
<tr>
<td>Constant</td>
<td>-51591.1** (17296.8)</td>
<td>-22961.97** (7463.02)</td>
</tr>
<tr>
<td>N</td>
<td>43</td>
<td>39</td>
</tr>
<tr>
<td>p(F)</td>
<td>0.00</td>
<td>0.00</td>
</tr>
</tbody>
</table>

Standard errors in parentheses; **p < 0.01, *p < 0.05
Chapter 4

Agency as Architect:
Setting the Stage for Citizen Lawsuits at the Environmental Protection Agency

“The information in scientific data banks should…be open to all… With science integrated into the total culture of mankind, I have no fear for the future. Man will not only survive, but prosper, and advance in wisdom as a guardian of the earth.”
- Remarks of William D. Ruckelshaus, First Chairman of the EPA, before the National Environmental Information Symposium, September 25, 1972.¹

I. Introduction: The Foundation of the EPA and the Citizens' Right to Sue

In the years preceding the formation of the EPA, environmental protection was characterized by a deep fragmentation of governmental regulation. Preoccupation with the development of the post-World War II industrial economy translated into a very limited role for the federal government in environmental regulation. Instead, in the early to mid 20th Century, environmental protection was left to a rather dizzying array of state and local government enforcement efforts (Kraft and Vig: 1994). Under this network of localized enforcement, pollution control standards varied from state to state and, with no clear national mandate or program to eliminate egregious polluters, enforcement efforts were disconnected and administratively ineffective. But by the late 1960s, a deep shift occurred in the federal government's commitments to environmental policy. Responding to a growing concern among the general public for greater environmental protections, President Nixon signed the National Environmental Protection Act in 1970 ["NEPA"], creating a Council on Environmental Quality to advise the President and Congress on environmental matters and charging government

¹ Speech delivered by William D. Ruckelshaus at the National Environmental Information Symposium, 25 September 1972, NARA, RG 412, Control Corres 1972, Box 16, Office of Planning & Management (Oct 72 and Nov 72).
organizations with the duty of meeting environmental standards and filing environmental impact statements for any actions which might cause environmental harm.

While the NEPA represented the first effort to give environmental matters credence within the federal government, Nixon voiced concerns in a draft signing statement about attempts to establish "still another organization dealing with environmental quality."\(^2\) Lamenting the fragmentation that caused "programs [that] are markedly similar…[to be] administered in near isolation from each other," the Administration noted the need for centralized and "strong leadership from the Federal government" on environmental regulation. In internal documents, Administration officials noted that "public concern for environmental issues has grown enormously in recent years," and that there was "good reason to believe that they will be the domestic issue of the new decade."\(^3\) But with "environmental programs…scattered throughout a number of departments, often buried in bureaucracy," Nixon later recalled in his State of the Union Message of 1973, "there was no critical focus for policy planning or implementation."\(^4\) Viewing the establishment of a new independent environmental department as "attractive politically…[as] it would demonstrate to the public and to the Federal establishment itself that the Administration place[d] serious priority on environmental issues," the Administration mustered its support behind the creation of a new department.


\(^4\) Environmental Insert for State of the Union Message, n.d., NPM, WHCF: Subject Files: FG 6-17 (Council of Environmental Quality), Box 2, WHCF: [Gen] FG 6-17 [1/1/73-7/29/74].
The development of the Environmental Protection Agency marked the first occasion when the federal government committed to a comprehensive and organized effort to engage in environmental regulation. Shortly after assuming office in January 1969, President Nixon formed and charged a council, led by Roy L. Ash, with developing a proposal for the reorganization of the federal environmental program. Members of the Ash Council and the Nixon Administration immediately began to consider the policy mission of the new department. Some members of the council, most notably its Chairman, Roy L. Ash, and its staff coordinator, Amory Bradford, favored the development of a Department of the Environment and Natural Resources, which would combine the regulation of pollution levels with the management of the market of the nation's natural resources. But outside experts and existing organizations like the CEQ opposed this plan, arguing that a fragmented environmental program would not be able to handle new pollution problems yet to arise. Likewise, these organizations argued that the promotion of natural resource markets should be separated from environmental protection regulation in order to avoid conflicts of interest that would likely arise (Marcus 1980, 1991). This opposition to the super-department resulted in a compromise which authorized the creation of a new department that would house and integrate the until-then dispersed government pollution control functions, but which would be separated from any governmental management of natural resources. In its

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proposal to the Administration, the Ash Council stressed its reasoning for the creation of a new, integrated department, noting that "no [current] single agency encompasses more than a few of the perspectives requisite to environmental administration."6

In the final reorganization plan, the Nixon Administration proposed the creation of a separate pollution control agency, the Environmental Protection Agency ("EPA"). In its first years, the EPA would be charged with implementing a rash of congressional legislative activity on environmental matters. As discussions over the organization of the EPA were underway at the White House, Congress enacted one of the first significant pieces of environmental legislation, the 1970 Clean Air Act ["CAA"],7 which gave the EPA a 30 day deadline to establish national air quality standards and emission limits. Two years later, Congress would also pass the monumental Federal Water Pollution Control Act [referred to hereafter as the Clean Water Act, or "CWA"] which imposed its own demanding list of impending deadlines for the Agency to issue effluent guidelines, grant emissions permits to water sources, and install water pollution control technology.

But these environmental statutes made provisions for another means of achieving environmental protection. In addition to granting quite wide-ranging environmental regulatory powers to the newly formed EPA, the statutes also – with the support of the Administration8 and following the lead of NEPA (which included the first federal provision for an environmental

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8 Summary: Second Annual Report of the Council on Environmental Quality, 6 August 1971, NPM, WHCF: Subject Files: FG 6-17 (Council of Environmental Quality), Box 1, WHCF: [Ex] FG 6-17 8/1/71-8/31/71.
private right of action in the courts) – included citizen suit provisions. While opponents of the citizen suit measures in Congress warned against "burdening the courts with a large number of lawsuits," proponents of the provisions pointed to citizen suits as a necessary supplement to federal enforcement efforts, which were largely hampered by limitations on agency administrative resources to fully prosecute environmental protection violations (Miller 1987: 5).

The citizen suit provisions adopted by the Clean Air Act\textsuperscript{11} were, for the most part, incorporated into most subsequent environmental statutes and amendments\textsuperscript{12} – at times conferring greater legal enforcement powers to citizen suits than those administrative powers granted to the EPA (Miller 1987: 6-7).

A. How the EPA Can Mobilize Private Environmental Litigation

These legislative citizen suit provisions secured the role for an alternative means of environmental policy enforcement, ensuring that environmental regulation would not be confined to the administrative processes of the EPA, but would also have a place in the court dockets and litigation strategies of private actors seeking to secure environmental protection. But how the EPA came to view and engage with private environmental litigation will be the central investigation of this chapter. As this chapter will demonstrate, the EPA, burdened by a regulatory

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\textsuperscript{9} Clean Air Act § 304; Clean Water Act § 505; Comprehensive Environmental Response, Compensation, and Liability Act § 310; Resource Conservation and Recovery Act § 7002; Toxic Substances Control Act § 20.

\textsuperscript{10} Remarks by Senator Hruska during Senate debates, September 23, 1970 (Miller 1987: 5, fn 7).

\textsuperscript{11} The Clean Air Act citizen suits provisions stipulated that while citizens could sue to redress statutory violations and could be awarded attorneys' fees, they were restricted from collecting damages, were required to notify government agencies to give federal regulatory agencies an opportunity to prosecute the violations first, and could be liable for the costs of attorneys' fees from the opposing party if the lawsuit was deemed frivolous.

\textsuperscript{12} With the exception of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) (U.S.C. §§135-136y, ELR Stat. 42301-20), which did not include a citizen suit provision.
workload that it did not have the resources to adequately address, would come to view private litigation as an important tool to supplement its restricted administrative enforcement efforts; and citizen groups, faced with the extreme complexities and costs associated with bringing environmental lawsuits, would come to depend on the EPA for support, legal guidance, and access to evidence in bringing their legal claims.

Over time, private environmental litigation has become a formidable tool for achieving environmental protection, but the key to understanding its development and success is located squarely in the nexus of the regulatory partnership that formed, over time, between the EPA and civil environmental groups. In this chapter, I will explore the varied strategies by which the EPA set out to establish methods and means to facilitate the process of private litigation and make it in the interest of private individuals and groups to bring environmental suits in court, or in other words, to help ensure that $B_p > C$ (see Table 4.1). As EPA leadership and environmentalists would recognize over time, the agency had several tools at its disposal to affect the expected value of the decision of private citizens to sue (Fadil 1985; Environmental Law Institute 1984). The agency would, first, promote the development of a body of environmental law favorable to litigation brought against environmental polluters. By filing amicus briefs and intervening in private suits, the agency would become a major player in the development of legal precedent that favored plaintiffs' suits. The agency would also combat the complexities of bringing private environmental suits by publicly supporting private litigation efforts, whether through direct litigation support, legal guidance and training, or litigation funding.

13 Memorandum, Timothy Atkeson (General Counsel) to Richard Fairbanks, 12 January 1972, Re: Final Report of CEQ Legal Advisory Committee, NPM, WHCF: SMOF: Whitaker, Box 126, WHCF: SMOF: John C. Whitaker, Fairbanks Subject File, Council on Environ. Quality [from CFOA 770] [1 of 3].
But perhaps most importantly, the EPA would organize its administrative processes to facilitate the greatest needs of environmental litigants: particularly, public access to scientific evidence of environmental violations. Given the complexity of environmental regulatory law, and the extreme costs associated with environmental litigation, the EPA would help combat many of the high-cost impediments to bringing environmental suits by prioritizing the development of clearly enumerated environmental standards, disseminating helpful publications which explained highly complex environmental law, collecting costly monitoring data and using its technical expertise to conduct analyses of this data, and ensuring the accessibility of these publications and data systems to the public. Through this strategy, the agency constructed an 'architecture' of legal information and evidence to which private litigants and their attorneys could turn to overcome many of the costly impediments to bringing private environmental suits. In the following chapter, I will trace the utilization of these various tools by the EPA, offering historical and statistical analyses which uncover the various strategies by which the Agency sought to promote and protect private environmental litigation.

II. Historical Analysis: A Periodized Account of EPA Enforcement Capacity

A. Private Environmental Litigation in the Formative Years: An Unused Tool

The organization of the functions of the new Environmental Protection Agency was spearheaded by the first Chairman of the Agency, William D. Ruckelshaus. Appointed by President Nixon during this legislative escalation of environmental policy, Ruckelshaus equated the experience of developing the functional structure of the EPA to "running a 100-yard dash, while undergoing an appendectomy" (Marcus 1991: 22, from Quarles 1976: 32). Ruckelshaus was, first, confronted with the question of how to integrate the previously fragmented
environmental pollution control goals of the federal government under one roof. One of the chief organizing goals for Ruckelshaus was the need to enhance and strengthen federal enforcement efforts through the EPA. Because environmental protection had been "regarded as the responsibility of state and local governments," federal environmental agencies "on only the rarest occasions…resort[ed] to court action to compel compliance with pollution control requirements,"\textsuperscript{14} Ruckelshaus strove to solidify the agency's credibility with environmental groups and secure public support by developing an agency reputation as a serious and vigorous prosecutor of pollution violations. Guided by his past experience as an attorney with the Justice Department, Ruckelshaus resorted to an "activist suit strategy" to compel compliance, spearheading lawsuits against multiple industrial polluters in the agency's very first week (Marcus 1980: 88; Quarles 1976) and conducting five times as many enforcement actions in the agency's first year than had been conducted by the numerous fragmented environmental organizations in the previous year.\textsuperscript{15}

But given the breadth and magnitude of the enforcement responsibilities accorded to the agency, EPA leadership was quite aware of the limitations on its enforcement efforts. Given the "cumbersome process" of "individual case litigation," which was accompanied by "long delays and voracious consumptions of manpower," the agency found it "perfectly clear that on a nationwide basis other systems allowing greater use of administrative technical judgment [would need to] be utilized as the primary means to establish specific abatement requirements."\textsuperscript{16}


\textsuperscript{15} Ibid; Marcus 1980: 89.

\textsuperscript{16} Ibid, fn 13.
suit strategy faced a number of roadblocks. The Office of Enforcement, first, was – according to its budget and personnel size – the smallest office in the EPA (Marcus 1980). While the agency generally fulfilled its staffing needs by transferring personnel from previous environmental programs, few of these predecessor programs had enforcement positions staffed by attorneys trained in environmental law (Quarles 1967: 47; Marcus 1980). Personnel in the Office of Enforcement likewise met formidable and unnecessary delay. Many of these inherited employees were staffed in regional offices and, without a clear legal enforcement strategy mandate from headquarters, could not move forward on enforcement suits without first contacting the headquarters to make sure a suit did not conflict with other regional interests. And, while the EPA could prepare lawsuits against environmental policy violators, it was statutorily required to refer them to the Justice Department to litigate in court. Because Justice Department priorities did not always match those of the EPA, environmental suits often became mired in the Justice Department's crowded litigation schedule (Marcus 1980).

But perhaps one of the greatest roadblocks to the agency's new enforcement efforts was the inability of the agency to meet statutorily-defined timetables for establishing permit and monitoring data systems and for submitting pollution control guidelines. The agency's enforcement effort hinged on the development of standards to which industrial polluters could be held, and the collection of monitoring data according to which pollution violations could be identified, but the EPA faced trouble implementing both of these components of its enforcement strategy during this formative period. Within its first two years of existence, the agency was charged with issuing guidelines within less than a year of the passage of the CWA and a mere 30 days after the passage of the CAA, but the young agency was ill-equipped to meet these challenging deadlines. As John Quarles, the Chief Legal Officer of the EPA, related, these new
statutes "presented a bewildering array of requirements...[and] took several months to read..., debate its ambiguities, and set a strategy for carrying out the program" (1976: 114).

Faced with this complexity, the agency needed information and monitoring data on pollution levels in order to begin to develop emissions standards. But because the EPA was relying on data systems and laboratories that were inherited from predecessor environmental programs and agencies, the agency did not have the tools to properly issue standards in a timely manner. The existing monitoring system was filled with out-of-date data that required time-consuming analysis (Marcus: 116), a sad state of affairs which Robert Fri, the Deputy Administrator of the EPA, deemed "insufficient to produce the type of data that we will need to judge the compliance with standards, to carry out enforcement actions or to develop strategies for new standards."

But while the agency considered adopting new data systems and processing equipment, the development of regulations and guidelines faltered. In a speech entitled "The Conquest of the Overload" before the National Environmental Information Symposium, Ruckelshaus lamented that "the lack of data can retard project timetables, render economic forecasting hazardous, mislead us on labor market conditions and present obstacles to timely investment," and pled with the audience that "in order to make wise decisions" from an

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17 Memorandum, Assistant Administrator to Deputy Administrator, 21 November 1972, Re: Quality Control Program, NARA, RG 412, Control Corres 1972, Box 18, Office of Research & Monitoring.

18 Thomas E. Carroll (Assistant Administrator for Planning and Management) to N. A. Abersfellow (Commissioner, Federal Supply Service), 2 March 1971, NARA, RG 412, Office of the Administrator, General Correspondence, 1971-1982, Box 1, Aa-Ae 1971: Memorandum, Robert Fri to Thomas E. Carroll (Assistant Administrator for Planning and Management), n.d., Re: EPA's Plans for Data Systems, NARA, RG 412, Control Corres 1972, Box 18, Office of Planning & Management Nov-Dec 72; Memorandum, Lee DuBridge (Director Office of Science and Technology) to John D. Ehrlichman, 26 June 1970, Re: S. 3410 -- A Bill to Create a National Environmental Laboratory, NPM, WHCF: SMOF: Whitaker, Box 61, WHCF: SMOF: SMOF: John C. Whitaker, Subject File, Environmental Lab [from OA 8181] (about opposition to creation of the National Environmental Laboratory).
administrative standpoint, he would need the help of those in the room to provide "the very best evidence and judgments" they could offer.\textsuperscript{19}

Despite the strong enforcement powers granted to the agency by Congress, the EPA was not equipped to fully address the backlog of duties pertaining to guideline submissions, monitoring and data collection, and violations that accumulated in its enforcement divisions. Without proper monitoring data, the agency was unable to formulate pollution control standards, leaving it with very few tools in its war chest to prosecute polluters and engage in the strong, command-and-control regulatory actions that Ruckelshaus envisioned for the agency. In response to these administrative shortcomings, the EPA came to frame alternative mechanisms of enforcement, like the legislative provision for environmental citizen suits, as a complementary approach to its own regulatory actions. Viewing private litigation as an extension of the agency's own enforcement arm, Ruckelshaus identified it as "one of the tools that we have to do something about pollution."\textsuperscript{20} In a press conference marking his nomination as the first Administrator of the agency, Ruckelshaus told reporters that he felt "strongly that the attack on pollution must be a cooperative effort between the Federal Government, State government, local government, and the private and independent sector," and emphasized that he believed "that many of these public interest law firms which are dealing with the problems of the environment should be given every encouragement to continue to do so."

\textsuperscript{19} Speech delivered by William D. Ruckelshaus at the National Environmental Information Symposium, 25 September 1972, NARA, RG 412, Control Corres 1972, Box 16, Office of Planning & Management (Oct 72 and Nov 72).

In the early moments of the formation of the EPA, the agency took actions and stances to ensure that this was the case. Following a proposal by the Internal Revenue Service to revoke the tax-exempt status of environmental interest groups, Ruckelshaus, in a joint press conference with the Chairman of the CEQ and future Administrator of the EPA, Russell Train, rebuked the proposed rule, adding that, "to the extent that this proposed regulation...would deprive [environmental groups] of an avenue of doing something about pollution, I think it is very unfortunate."\(^{21}\) Recognizing the extent to which this economic burden would hinder the ability of environmental groups to successfully bring lawsuits in court, Train shared Ruckelshaus' hope that the IRS would reverse its position so "that the citizens' suit right will be protected." \(^{22}\)

Likewise, the President's Council on Environmental Quality – which was charged with working closely with the EPA in coordinating environmental policy and enforcement – proposed strategies for how the government might encourage and promote private environmental litigation. In a report issued by the CEQ's Legal Advisory Committee, the Subcommittee on Private Litigation – which the CEQ assembled "to study proposals for strengthening private litigation as a technique for environmental protection" – concluded that "responsible private

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litigation should be encouraged as constituting at least one of the important tools available for
the protection of resources." The Committee found that "despite traditional concern about
costliness and delay in litigation, the courts have proven to be a significant battleground for
environmental issues" and adopted rules to ensure that the courts would remain a viable pathway
for environmental protection. The Committee adopted a resolution to abolish "substantive and
procedural impediments to the conduct of litigation," such as rules or court actions restricting the
standing of environmental groups (which the Report accused the Justice Department of engaging
in, "contrary to the policy enunciated by the President and by Congress of protecting the
environment against abuse"), proposals that environmental decisions by agencies must be
"sustained unless they are arbitrary or capricious," and rules that required the "exhaustion of
administrative remedies prior to court action."23

In addition to publicly supporting and proposing methods by which the government could
promote private litigation as a tool for enforcement of environmental policies, the EPA offered
practical support to empower citizen groups bringing environmental suits. Given the complexity
of the new environmental laws, the agency took measures to inform the public of the remedies
available through the new laws. In a memo entitled "Encouraging Private Efforts Against
Pollution," the Nixon Administration's National Center for Voluntary Action acknowledged that
"there will never be enough money for the Federal Government to pay the entire bill for cleaning
up our national environment" and set out to "induce the private sector to supplement the

23 The Administration, in fact, found this report so incendiary, particularly its rebuke of the Justice Department's
restrictions on standing, that it considered concealing it from public view. Given, however, that the Legal Advisory
Committee was under the impression that the report would be made publicly available when it composing it, John
Dean, White House Counsel, recommended its release in order to prevent possible embarrassing publicity.
government's existing efforts.\textsuperscript{24} In order to stimulate private litigation, the Center recommended working with the American Bar Association's subcommittee on the environment to "write a booklet defining the rights of the public in stopping the pollution of its surroundings" and to inform and bring local bar associations into its efforts. In that vein, the EPA developed encyclopedias for groups to use to familiarize themselves with the complexities of the new environmental laws,\textsuperscript{25} and sent materials to bar associations on the remedies available under the new laws.\textsuperscript{26}

Given that private individuals were most at risk of being silenced by the complexity of the new laws, the agency also offered funding for short-term seminars that trained the public on environmental laws\textsuperscript{27} and assembled a Directory of Environmental Organizations to help connect individuals with environmental groups that could aid individual citizens with bringing their claims in court and navigating the legal system.\textsuperscript{28} In fact, the EPA considered the involvement of environmental groups and private attorneys to be so fundamental to the enforcement of environmental statutes that it sought to develop lasting working relationships with the groups.

\textsuperscript{24} Memorandum, Bud Wilkinson to Leonard Garment, 6 February 1970, Re: Encouraging Private Efforts Against Pollution, NPM, WHCF: SMOF: Bradley H. Patterson, Jr., Box 28, WHCF: SMOF: Subject Files, Environment.

\textsuperscript{25} Speech by Mary Lane Reed Ward Gentry, J.D. (Legal Consultant to the Administrator), n.d., Re: The Attorney and Environmental Law, NARA, RG 412, Control Corres 1972, Box 15, Office of Legislation.

\textsuperscript{26} G. Stanley Hood to William D. Ruckelshaus (Administrator), 30 March 1971, Re: Allen County Indiana Bar Association Seminar on Pollution Control, NARA, RG 412, Office of the Administrator, General Correspondence, 1971-1982, Box 16, Hoo-Hoy 1971.

\textsuperscript{27} A Guideline for The Regional Public Affairs Offices presented at the Regional Administrators Meeting, 12 October 1972, NARA, RG 412, Inter-Agency Corres 89; Acc # 91-0034, Box 1, EA (Jan-Mar); Paul F. Wagner (Acting Chief, Grants Information Branch, Grants Administrative Division) to Forrest H. Dobson, 28 December 1971, NARA, RG 412, Office of the Administrator, General Correspondence, 1971-1982, Box 9, Doo-Dr 1971.

\textsuperscript{28} Henry S. Ruess (Chairman, Conservation and Natural Resources Subcommittee) and John B Dingell (Chairman, Subcommittee on Fisheries and Wildlife Conservation) to Thomas T. Hart (Director of Public Affairs), 12 December 1972, NARA, RG 412, Control Corres 1972, Box 16, Office of Public Affairs (Nov-Dec).
during its formative years. Keeping itself apprised of the litigation activities occurring in the private sphere, the agency kept records of the interest groups, private attorneys, and bar associations involved in private environmental litigation. The agency reached out to these groups, inviting them to meetings and briefings with EPA and White House officials to discuss enforcement strategies, speaking at conferences and events held by bar associations and law schools, and offering direct litigation support by sending information to attorneys on navigating environmental statutes.
But despite these agency efforts to protect and promote the citizens' right to sue, and despite Congress' own statutory provisions for the private right of action on environmental claims in court, citizen suits against violations of environmental statutes were rarely invoked in these early moments of environmental regulation by the EPA. In 1976, a mere 54 private suits were filed against violators in the US district courts (see Figure 4.1). Why, then, given such clear statutory provisions for citizen suits and bureaucratic recognition of the enforcement potential of private litigation, were private environmental litigation rates so low?

While congressional and agency actions publicly promoted the citizens' right to sue for environmental violations, these actions were not sufficient to motivate individuals and environmental groups to engage in private litigation. Rather, the viability of private environmental suits hinged on several critical factors which the EPA was unable to address due to early agency shortcomings in its administrative organization. First, the agency failed to collect sufficient monitoring data for private suits to prove violations of environmental statutes in court.

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32 Frank M. Covington (Director, Division of Planning and Interagency Progress) to John Black (David, Graham & Stubbe), 21 January 1971, NARA, RG 412, Office of the Administrator, General Correspondence, 1971-1982, Box 3, Bla-Blz 1971.
Legal claims of environmental violations require the analysis and collection of scientific monitoring data which, in most cases, is too costly for individuals or citizen groups to carry out on their own. Such claims require costly scientific testing, regular monitoring, and the assistance of well-trained experts to analyze the technically complex data. Given this technical hurdle, Congress made special provisions in the CWA for public access to the data contained in the discharge monitoring reports submitted by industrial polluters to the EPA. But the young EPA, burdened with restructuring an inherited and segregated data collection system which provided antiquated information, could not, at this historical moment, provide private actors with the scientific data and evidence that was critical to the success of private environmental lawsuits. In the meantime, the potential for direct legal enforcement actions by private actors was held captive by the EPA's inability to collect and provide timely public access to accurate monitoring data.

Second, this lack of adequate monitoring data caused delays in the development of guidelines and permit requirements by the EPA. In the absence of clearly stated pollution control standards, environmental groups and aggrieved individuals lacked guidelines for the identification of environmental protection violations and were unable to engage in the 'watchdog role' of using available monitoring data to identify and prosecute the most egregious polluters (Miller 1987). While lawsuits directed against polluters were encumbered by these administrative shortcomings, private litigants gained more leverage by participating in the formulation of guidelines that would dictate the scope of later enforcement efforts – public and

While Congress and the EPA recognized the regulatory potential of private litigation as an essential tool for the enforcement of environmental statutes, the viability of private environmental lawsuits was still too tenuous at this early moment. Early decisions to promote private litigation as an arm of environmental protection – through both the EPA's development of working relationships with environmental groups which hinged on the provision of legal advice and information, and Congress' provision of the citizens' right of action and private litigation incentives like attorneys' fees provisions – were not sufficient for developing private environmental litigation as a realistic and economically feasible option for private actors. Until the agency actively addressed some of the major impediments to private environmental litigation – namely ensuring the swift and efficient development of agency standards and permitting requirements, and the provision of adequate monitoring data – the viability of private litigation as an enforcement option for environmental policy hung in the balance.

B. The Carter Administration: Setting the Stage for Private Litigation

While the EPA struggled through its formative years to meet administrative requirements for standard-setting and data collection, these would become new commitments under the leadership of Carter-appointee Administrator Douglas Costle. While, as Ruckelshaus later

33 Though these private legal challenges of agency decisions contributed to further delays in the administrative development of guidelines and standards, as Fadil notes, this trade-off between these different types of citizen suits speaks to the determinative relationship between stages of regulatory development and the degree to which citizen litigation enforcement will be employed (1985: 65-66). At early moments of development, when regulations are still being formulated, the viability of private lawsuits against polluters is tenuous. Citizen groups are likely to gain more benefits, however, by participating in the administrative rulemaking process through lawsuits challenging agency decisions, which may, in turn, open possibilities for direct litigation against polluters in the future.
recalled to a journalist, the EPA, at its formation, "inherited…a lot of implementing legislation that, like the Clean Air Act, just rapidly came on and didn't give us a lot of leeway in terms of setting not only the goals but also the method by which they were to be achieved," the EPA, under the Carter administration, would begin to alter its approach to environmental regulation with more long-term enforcement goals in mind. The 1977 amendments to the Clean Air Act and Clean Water Act would extend many of the strict timetables and deadlines contained in the original statutes, giving the agency greater freedom to use technology and knowledge to set standards. No longer concerned with chasing after enforcement opportunities (see Figure 4.3) and statutory deadlines in an effort to quickly build a reputation as a strict enforcer – which Ruckelshaus pursued at the expense of focusing on "the abstractions of organization" (Williams 1993) – the EPA, under the Carter administration, refocused its efforts on organizing its administrative and scientific goals to better meet its growing enforcement responsibilities and the needs of private environmental groups.


35 Marine Protection Act of 1972 (PL 92-532) (regulation of dumping of waste materials in oceans); Safe Drinking Water Act of 1974 (PL 93-523) (authorized EPA to create standards for quality of drinking water and to regulate state programs to protect quality of underground water); Toxic Substances Control Act of 1976 (PL 94-469) (authorized EPA to ban the use or sale of any chemical causing "unreasonable risk of injury to health or environment); Resource Conservation And Recovery Act of 1976 (PL 94-580) (authorized EPA to set standards for treatment, storage, and disposal of hazardous wastes); and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (PL 96-510) (authorized EPA to clean up hazardous waste sites and manage emergencies).
standards for each of these statutes, the EPA directed its efforts toward the development of administrative capacities that would enable it to take on such an enlarged, and varied, regulatory workload and reformed its standard-setting procedure through the development of an integrated approach to rulemaking. Since the EPA's formation, agency decision making had occurred programmatically on a statute-by-statute basis, with the development of standards for one program taking place rather separately from that of another. Early EPA administrative structures, restricted by the inheritance of various programmatically-distinct enforcement agencies (e.g. water, air, pesticides), largely mimicked the organization of these disparate programs (Marcus 1980; Schmandt 1985). While the EPA did, after its first several years, begin to gradually reorganize its structure according to agency functions (e.g. enforcement, research, monitoring) rather than programs, this programmatic organization came to define agency planning and decision making for much of its early history, and made it difficult for outside, public groups to make sense of the agency's varied standards and guidelines.

Beginning with the Carter administration, however, the agency began to work towards a more integrated approach to standard-setting on toxins. In an effort to fulfill the agency's organizational objectives to "analyze the health and ecological risks of pollutants in a comprehensive fashion and regulate in a sensible, consistent, and efficient manner across all sources and pathways of concern," the agency developed the Toxics Integration Program [TIP] to "design a more aggressive strategy for integrating the Agency's control over toxic substances" (Toxics Integration Program Report 1981: i). An investigatory report issued by the program revealed that the agency's regulatory approach, which was "dominated by semi-autonomous programs, each built with its own series of legislative additions and expansions…measur[ing] the health and environmental consequences of pollution with its own set of legislatively imposed
values...[and] compet[ing] for scarce resources with a uniquely defined view of priorities,” contributed to inconsistencies and costly duplications of efforts which slowed down decisionmaking processes (I-6). Rather than regulating in a piecemeal fashion, with little knowledge of how a pollutant might also travel to and effect other parts of the environment, the report established a plan for integrating the regulation of the various toxins under the EPA's charge.

A more integrated approach to standard-setting and agency decision making on toxins contributed to the development of a streamlined, consistent, and clear regulatory program that the public could more easily navigate. Indeed, removing ambiguities and inconsistencies and increasing the clarity of standard-setting for the public became a major motivation of the agency, in particular, and the Carter administration, in general. In 1978, Carter issued an Executive Order requiring agencies to "make government regulations more sensitive and comprehensible to the American citizen." In the spirit of this directive, the agency encouraged its regulation writers to submit "non-bureaucratic presentations" of "clear," "straightforward," "jargon-free" regulations using "everyday language" that is "easily understandable to an educated non-expert."

Recognizing the utility of such clarity and organization in regulations to the public, the agency even developed the Plain English Cash Awards, to be distributed to agency personnel who authored the most "clear and well-organized regulatory documents." Given the complexity of environmental statutes and provisions, the agency took efforts not to lose any of the public in


translation, and prized regulations that non-experts could follow, digest, and, in turn, act upon – enabling the public to operate as partners in the identification and prosecution of environmental violations.

But the agency was not only concerned with the presentation of its regulations to the public; it also, through several different programs, prioritized the involvement of the public in agency decision making. Declaring that "public participation…must be built into our program operation to a much greater extent," the agency aimed to strengthen public participation – especially that of environmental interest groups – in agency programs. 38 With a special interest in including "non-profit or impecunious groups…in our regulatory proceedings," federal agency personnel reigned in state and local agency managers who thwarted their participation in public proceedings, 39 and even established a program to provide funding to non-profit environmental groups to take part in agency decision making processes, 40 with the hope that "financial barriers [would] no longer inevitably prevent an outside group or individual from participating in the

38 Memorandum, Douglas M. Costle (Administrator) and Barbara Blum (Deputy Administrator) to Assistant Administrators et al, 19 April 1978, Re: Strengthening Public Participation in Agency Programs, NARA, RG 412, Office of the Administrator, Intra-Agency Memorandums, 1977-1983, Box 30, Dep. Adm. (Apr-June); Douglas M. Costle (Administrator) to Abraham Ribicoff (D-CT), et al. (House and Senate members), 18 August 1978, NARA, RG 412, Office of the Administrator, General Correspondence, 1971-1982, Box 304, Chronological File (Aug 16-31). For examples of the EPA reaching out to environmental citizen groups for comments on regulations, see John Quarles (Acting Administrator) to multiple Environmental Groups, Re: Pretreatment, 18 February 1977, NARA, RG 412, Office of the Administrator; Letters Sent, 1977-1982, Box 1, Multiple Letters (Feb 1977); Douglas M. Costle to David Standley, 31 March 1977, NARA, RG 412, Office of the Administrator; Letters Sent, 1977-1982, Box 1, Multiple Letters (Mar 1977); Douglas M. Costle (Administrator) to multiple recipients, 6 October 1978, NARA, RG 412, Office of the Administrator; Letters Sent, 1977-1982, Box 3, Multiple Letters (Oct 1978).

39 Memorandum, James N. Smith (Special Assistant to the Assistant Administrator) to Barbara Blum (Deputy Administrator), 12 January 1979, Re: OWWM Public Participation Regulations, NARA, RG 412, Office of the Administrator, Intra-Agency Memorandums, 1977-1983, Box 50, WWW (Jan-June).

40 Memorandum, Joan Z. Bernstein (General Counsel) to Douglas M. Costle (Administrator) and Barbara Blum (Deputy Administrator), 10 October 1978, Re: Public Participation Funding, NARA, RG 412, Office of the Administrator, General Correspondence, 1971-1982, Box 305, Chronological File (Oct 1-15).
decision-making process."\textsuperscript{41} Finding it to be "one of the most effective ways for an agency to obtain a better and broader record for its rules," providing compensation for citizen groups to participate in regulatory proceedings was one method by which the agency could ensure the inclusion of provisions that environmental groups would find substantively appealing for their own enforcement efforts.\textsuperscript{42}

But one of the surest ways to guarantee the formulation of consistent, clear standards and public participation in the identification and prosecution of pollution control violations was the development of a more comprehensive, accessible, and transparent system of monitoring data. Recognizing that the success of agency programs "depends critically upon the availability of valid monitoring data," the agency considered it important to develop a systematic way of collecting, analyzing, and disseminating data among the different programs in the agency, and within the public sphere.\textsuperscript{43} But, as agency administrators recognized, the EPA had been "long…criticized from within and without…about the data the agency collects."\textsuperscript{44} Vague directives by top agency managers ordered the collection of the useless data, poor quality control


\textsuperscript{42} Memorandum, Joan Z. Bernstein (General Counsel) to Douglas M. Costle (Administrator) and Barbara Blum (Deputy Administrator), 10 October 1978, Re: Public Participation Funding, NARA, RG 412, Office of the Administrator, General Correspondence, 1971-1982, Box 305, Chronological File (Oct 1-15).

\textsuperscript{43} Memorandum, Douglas M. Costle to Assistant Administrators, et al., 12 December 1979, Re: Establishment of Toxics Data System, NARA, RG 412, Office of the Administrator, Intra-Agency Memorandums, 1977-1983, Box 44, Administrator (Oct-Dec)

\textsuperscript{44} Memorandum, William Drayton Jr. (Assistant Administrator) to Barbara Blum (Deputy Administrator), 19 December 1978, Re: Summary of the Status of Review of EPA's Monitoring Activities, NARA, RG 412, Office of the Administrator, Intra-Agency Memorandums, 1977-1983, Box 33, OPM (July-Dec); Memorandum, Richard M. Dowd (Staff Director, Science Advisory Board) to Administrator, 02 March 1979, Re: EPA Monitoring Programs—Progress Report, NARA, RG 412, Office of the Administrator, Intra-Agency Memorandums, 1977-1983, Box 38, SAB (Jan-Mar); Memorandum, Douglas M. Costle to Assistant Administrators et al., 18 September 1979, Re: Monitoring and Information Management at EPA, NARA, RG 412, Office of the Administrator, Intra-Agency Memorandums, 1977-1983, Box 42, Administrator (July-Sept).
measures led to the production of unreliable data, and programs assessing their own effectiveness engaged in biased analyses of data. To combat these monitoring problems, Administrator Costle ordered improvements to the monitoring activities of the agency which were centered around the development and implementation of quality assurance programs, the coordination of monitoring activities to avoid redundancy, and the prioritization of long-term projects which clarified what types of data would be most useful for fulfilling enforcement goals.45

Central to this improvement in the EPA's monitoring data system was the organization of data in accessible and integrated systems that could provide an architecture of information and evidence for private litigation. But again, due to the agency's early programmatic regulatory organization, much of the agency's research and data collection systems were "dispersed, contain[ed] duplicate information, and [were] not coordinated with one another for optimal use."46 Given that the agency's data systems were originally organized to "support the missions of differing agencies," they typically used "dissimilar equipment and computer languages and programming, [that were] difficult to use, and…contain[ed] highly specialized data." This fragmented data system "compounded…data-sharing problems…because agencies generally [did] not know what data [had] already been collected by whom." And as the agency became responsible for more and more programs through new environmental legislation, this only


exacerbated the problem and contributed to an "uncontrolled piecemeal growth" of the data systems which, in the end, could not add up to a "coherent whole." \[47\]

In response, the agency developed an Interagency Toxic Substances Data Committee in 1978 which – much like the Toxic Integrated Program's contribution to the agency's standard-setting process – helped integrate and coordinate the agency's diverse data systems. \[48\] Through the development of a "comprehensive and efficient system" of "data and information relevant to chemicals" which was "designed to make data on toxic substances rapidly and easily accessible," the Committee hoped that the system would "ultimately serve not only government agencies with regulatory responsibilities, but also scientists, the industrial community, educators, public interest groups, and others concerned with toxic substances." In the continued effort to coordinate data systems among the agency's separate programs, the agency also developed the EPA Information Clearinghouse two years later. \[49\] The Clearinghouse provided a "centralized reference and referral source for all EPA environmental data," and compiled an inventory of the measurement data bases and mathematical models used in different agency programs.

In implementing these plans for the coordination and integration of agency data systems, agency administrators were not only concerned about making internal decisionmaking more consistent and reliable, but also developing a data base that the public could access and use for

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its participation in environmental regulation. In profiles presenting data and trends to the public, the EPA was careful to present data in an easy-to-read fashion for non-technical readers, ensuring that the general public could comprehend and work with complex regulatory data. But EPA administrators also considered the "rendering of technical support…[to the public to be] a necessary function" of the agency that was "growing and [would] continue to grow." The agency deemed technical support for the public to be such a "legitimate function" of the EPA's mission given the complexity of its data collection and analysis that administrators proposed to include it as a line in the budget in order to guarantee its funding. Indeed, considerations of the public were so integral to the development of these data systems that citizen groups were given the chance to comment on ways to make the systems more useful to the public. In carrying out its responsibility under the TSCA to develop an inventory of all chemical substances manufactured and processed in the country, the EPA listened to requests from environmental groups for more detailed data, more specific and objective standards for reporting rules, and the integration of information into existing data systems.

These efforts to utilize technological innovation to enhance the agency's conferral of information and monitoring data to the public extended to the development of helpful computerized directories useful to environmental law practice. The agency developed an automated Chemical Regulations and Guidelines System which provided users inside and


outside of the agency with "information on standards which have been proposed or promulgated, existing laws, regulations, court decisions, and state regulations and laws concerning individual chemical substances." The agency, once again, turned to the public for input, interviewing members of the public sector to gauge the usefulness of the project. Given that "no comparable data system" existed at the time, the development of the guidelines system provided citizen groups with a new tool for navigating evolving environmental statutes, court opinions, and law.

In addition to arming environmental groups with information pertinent to the conduct of environmental law, the EPA also provided direct litigation support to these citizen groups. One of the main mechanisms by which the agency did this was through intervention in citizen suits against polluters. In one of the most studied examples, the EPA joined a massive citizen enforcement effort – which included six lawsuits brought by ten environmental groups in three states – to bring the Tennessee Valley Authority into compliance with the provisions of the Clean Air Act (Durant, Fitzgerald, and Thomas 1983; Durant 1984). After spending months trying to compel the TVA to comply with air pollution standards, but to no avail, the "EPA within the Carter Administration came to virtually invite the involvement of citizen groups…in the burgeoning fight" (Durant, Fitzgerald, and Thomas 1983: 214) and joined citizen suits in


order to shape a more favorable legal precedent for Clean Air Act enforcement. The EPA likewise promoted and protected the right of citizen groups to intervene and shape litigation brought by federal and state enforcement agencies. In a memorandum to agency leadership, the EPA's General Counsel considered proposals that NPDES states allow citizens to intervene in state enforcement actions to be "clearly desirable from the standpoint of environmental protection and public participation," in that they would ensure that "states [could not] enter into inadequate settlement agreements in suits against polluters" and that private groups would have the right to demand and compel strong legal enforcement action.

Strategies for promoting the private right of action in court, however, were not limited to the provision of procedural protections and technical and legal advice, but also took the form of direct economic incentives via agency funding for private litigation efforts. In order to encourage citizen groups to intervene in governmental enforcement actions, agency administrators advocated for the development of an intervenor funding package that would supplement the litigation expenses of non-profit organizations. Even after the creation of the program was postponed due to budgeting issues, the agency quickly directed its attention towards other "pressing need[s] of...public interest groups" like "funds to pay the fees and other expenses of expert witnesses." Recognizing that the agency's own direct expertise and technical support

55 Memorandum, Legro to Administrator, 30 June 1977, Re: Citizen Suits Filed Against TVA under Section 304 of the Clean Air Act, NARA, RG 412, Office of the Administrator, Intra-Agency Memorandums, 1977-1983, Box 7, Enforcement (Apr-Jun).

56 Memorandum, Joan Bernstein (General Counsel) to Deputy Administrator, 5 April 1979, Re: Citizens for a Better Environment v. EPA: Citizen Intervention in State Water Enforcement, NARA, RG 412, Office of the Administrator, Intra-Agency Memorandums, 1977-1983, Box 50, OGC (Jan-June).

57 Memorandum, Michele Beigel Corash (General Counsel) to Douglas M. Costle (Administrator), 29 July 1980, Re: Public Participation Funding Package, NARA, RG 412, Office of the Administrator, Intra-Agency Memorandums, 1977-1983, Box 62, OGC (July-Sept).
could extend to only a limited number of private groups, the EPA proposed to contract expert witnesses for environmental groups "insofar as these expert witnesses could present pertinent information and viewpoints which otherwise would not be available." The EPA's Office of Enforcement, in response to findings that the "citizen suit provision is underutilized and that citizen groups should be encouraged to use it more," also developed and proposed Innovative Enforcement Grants to fund the enforcement activities of environmental groups. These private activities included providing educational materials to the public and establishing local offices to create greater ties with communities that would "mobilize citizen groups…coordinate citizen compliance monitoring…and sue violators under citizen suit provisions."  

These funding efforts were enveloped into a broader agency effort to embolden environmental enforcement through the development of partnerships with private environmental groups. The EPA formally developed a Public-Private Partnerships Initiative to foster the development of partnerships between the agency and external actors with interests in environmental regulation and, in particular, recognized the unique reciprocal relationship that existed between the agency and citizen groups. In preparing remarks for an address to the National Meeting of the Sierra Club, the Acting Assistant Administrator for Research and Development emphasized the importance of a "partnership approach where the Agency expends more effort to understand and respond to citizen group concerns, and they in turn provide more


active support in buttressing Agency action." These partnerships were acted out in agency meetings and conferences with environmental groups to discuss environmental regulation strategies, in speeches that agency administrators addressed to environmental groups and attorneys, and in agency efforts to promote and strengthen the private environmental bar.

Recognizing that "one of the critical elements to a successful legal and enforcement program is an informed bar," the agency took measures to disseminate useful legal information and initiate series of seminars with the private bar, believing that these efforts would "provide a necessary service for practicing attorneys, while at the same time informing us of the concerns and questions of private practitioners." In this reciprocal relationship with environmental groups

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62 Douglas M. Costle to Jerome C. Muys (Program Chairman, Section of Natural Resources Law, ABA), 11 July 1978, NARA, RG 412, Office of the Administrator, General Correspondence, 1971-1982, Box 302, Chronological File (Jul 1-15); Barbara Blum (Deputy Administrator) to Frederick A. Anderson (President, Environmental Law Institute), 6 September 1978, NARA, RG 412, Office of the Administrator, General Correspondence, 1971-1982, Box 304, Chronological File (Sept 1-15); Douglas M. Costle to Thomas L. Kimball (Executive Vice President, National Wildlife Federation), 13 November 1978, NARA, RG 412, Office of the Administrator, General Correspondence, 1971-1982, Box 306, Chronological File (Nov 1-15); Memorandum, Barbara Blum (Deputy Administrator) to Assistant Administrators, 10 February 1978, Re: Input for National Meeting of the Sierra Club, NARA, RG 412, Office of the Administrator, Intra-Agency Memorandums, 1977-1983, Box 30, Dep. Adm. (Jan-Mar); EPA Speakers Calendar, 16 January 1978, NARA, RG 412, Office of the Administrator, Intra-Agency Memorandums, 1977-1983, Box 31, OPA (Jan-June); List of 1973 Staff Speeches (Jul-Dec), n.d., NARA, RG 412, Press Conference FLDr, Box 3, Staff Speeches; Memorandum, Anne L. Dore (Director, Office of Public Affairs) to George Marienthal (Director of Office of Regional Liaison), n.d., Re: OPA Speakers Bureau, NARA, RG 412, Controlled & Major Corres 1975, Box 4, EPA Reference Material.

and the private bar, the agency located its strategies for securing an effective environmental program that incorporated the tools of private legal enforcement.

By focusing agency enforcement strategies on the development of clear and integrated standards and regulations on toxic substances (the process of which was open to the public), the collection of more reliable and comprehensive monitoring data and information systems which agency personnel and the public could access for their regulatory efforts, the encouragement and support of private suits through interventions, and the facilitation of the development and growth of the capacities of environmental groups, the agency developed a more comprehensive approach to enhancing the viability of citizen efforts to engage in the enforcement of environmental statutes. By the end of the Carter administration – nearly 10 years after congressional provisions for the citizen's right to sue were put into place – citizen suits against polluters finally began to occur with greater frequency (See Figure 4.1). While only 53 citizen suits were filed in 1977, this figure increased by 50 percent by the following year. By 1980, 103 private lawsuits were filed, much more than the agency "initially anticipated" given the previous underutilization of citizen suits (Environmental Law Institute [hereafter "ELI"] 1984: vi).

By ensuring greater public access to reliable and useful monitoring data that could be used as proof of violations of more clearly stated and integrated pollution control standards, the EPA began to institutionalize incentive structures that made private litigation a more viable and attractive option for environmental groups. With these structural elements in place, the EPA began to secure the private right of action in environmental law, facilitating the development of an enforcement partnership with environmental groups engaged in private litigation. But with changing political tides, these structures would soon be put to the test. The Reagan administration, ushering in a new era of regulatory devolution, would wage an assault on
environmental regulation that would threaten to dismantle the enforcement capacity of the EPA. But even in the face of these assaults, Administrator Costle's efforts to lay the groundwork for private mechanisms of environmental regulation would prove a lasting enforcement strategy for the agency. With the agency's most important tools for promoting private environmental litigation now institutionalized and out of reach of incoming political appointees, private litigation would remain a viable, and attractive, option for environmental groups confronting an Administration hostile to the enforcement of environmental protection.

C. Reagan's Era of Regulatory Relief: Dismantling Environmental Regulation…

And Putting it Back Together Again

While the EPA constructed institutional devices to protect and promote the viability of private environmental litigation under the leadership of Douglas Costle, the 1980 presidential election would usher in a new era of regulatory reform that would offer the greatest challenge yet to federal environmental policy enforcement. Upon entering office, the Reagan administration "made it abundantly clear that they intended to use their full administrative powers to reverse the thrust of past environmental policies—which they considered fanatically pro-environmental—to achieve a 'balanced approach' that recognized the interests of business and economic development" (Vig 1994: 78). In order to institutionalize this agenda, Reagan appointed Anne Gorsuch, an ideological conservative who was "avowedly hostile to the mission of EPA," to be Chairwoman of the agency (Ringquist 1995: 345). A "frequent critic of the federal government's regulatory activities," Gorsuch "often complained about the Environmental Protection Agency's interference in decisions she believed were the province of state lawmakers," and spearheaded
reforms to reallocate the enforcement of environmental policy from the Federal government to the states and industry, itself.\textsuperscript{64}

Objecting to the fact that Gorsuch had "no regulatory experience, no experience with pollution issues and other questions she [was] called upon to handle, no scientific expertise, and no particular administrative background,"\textsuperscript{65} environmental groups recognized that through the leadership of Gorsuch, the Reagan administration was "intent upon gutting the EPA."\textsuperscript{66} In an indictment of the Reagan administration's attempts to dismantle the federal apparatus of environmental enforcement, several environmental groups accused the administration of using "budget cuts to cripple the agencies that carry [environmental policies] out."\textsuperscript{67} Immediately upon taking office, the Reagan administration instituted a Zero Based Budget that severely constrained agency budgets\textsuperscript{68} and proposed a 39\% cut in the EPA's 1981 operating budget, resulting in a 55\% reduction in the agency's research budget and a 25\% reduction in its enforcement budget.\textsuperscript{69}

Opposing congressional attempts "to add extra and unnecessary funds" for the EPA, Gorsuch and the Administration praised House Republicans for "maintain[ing] a reasonable level of


\textsuperscript{66} Adrian Dewind (Chairman of the Board, Natural Resources Defense Council) to Multiple Addressees, 10 September 1982, NARA, RG 412, Office of the Administrator, Intra-Agency Memorandums, 1977-1983, Box 95, Administrator (July-Sept).


appropriations for the Agency”⁷⁰ and supported congressional proposals to freeze agency funds at a time when "all too many are bowing to popular pressure" to support measures because they are "environmentally popular."⁷¹

These budget cuts, the Democratic National Committee warned, would "cripple" the EPA and effectively "slash" the "environmental safety net,"⁷² and, indeed, were a component of the Reagan administration's plan to ensure the "reduction of bureaucratic redundancy" in environmental regulation.⁷³ Eschewing a command-and-control model of an activist federal regulatory presence, the EPA under the Reagan administration would discontinue "the adversarial and confrontational style of regulation so prevalent under the previous administration,"⁷⁴ and "systematically cut…back EPA enforcement efforts and relax…environmental protection rules" through the issuance of regulations that waived or relaxed standards for pollution control that existed under previous administrations.⁷⁵ Outlining the agency's new approach to environmental regulation, Gorsuch urged EPA employees that "rather than setting industry and EPA in an adversarial posture, we must act upon the assumption

⁷⁰ Anne M. Gorsuch (Administrator) to C.W. Bill Young (R-FL), 17 September 1982, NARA, RG 412, Office of the Administrator; Letters Sent, 1977-1982, Box 8, Multiple (September).

⁷¹ Anne M. Gorsuch (Administrator) to James T. Broyhill (R-NC), 17 September 1982, NARA, RG 412, Office of the Administrator; Letters Sent, 1977-1982, Box 8, Multiple (September).


that responsible industries, like good private citizens, want a clean, healthful environment and are willing to contribute their skills and resources to achieve it." Supplanting its traditional policing enforcement strategy with one focused on achieving voluntary compliance, the agency adopted new enforcement programs that "deal[t] with the regulated community with a presumption of good faith."

Affirming that "enforcement is not measured just by the number of cases filed, nor by the number of enforcement attorneys," the agency shifted its regulatory attention from "costly, time-consuming litigation to a greater attempt to resolve disputes through administrative orders and negotiation" that would encourage voluntary compliance by industry. Indeed, the agency became intent upon removing environmental protection from the courts as much as possible. Throughout the 1970's, the courts regularly exercised judicial review to maximize the protective intentions of environmental statutes. As Glicksman and Schroeder relate, agency decisions that were "disrespectful of environmental interests were much more likely to be subjected to intense judicial review and decisions in which the agency had acted to protect the environment or public health conditions under conditions of uncertainty were more likely to receive more deferential treatment" (1991: 273). With the courts ruling so heavily in favor of strong environmental enforcement actions, the Gorsuch administration referred less than half as many civil enforcement cases to the Department of Justice in 1982 than it had in 1979 (see Figure 4.2) and


77 Anne M. Gorsuch (Administrator) to Alex Katzenstein, 28 May 1982, NARA, RG 412, Office of the Administrator; Letters Sent, 1977-1982, Box 7, Multiple (May).
filed a quarter as many cases in court, effectively dismantling the administrative legal enforcement program in an effort to keep environmental enforcement actions out of the courts.

These efforts to deregulate federal environmental enforcement had consequences for private environmental litigation, as well – particularly litigation on newer, less-established regulations. Carter-era EPA efforts to streamline and increase the public accessibility of standards-setting and monitoring data were overturned under the Regan administration. Immediately upon taking office, Reagan placed a freeze on all new rules issued by agencies and created a Presidential Task Force on Regulatory Relief which would review and evaluate all new and existing federal regulations guiding agency behavior (Vig 1994). Leadership at the agency, complaining of the "cumbersome and oftentimes burdensome regulations and procedures of the Agency," declared that the Agency's "resolutions clearly need[ed] to be re-evaluated in light of the current state of the environment" and to "determine if the same regulations set in the 1970s [were still] required in the 1980s." Freezing any new rules or regulations issuing EPA interpretations of its mandate, Reagan issued Executive Order 11291 in February 1981 which established new procedures for the development of agency regulations. The Executive Order required agencies to prepare Regulatory Impact Analyses (RIAs) – to be reviewed by the new


79 Anne M. Gorsuch (Administrator) to Finis St. John, 8 January 1982, NARA, RG 412, Office of the Administrator; Letters Sent, 1977-1982, Box 7, Multiple (January).

Office of Information and Regulatory Affairs and the Office of Information of Management and Budget – for any proposed major rules and to describe the costs and benefits of the proposed rule and that of any alternative that might achieve regulatory goals at less cost.  

The new regulatory review process imposed heavy burdens on agency rule-making and enabled the Administration to effectively obstruct the development of new regulations. A year-end summary of the Administration's Regulatory Relief Program proudly confirmed that the "number of rules published in the Federal Register has decreased by about twenty-five percent…during the first ten months of the Reagan administration…[with] roughly half as many major regulations published during this part of 1981 as during the same period of 1980." 

Practically, the new review process meant massive delays in the production of new regulations and standards for environmental pollution control and greater control by the Administration over the content of their development and agency enforcement actions, in general. The EPA was
reprimanded by Congress and environmental groups for the adverse consequences that the delay in issuing regulations had on environmental enforcement actions, inside and outside the agency. Finding that it took almost a year for enforcement policy and procedure guidance to be issued by the agency, the GAO reported that the EPA's Enforcement Counsel stated that the delay "contributed to the reduction in the number of enforcement cases developed and processed by EPA." Likewise, the GAO found that the "implementation of the [newly-authorized] Superfund program [was] hampered by a lack of final policies and guidance," and that delays in "providing the final guidance [were] the main factor hampering cleanup efforts to date." In response to the EPA's delay in issuing Pollution Control Guidance Documents, the National Resources Defense Council warned that "if EPA fails to play a leadership role, regulatory standards will be developed ad hoc in individual permitting proceedings," an approach which "is virtually certain to generate controversy and uncertainty, ultimately harming both the industry and the regulatory process."

Environmental enforcement, both inside and outside of the office, was held hostage by the delay caused by the Reagan administration's regulatory relief program - delay that was only exacerbated by the agency's under-funded research program. The limits that budget constraints imposed on the collection of monitoring data were aggravated by the attrition of EPA scientists


and engineers under the Reagan administration and by agency reorganizations that separated enforcement staff from research staff, making the dissemination of information between the two departments much more difficult. In a letter to the agency regarding EPA regulatory efforts on synthetic fuels, the NRDC stressed the thus-far unmet need for research on the pollutants. Given that "historically the bulk of health and safety research has been conducted by the federal government, with federal assistance or in response to explicit federal regulatory requirements," the NRDC stressed that "neither private industry nor the states can be expected to step in to compensate for EPA's abdication of its role." Due to severe cuts in the research budget, however, the NRDC worried that that "regulatory action necessary to assure the safe development of the industry [would] be delayed, and the public [would] have to bear serious and unnecessary risks." But despite these constraints on the EPA's research budget, the agency leadership insisted on securing scientific certainties before imposing regulations that may affect Americans' pocketbooks. In response to calls for an agency position on acid rain, administrators countered that "now is the time to find answers – not to grab at solutions which will temporarily calm the public but really do nothing about the long-term concerns of our citizens." Insisting that scientific research needed to be 100 percent certain before regulatory action could be taken,


the research process itself – already encumbered by massive resource constraints – became a tool for regulatory delay within the Agency.

In an effort to remove support from private enforcement efforts, the Reagan administration did what it could to restrict the dissemination of information and scientific data to the public. Environmental groups leveled the claim that "under the cloak of 'reform,' the Reagan Administration [was] carrying out a program to eliminate [environmental] protection…and participation by the public in the formation of environmental policy through regulation" in order to "smooth relations with industry." The NRDC accused the EPA of "smothering" reports and information, and of "launch[ing] an aggressive plan forbidding EPA-hired researchers from publishing politically unacceptable finding about environment threats," requiring that scientific findings be first reviewed by agency attorneys. In order to "ensure that information released [to the public] represents the viewpoint of Agency management," the EPA also ordered a freeze on the publication of all public access materials – including pamphlets, brochures, newsletters, magazines, and press releases – and suspended public participation grants and contracts.


pending further review of the activities conducted with the funding. The agency further strapped its public participation responsibilities by consolidating the Offices of Public Awareness and Press Services into the new Office of Public Information, but with "considerably fewer personnel" to handle public information duties.

Through these measures, the appointed EPA leadership sought to limit and control public access to the regulatory process, and devastated the EPA's own administrative enforcement efforts (see Figure 4.3). But though the leadership's plan for environmental deregulation stifled many private environmental efforts – especially those on newly-authorized statutes that were subject to the EPA's revised standard-setting and monitoring delay tactics – a small, but significant movement of citizen suits, aided by middle-level bureaucrats within the agency's ranks, was brewing in the courts. Under these deteriorating conditions, EPA personnel, sympathetic to the agency's traditional pro-environmental mission, fled the agency. Environmental groups encouraged EPA personnel to leave the agency and join the ranks of environmental groups – now doubly mobilized to compensate for the agency's weak enforcement efforts – to help bring citizen suits in court (Environmental Law Institute 1984; Ringquist 1995).

But many personnel who remained within the Agency likewise resisted "top-down political directives" from agency leadership and "supported and encouraged citizen suits" on select statutes (Ringquist 1995: 355, 357). Taking advantage of the institutional incentives – such

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as the development of clear, integrated pollution control standards and a fairly comprehensive system of monitoring data – established on existing statutes under the previous administration, these pro-environmental civil servants within the agency used "subtle strategies and 'hidden actions' to maintain a strong enforcement presence…contrary to Reagan administration policy wishes" (359).

In the end, despite a drastic reduction in formal enforcement activity under Gorsuch's leadership, citizen legal actions remained at a fairly steady rate since first filtering into the courts during the Carter administration. In 1982, 80 suits were filed in court by citizens and environmental groups, a large majority of which pertained to "less politically divisive [and] less salient" CWA violations – which middle-level EPA personnel had more freedom from agency leadership to enforce, and on which there was already a well-institutionalized collection of EPA-issued standards and monitoring data (Ringquist 1995: 341; see also Ringquist 1993, 1994). Given the wealth of monitoring data available through the agency's collection of routinely filed Discharge Monitoring Reports, and the "cooperation of EPA staff in assisting [private litigants] in their research in the published records," CWA violations became an easy target for citizen groups to identify and fight in court (Environmental Law Institute 1984: V-13).

This litigation-based backlash to the EPA leadership's reduced enforcement efforts and extreme politicization of environmental protection was echoed throughout the public sphere and other government offices. Environmental groups banded together to release a 32-page Indictment of the agency's enforcement efforts, outlining the methods by which the Reagan administration has "broken faith with the American people on environmental protection" by taking "scores of actions that veered radically away from the bipartisan consensus in support of environmental
protection that has existed for many years."  

Congress directed its own campaign against Gorsuch's leadership, holding numerous hearings and investigations on the reduced enforcement actions of the agency, including one in which Congress held Gorsuch in contempt for denying the body investigatory documents on superfund clean-ups.  

Facing a growing groundswell of public and political condemnation, Gorsuch resigned as Administrator of the agency in early 1983. Heading into the 1984 presidential election, the administration engaged in a shrewd political calculation meant to stem the tide of public outrage against its anti-environmental record and reinstated William Ruckelshaus – the tried-and-true veteran who had led the agency as its first Administrator. Under this new agency management, the trickle of private litigation activity that had begun under the Carter administration would become a flash flood by the mid-1980s. Having lost the public relations battle over the deregulation of environmental enforcement, the new Ruckelshaus-led EPA would undergo a reevaluation of its enforcement goals, and carve out a large role for those strategies that utilized the enforcement powers of private environmental litigation.

1. Re-regulating Environmental Protection

The re-institution of Ruckelshaus as Administrator of the EPA marked the culmination of considerable protest against the Reagan administration's strategy of environmental deregulation. Having, according to many conservatives, "squandered an opportunity for lasting reform of

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97 Anne M. Gorsuch (Administrator) to Eugene V. Atkinson (U.S. Representative) et al., 20 December 1982, NARA, RG 412, Office of the Administrator; Letters Sent, 1977-1982, Box 8, Multiple (December); Anne M. Gorsuch (Administrator) to John D. Dingell (Chairman, Subcommittee on Oversight and Investigations, Committee on Energy and Commerce), 16 December 1982, NARA, RG 412, Office of the Administrator; Letters Sent, 1977-1982, Box 8, Multiple (December).
environmental regulation and statutes," Reagan was forced to replace many of his ideologically conservative appointments at the EPA with more moderate candidates, who could better speak to the revived environmental movement that grew in response to the administration's dismantlement of the federal environmental regulatory program (Vig 1994: 79). To environmental groups, Ruckelshaus’ appointment signaled a breath of fresh air. Later credited by groups with "restoring morale and a high sense of purpose to the beleaguered profession" in the EPA, Ruckelshaus was applauded in the media for "turning around an agency that had become mired in scandal" and "restoring the public's confidence in the agency."

Upon returning to the EPA and finding the agency's enforcement apparatus in such disarray, Ruckelshaus, in a speech before agency personnel at the National Compliance and Enforcement Conference, disclosed that "based on what I have learned, I am nervous about how we are doing in discharging our enforcement responsibilities…[and] I am nervous about what I perceive to be an apparent lack of action and serious commitment to ensuring that these laws and regulations are enforced." Calling upon EPA personnel to ramp up enforcement efforts, Ruckelshaus made it clear to his staff and the public that he would "disabuse anyone who believes EPA, while I am there, will not have the will and the determination to enforce the laws as written by Congress." Shedding much of his predecessor's pro-industry politics, Ruckelshaus

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98 Andrian W. DeWind (Chairman, Natural Resources Defense Council, Inc.) to William D. Ruckelshaus (Administrator), 29 November 1984, NARA, RG 412, Controlled Corres 84; Acc # 86-0055, Box 3, DEJ-DEZ July-Dec.

99 Memorandum, Robert P. Meacham (Acting Director, Office of Public Affairs) to William D. Ruckelshaus (Administrator), 7 December 1984, NARA, RG 412, Intra-Agency Correspondence 84, Box 3, Region VI (July-Dec).

100 Remarks of William D. Ruckelshaus (Administrator, U.S. Environmental Protection Agency) before the National Compliance and Enforcement Conference in Alexandria, VA, 24 January 1984, NARA, RG 412, Intra-Agency Correspondence 84, Box 1, ECM (Jan-Mar).
worked to translate this will into action – his first step consisting of "restor[ing] a stable, effective, and harmonious working environment" at the agency. Reinstating the Office of Enforcement, which had been dismantled (twice) under Gorsuch’s administration, Ruckelshaus reorganized the agency to achieve "a straightforward management structure with clearly defined roles for everyone in the agency in support of EPA's mission."\(^\text{101}\) Ruckelshaus, likewise, worked to restore much of the agency's budget and workforce that was cut by the Gorsuch Administration (see Figures 4.4 and 4.5) and even sanctioned Republican House members to reach across party lines and join the Democratic majority in restoring EPA funding to levels enjoyed before the Reagan administration.\(^\text{102}\) Agency personnel credited Ruckelshaus' rousing messages to EPA employees calling for more vigilant environmental enforcement with igniting a new fire under agency enforcement personnel, who referred 45.6 percent more cases to the Department of Justice in 1984 than in the previous year (see Figure 4.2).\(^\text{103}\) Ruckelshaus made it clear upon his return to the EPA that informal negotiations with industry would no longer encompass the agency's enforcement strategy. When administrative procedures do not "achieve prompt and complete compliance," Ruckelshaus made it clear that "judicial enforcement should be employed without hesitation."\(^\text{104}\)

\(^\text{101}\) Barbara Blum (Deputy Administrator) to James H. Evans (Chairman of the Board, Union Pacific Corporation), 28 June 1978, NARA, RG 412, Office of the Administrator, General Correspondence, 1971-1982, Box 302, Chronological File (Jun 16-30).

\(^\text{102}\) William D. Ruckelshaus (Administrator) to William Drayton (Chair, Environmental Safety), 12 September 1984, NARA, RG 412, Controlled Corres 84; Acc # 86-0055, Box 4, DON-DT (July-Dec).

\(^\text{103}\) Roger P. Meacham (Acting Director, Office of Public Affairs) to William D. Ruckelshaus (Administrator), Article from Dallas Morning News, 7 December 1984, NARA, RG 412, Intra-Agency Correspondence 84, Box 3, Region VI (July-Dec).

But even with this renewed commitment to environmental protection, the EPA faced major administrative hurdles. Challenged with meeting new statutory responsibilities and addressing a backlog of violations incurred during the agency's previous lax enforcement period, the EPA's enforcement capacity, environmental groups worried, was "hopelessly inadequate to [meet] the new circumstances of the mid 1980s."\(^{105}\) But following the successful legal campaign of citizen groups during the Gorsuch administration, the agency now had a new tool firmly established on its radar for the enforcement of environmental statutes. Shortly after environmental groups held a conference to discuss strategies for augmenting the agency's enforcement efforts through private environmental suits (Ringquist 1995: 356), Ruckelshaus asked the Office of Enforcement and Compliance Monitoring and the Office of Policy, Planning, and Evaluation to conduct a study in conjunction with the Environmental Law Institute ["ELI"] – an independent environmental research center – to provide an analysis of the regulatory role played by citizen suits.\(^{106}\) Ruckelshaus was particularly interested in gathering information to determine whether there is "room for improving the citizen suit process" and whether the "EPA should change its policy toward such suits" and officially offer direct litigation support.

Through interviews with agency personnel, citizen groups, and industry representatives, the study offered the first comprehensive catalogue and analysis of citizen environmental suits, and provided recommendations on how the agency might foster and facilitate the process of private environmental litigation. While industry officials viewed private environmental suits as a

\(^{105}\) William Drayton (Chair, Environmental Safety) to William D. Ruckelshaus (Administrator), 17 August 1984, Re: Attachment: Environmental Safety's Response to Specific Issues Raised in William Ruckelshaus's July 31, 1984 Letter, NARA, RG 412, Controlled Corres 84; Acc # 86-0055, Box 4, DON-DT (July-Dec).

\(^{106}\) Memorandum, Courtney M. Price (Assistant Administrator for Enforcement and Compliance Monitoring) to Associate Enforcement Counsels, et al., 14 May 1984, Re: Citizens Suits Study, NARA, RG 412, {Ctrl & Major Corres}, Box 5, May Chron File End 61-135.
redundancy that posed an unnecessary additional threat to their economic interests, federal enforcement officials "expressed general support for citizen enforcement," noting that "a large portion of citizen notices addressed violations that either were worthy of agency action but had escaped EPA attention or, though not on EPA's priority list, were appropriate subjects of enforcement action" (ELI 1984: V-7). In that vein, the study recommended that given the recent surge in private suits, the EPA could take steps to further promote this legal strategy by publicly clarifying the EPA's attitude and policy toward citizen suits, making compliance data more easily available to private groups, recommending the extension of penalty provisions for noncompliance to other statutes besides the CWA, and creating a more complete catalog and tracking system of citizen actions.

In a continuation of this inquiry, Ruckelshaus also arranged meetings with environmental groups to discuss what role citizen suits might play in environmental enforcement and how the EPA might work with these groups to foster this alternate enforcement strategy. In a memo drafted in preparation for a meeting with Ruckelshaus, the NRDC outlined a prescriptive strategy for the EPA to "strongly support citizen suit activity." Given that citizen suits "augment EPA and state enforcement efforts" and "are a legitimate and appropriate form of public involvement in pollution abatement," the NRDC urged the EPA to establish a more firm and clear agency stance on citizen suits by "publicly support[ing] the concept of citizen suits" and "visibl[y] recogniz[ing]...key citizen enforcement groups" with an award or public commendation, endorsing and promoting "continued cooperation with citizen groups seeking information concerning permit compliance." assuring and respecting "the maintenance of full party status"

107 Memorandum, Jack A. Ravan (Assistant Administrator, Office of Water) to William D. Ruckelshaus (Administrator) 11 June 1984, Re: Citizen Suit Meeting on June 12, NARA, RG 412, Intra-Agency Correspondence 84, Box 1, OW (Apr-June).
for citizen plaintiffs by intervening in, rather than preempting, citizen suits, and by supporting "the viability of citizen suit litigation by intervening or filing amicus briefs" against challenges "which seek to undermine the availability or efficiency of citizen suits."

After meeting with the environmental groups, Ruckelshaus took measures to fulfill many of their requests. In a memo addressing the NRDC's proposals for agency facilitation of citizen suits, Courtney Price, the Assistant Administrator for Enforcement and Compliance Monitoring, recommended that while the EPA would need more study to develop an informed and nuanced agency position on citizen suits, EPA intervention, and amicus brief filings, the agency should "consider more active use of press releases and press conferences to note the efforts of [citizen] groups in particular cases" and "continue to cooperate with citizen groups in responding to their requests for information on non-compliance." In a follow-up letter to the environmental groups, Ruckelshaus expressed his gratitude for citizen "efforts...[that] have brought us close to

108 Rather than issuing a blanket statement of support of citizen suits, amicus briefs, or interventions, the agency thought it important to reserve judgment for those instances in which private suits might jeopardize environmental enforcement. The EPA was concerned, for instance, that congressional proposals to grant citizens the right to bring suits against companies to compel hazardous waste cleanup would force the EPA to divert resources away from actual clean-up efforts and toward obligations to join in the litigation of citizen suits. The EPA worried that such a "seemingly compassionate provision" would "second-guess our priority-setting mechanisms" and "be disruptive to our efforts to manage a very complex cleanup process" (Remarks of Lee M. Thomas (Administrator, EPA) before the 6th National Conference on Management of Uncontrolled Hazardous Waste Sites in Washington, D.C., 4 November 1985, NARA, RG 412, {Speech and Congress Testimony}, Box 1, Title III Communications; see also Testimony of Lee M. Thomas (Administrator) before House Ways and Means Committee, 25 July 1984, NARA, RG 412, Intra-Agency Correspondence 84, Box 2, EA (July-Dec)). The agency reserved the right, in other words, to support citizen suits which supplemented agency enforcement efforts, but not those that might impede its administrative processes.

109 The agency, for instance, developed an EPA Awards for Environmental Protection, see Memorandum, Robert H Wayland and Josephine Cooper to Lee M. Thomas (Administrator), 7 June 1985, Re: EPA Awards for Environmental Protection Achievement—Options Paper, NARA, RG 412, CNTRL CORRES 85; Acc # 87-0050, Box 5, EA (Apr-June).

110 Memorandum, Courtney M. Price (Assistant Administrator for Enforcement and Compliance Monitoring) to William D. Ruckelshaus (Administrator), 18 July 84, Re: EPA Response to Administrator's Meeting on Citizen Suits, NARA, RG 412, Intra-Agency Correspondence 84, Box 2, Administrator (July-Sept).
Stressing that he "truly believe[d] that citizen groups have played an important role in bringing instances of non-compliance to EPA's and the public's attention," Ruckelshaus, in a separate memorandum to EPA regional administrators, "urge[d] all Agency enforcement personnel to continue to cooperate with citizen groups." Relaying the appreciation of citizen groups to agency personnel "for the [past] cooperation of EPA employees in responding to information requests on non-compliance," Ruckelshaus encouraged agency personnel to continue to "promptly respond to...[information] requests and review...60-day notices" in order to support citizen suits in their nascent stages.

These directives to agency personnel were likewise translated into more formal agency strategies to enhance the public dissemination of more useful and reliable monitoring information. Under the leadership of Ruckelshaus and his successors, Lee Thomas and Bill Reilly, the EPA established new monitoring procedures and data systems that would facilitate the access and input of environmental groups and stronger enforcement of environmental mandates. Following the years of limited public access under the Gorsuch administration, Ruckelshaus immediately issued "EPA-wide methods of operation and goals" which ordered the

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111 William D. Ruckelshaus (Administrator) to Ross Sandler (Senior Attorney, Natural Resources Defense Council), 30 July 1984, NARA, RG 412, Controlled Corres 84; Acc # 86-0055, Box 11, SA-SCG (Jan-June).

112 Memorandum, William D. Ruckelshaus (Administrator) to Regional Administrators, 30 July 1984, Re: EPA Response to Citizen Suits, NARA, RG 412, Intra-Agency Correspondence 84, Box 2, Administrator (July-Sept).

113 Following Gorsuch, none of the EPA Administrator appointments made by Reagan or Bush were characterized by the same ideological fervor. Rather, the appointments of Ruckelshaus, Thomas, and Reilly were seen as concessions to environmental groups. Bill Reilly, the former president of the World Wildlife Fund and Conservation Foundation, for instance, was appointed to follow through on a campaign promise to environmentalists (Vig 1994: 81; Memorandum, Lee M. Thomas (Deputy Administrator) to all EPA employees, 23 December 1988, NARA, RG 412, Inter-Agency Corres 88; Acc # 90-0036, Box 1, Administrator (Oct-Dec)).
agency to "operate as if it were in a fishbowl." Affirming that the agency should "endeavor to play a useful role in reducing the gulf that exists between government, environmentalists, and those we regulate," Ruckelshaus emphasized that "Agency staff have an obligation to respond quickly and even-handedly to requests for information and to be available to all parties who have an interest in the Agency's actions."

Given that "knowledge about public health and environmental problems [would] sharpen the public's understanding of issues and allow it to suggest actions and politics that conform more closely to their interests," the agency began to fashion itself as a purveyor of policy and technical guidance. Ruckelshaus instructed agency personnel to explain "the Agency's work in clear, understandable terms that provide a basis for public response," and to "establish consistent processes and legal standards within EPA and throughout the Federal government to assess and manage environmental and public health risks." In that vein, the agency immediately developed its first environmental monitoring policy statement which "crystallized the considerable experience and expertise on environmental monitoring that has been gained over the past several years" to provide "an overall framework of objectives to guide our monitoring programs," and spearheaded the creation of a centralized capacity to manage all of the major information


115 Alvin L. Alm (Deputy Administrator) to A. Alan Hill (Chairman, Council on Environmental Quality), 1 May 1984, NARA, RG 412, Controlled Corres 84; Acc # 86-0055, Box 3, CEQ (Jan-Jun); William D. Ruckelshaus (Administrator) to Louis L. Goldstein (Comptroller of the Treasury), 3 January 1984, NARA, RG 412, Controlled Corres 84; Acc # 86-0055, Box 5, GJ-GON (Jan-June).

116 Alvin L. Alm (Deputy Administrator) to Assistant Administrators, et al., Re: Environmental Protection Agency Monitoring Policy Statement, 23 December 1983, NARA, RG 412, Controlled Corres 84; Acc # 86-0055, Box 472, Dec 15-31.

117 Alvin L. Alm (Deputy Administrator) to Tim A. Matzke, 26 January 1984, NARA, RG 412, Controlled Corres 84; Acc # 86-0055, Box 16, Jan 16-31.
systems at EPA. By centralizing authority over the agency's monitoring practices and information systems, EPA leadership was able to ensure that the collection and analysis of monitoring data was done in a way as to facilitate public access. As the EPA transitioned to monitoring systems that relied upon the analysis of risk assessment and the use of risk management in the 1980s, for instance, it quickly implemented the Integrated Risk Information System ("IRIS") which publicly released complex risk assessment and management information on chemical substances that was designed "for non-scientists who must deal with risk issues on a regular basis." The System, which was used extensively by environmental groups, was developed in "response to repeated [public] requests for Agency risk assessment information in various situations" and to "help prevent presentation of inconsistent information in response to such requests."

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118 Memorandum, Howard M. Messner (Assistant Administrator for Administration and Resources Management) to Alvin L. Alm (Deputy Administrator), 16 February 1984, Re: Creation of Central Capacity to Manage Major Information Systems in EPA, NARA, RG 412, Controlled Corres 84; Acc # 86-0055, Box 16, Feb 16-29.


121 Memorandum, A James Barnes (Deputy Administrator) to Assistant Administrators, et al., 31 March 1986, Re: Establishment and Implementation of the Integrated Risk Information System, NARA, RG 412, Corres of Admin & Deputy 1/86; Acc # 88-0033, Box 5, Deputy Administrator (Jan-Mar).
Maintaining that the Agency's "success in carrying out [its] mission depends in large measure on being able to understand existing environmental problems…, determine what impact our activities are having, and present this info as effectively as possible to the public," EPA leadership devoted considerable administrative resources to the development of monitoring practices and data systems that would be useful, comprehensible, and accessible to the public. Indeed, in the post-Gorsuch era, EPA leadership believed that "rebu[lding] the bridges with the environmental groups by seeking their opinions and hearing them" would "renourish the individuals and the process which contributed to the establishment of our Agency." As such, agency leadership reached out directly to these groups, including them in agency conferences at reduced rates "to facilitate broad public access" and inviting them to meetings to discuss policy and standard-setting, as well as citizen suits, more directly.

122 Memorandum, Henry Habicht II (Deputy Administrator) to Assistant Administrators, et al., 4 October 1989, Re: Development of Center for Environmental Statistics, NARA, RG 412, Inter-Agency Correspondence 89; Acc # 91-0034, Box 3, Deputy Administrator (July-Dec).

123 Memorandum, Thomas Eichler (Regional Administrator) to Lance Ayrault (Special Assistant to the Administrator), 16 April 1984, Re: One Year Assessment of Ruckelshaus' Administration, NARA, RG 412, Intra-Agency Correspondence 84, Box 2, Region III (Apr-June).

124 Memorandum, William D. Ruckelshaus (Administrator) to Assistant Administrators, et al., 9 July 1984, Re: Coordination of Speaking Engagements at Conferences, Conventions, Meetings, and Symposia, NARA, RG 412, Intra-Agency Correspondence 84, Box 2, Administrator (July-Sept).

125 Memorandum, Josephine S. Cooper (Assistant Administrator for External Affairs) to William D. Ruckelshaus (Administrator), 3 January 1984, Re: January Constituency Calendars, NARA, RG 412, Intra-Agency Correspondence 84, Box 1, EA (Jan-Mar); Memorandum, Alvin L. Alm (Deputy Administrator) to Howard M. Messner (Assistant Administrator), 20 December 1983, Re: Follow-up on November 22 Meeting with NRDC and Other Environmentalists, NARA, RG 412, Office of the Administrator, Intra-Agency Memorandums, 1977-1983, Box 112, AMR (Oct-Dec); Memorandum, Josephine Cooper (Assistant Administrator) to Lee Thomas (Administrator), 17 January 1985, Re: Proposed Meeting with Government, Business, Environmental Interest Groups, NARA, RG 412, CNTRL CORRES 85; Acc # 87-0050, Box 2, EA (Jan-Mar); Alvin L. Alm to Bob Adamson 5 July 1984, NARA, RG 412, Controlled Correspondence, Box 1, A-AK (Jul-Dec); Memorandum, Josephine S. Cooper (Assistant Administrator) to Lee Thomas (Administrator), 7 March 1985, Re: Office of Private and Public Sector Liaison 1985 Constituency Calendar, NARA, RG 412, CNTRL CORRES 85; Acc # 87-0050, Box 2, EA (Jan-Mar); Memorandum, Richard E. Sanderson (Acting Assistant Administrator for External Affairs) to Lee M. Thomas (Administrator), 1 August 1985, Re: Office of Private and Public Sector Liaison (OPPSL) 1986-86 Constituency Calendar, NARA, RG 412, CNTRL CORRES 85; Acc # 87-0050, Box 2, EA (July-Sept); Memorandum, Jack W. McGraw (Acting Assistant Administrator) to Lee Thomas (Administrator), 14 June 1985,
Sensing the growing importance, and prevalence, of citizen suits to environmental enforcement, agency leadership during the 1980s would continue to explore the regulatory possibilities of private environmental litigation. The agency made efforts to stay abreast of active citizen suits currently in court,\(^\text{127}\) to file briefs in support of citizen suits that might advance environmental policy and regulation,\(^\text{128}\) and to develop a role for itself in teaming up with and facilitating these private enforcement efforts. By the end of the Reagan administration, 351 citizen environmental suits were filed in the U.S. District Courts, a rate that far surpassed citizen environmental actions at any other point in the agency's history. With this new top-down strategy of actively protecting and enhancing the viability of citizen suits, the EPA now had a formidable tool at its disposal with which it could combat violations of environmental protection statutes.

III. Assessing the Effectiveness of the EPA's Private Litigation Enforcement Strategies

As a final exploration of the EPA's promotion and utilization of this alternate enforcement tool for environmental protection, this section offers an assessment of the

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\(^{126}\) Memorandum, Jack E. Ravan (Assistant Administrator) to William D. Ruckelshaus (Administrator), 11 April 1984, Re: Section 505 Citizens Suits Meeting, NARA, RG 412, Intra-Agency Correspondence 84, Box 1, OW (Apr-June); Memorandum, Courtney M. Price (Assistant Administrator) to James Barnes (Deputy Administrator), 4 December 1985, Re: Citizen Enforcement Suits, Clean Water Act, NARA, RG 412, CNTRL CORRES 85; Acc # 87-0050, Box 1, ECM (Oct-Dec).

\(^{127}\) Michael S. Alushin (Associate Enforcement Counsel, Air Enforcement Division) to Jerome Butler (Public Interest Law Center of Philadelphia), 27 March 1986, NARA, RG 412, Corres of Admin & Deputy 86; Acc # 88-0034, Box 1, B-Bal (Jan-June); Memorandum, Courtney M. Price (Assistant Administrator) to A. James Barnes (Deputy Administrator), 4 December 1985, Re: Citizens Enforcement Suits, Clean Water Act, NARA, RG 412, CNTRL CORRES 85; Acc # 87-0050, Box 1, ECM (Oct-Dec).

\(^{128}\) Memorandum, Courtney M. Price (Assistant Administrator for Enforcement and Compliance Monitoring) to A. James Barnes (Deputy Administrator), 22 July 1985, NARA, RG 412, CNTRL CORRES 85; Acc # 87-0050, Box 1, ECM (July-Sept).
effectiveness of this regulatory strategy in motivating private environmental litigation. That the EPA, much like the EEOC, viewed and promoted private environmental litigation as an important component of its enforcement strategy is evident from the historical record. Without adequate resources to effectively combat widespread environmental problems through command-and-control administrative actions, the agency developed strategies to promote and enhance an alternate pathway for the enforcement of environmental policy, strategies which hinged, most critically, on the development of systems which could reduce the costs of engaging in highly complex private environmental litigation. But again, the question of whether these strategies produced the intended outcome, and actually motivated private environmental litigation, is an important component of this project. Without such evidence, we have very little to say about the capacity of underfunded, understaffed, and disempowered bureaucratic agencies in the American state to develop alternate pathways of policy enforcement and to implement strategies which actually motivate private regulatory behavior. Using annual aggregate data on environmental litigation rates and an original measure of the EPA's efforts to mobilize private environmental litigation, this section tests whether these efforts resulted in greater environmental legal activity among private individuals.

**A. Measurement of the Variables**

While a body of literature has explored the empirical ramifications of the EPA’s administrative actions (e.g. Wood 1992, 1998; Ringquist 1995), little work has been done to untangle and test the more informal agency actions that contribute to the enforcement of environmental policy. But by making use of the in-depth archival explorations of EPA behavior presented herein, we can begin to identify and devise a measurement of largely 'hidden' and
informal enforcement actions that fall outside the realm of statistics capturing more formal agency administrative activities (Collier et al. 2004). As revealed by the archival evidence discussed in the previous section, the EPA contributed most heavily to the motivation of environmental litigation by developing regulations to which polluters could be held legally accountable and by collecting and disseminating data according to which environmental protection violations could be easily detected and litigants could build a well-founded lawsuit. While private individuals and environmental groups typically do not have the financial capability to collect the costly scientific data needed to prove environmental violations or possess the expertise to interpret and analyze highly complex pollutant data in order to make fine-grained legal interpretations, the agency stepped in as the primary architect of a system of data collection and analysis that armed plaintiff groups with the otherwise unattainable tools that were necessary for bringing private environmental litigation.

Though the creation and maintenance of an effective system of data collection and analysis took some time to cement – given, especially, the complexity of organizing and developing a singular, integrated data system from the decentralized and inadequate systems that existed prior to the agency’s formation – this architecture of information, once created, offered a lasting resource to private plaintiffs, one that middle-level career bureaucrats who were sympathetic to the EPA’s goals could use and disseminate to private environmental groups even at moments when hostile agency leadership was deconstructing the more formal administrative enforcement activities of the agency. As such, my main variable of interest, EPA-motivated

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129 While EEOC efforts to motivate private employment litigation are represented by a more variable measure, which fluctuates according to periods of promotion, and demotion, of private litigation efforts, the measure of EPA private litigation enforcement remains steady after the architecture of a data system and effluent standards is put in place. As will be discussed in Chapter 6, these differences have much to say about the how the organization of agency enforcement activities can affect the degree to which bureaucratically-motivated private litigation
'private litigation enforcement,' captures the period of institutional development in which the agency developed an architecture for data collection and analysis that could be used by private litigant groups to bring environmental litigation in the courts, a moment that was characterized by the concerted efforts of the EPA to develop regulations and an integrated and open data system during the Carter administration. Since the archival evidence suggests that these regulations and data systems were mostly solidified by 1978 – and continued to be available to plaintiff groups after this period – the measure of EPA private litigation enforcement ("EPA-PLE") takes on a value of 1 starting in 1978, and a value of 0 before this period of data availability. Using this measure, I test the effect of this agency private enforcement strategy on the prevalence of environmental legal efforts, which is measured as the annual number of private environmental lawsuits filed in the U.S. District Courts.

Enforcement is subject to fluctuations in the ideological position of appointed leadership. While the EEOC's strategies for promoting private employment litigation were inextricably connected to daily administrative activities that could be easily manipulated by agency leadership, the EPA's strategy of private litigation enforcement, which was based in the construction of a system that produced lasting results, was more highly insulated to ideological shifts in the agency leadership.

While the EPA did engage in several other strategies to promote private litigation (e.g. setting up training and funding programs, shaping legal precedent through agency interpretations and briefs, etc), there is common consensus that one of the greatest impediments to private environmental litigation is the significant expense of collecting and analyzing scientific environmental information. Indeed, as the archival analysis reveals, while the agency did engage in these other strategies in its early formative years, private environmental litigation rates still remained low. As such, in this statistical analysis, I will focus on the moment when the agency developed a system of collecting data and issuing regulations, arming plaintiffs with the tools they most needed to bring private environmental lawsuits.

I tested two models with two different dependent variables in Chapter 3 (EEOC charge receipts and employment discrimination lawsuit filings), this analysis on the EPA only tests the effects of PLE on environmental litigation rates. There are two reasons for this: one more theoretical, and the other more practical. First, the EEOC administrative and litigation processes differ markedly from those on environmental matters. While complainants with employment discrimination claims must first go through the EEOC's charge processing and conciliation process, complainants with claims of environmental violations do not need to first go through an administrative process at the EPA, but only need to file a notice of intent to sue with the agency. The EEOC charge process, therefore, can be better conceptualized as a first stage in the employment discrimination litigation process, and so it is even more imperative to include this initial stage in a statistical analysis of the effects of EEOC motivations of private litigation. While it would be useful to also test the effects of EPA private litigation enforcement strategies on the rates of intent to sue notices filed (as this would also include those potential environmental legal actions that are settled before they reach the judicial system), it is less theoretically necessary, but also quite difficult, practically.
When testing the effect of these agency efforts on rates of private environmental litigation filings, I also included several control variables which might, given theoretical considerations, impact the likelihood that individuals will engage in private environmental litigation. Following the analysis presented in Chapter 3, I control for the effect that external political institutions might have on private legal enforcement of environmental claims, and include variables measuring the influence that congressional and judicial actions might have on rates of private environmental litigation. Congressional environmental legislation can shape private litigation on environmental matters through its statutory provisions of, for instance, the private right to sue, definitions of what constitutes standing to bring environment lawsuits, or stipulations on attorneys' fees provisions, punitive damages, and compensatory claims. Given that environmental issues have become highly politicized over the years, with Republican members of Congress voting in opposition to typically Democratically-supported environmental protection policy (Calvert 1979, 1989; Kamieniecki 1997), and that Congress has passed a number of pieces of legislation enacting environmental regulations and shaping private rights of action over the years, I include a measure of congressional ideology, compiled as the average of common space score of members sitting in the House and Senate (Poole and Rosenthal 1997; Poole 1998). Likewise, since the judiciary issues opinions which can shape the legal landscape

Numerous conversations over the last two years with personnel at the EPA and DOJ have indicated that neither office maintains records of notices to sue filings.

132 The dependent variable was transformed to the natural log of the litigation rate to ensure that the relationship between my main variable of interest (EPA PLE) and litigation was linear. Measurements of environmental litigation are assembled by the Statistics Division of the Administrative Office of the US Courts, and are available in the "Federal Court Cases: Integrated Data Base" study through the Inter-University Consortium for Political and Social Research (Study 8429 contains individual-level litigation data for the years 1970-2000; individual studies are also available for the years 2001-2009). The data base also contains information on the nature of the suit; in this case, I included all private lawsuit filings which were coded as pertaining to "environmental matters," and excluded any filings in which the US was named as either the plaintiff or defendant.
for private litigation enforcement (e.g. through opinions on standing, definitions of statutory violations, etc), I include the judicial ideology measure used in Chapter 3, compiled as the average common space score of the appointing President of each justice or judge sitting on the U.S. Courts of Appeals or Federal District Courts that year.

Lastly, in order to account for the effects that larger national trends concerning the judicial process, or pollution levels, might have on private environmental litigation rates, I include several additional control variables. As previously discussed, the law and society literature suggests that the propensity for individuals to engage in litigation can be shaped by general fluctuations in the 'litigiousness' of society, presumably driven by activist judges and lawyers (Glazer 1976; Manning 1977; Kagan 1996). Accordingly, I include a measure of the number of private civil suits filed in the US District Courts each year (where the US is not a plaintiff or a defendant), excluding those suits that pertain to environmental matters. Likewise, given that we might expect delays in the litigation process to deter private groups from opting to file lawsuits in the courts system, I include an annual measure of the median time it takes for a federal civil suit to get to trial from the date of its filing each year.\footnote{Measurements of litigiousness and judicial delay were both provided by the Statistics Division of the Administrative Office of the US Courts.} And finally, we might also expect rates of environmental litigation to fluctuate according to pollution levels, with moments of heavy pollution leading to more litigation activity on environmental matters. While monitoring data from the EPA might tell us a bit about pollution levels, this information could just as easily provide a measure of the EPA's own administrative ability to track violations of environmental statutes. As such, given that we might expect pollution levels to be linked to
larger national trends in manufacturing output, I include a control variable which measures the annual gross value of industrial production, seasonally adjusted.\textsuperscript{134}

\textbf{B. Empirical Results and Analysis}

As in Chapter 3, this analysis utilizes a dependent variable that contains time series data, making ordinary least squares (OLS) inappropriate for estimating the model. OLS requires an assumption of no autocorrelation in the error term, but in times series data – represented, in this case, by a dependent variable containing a measure of the number of private environmental lawsuits filed each year – the disturbances of one time period can be correlated with the disturbances of the next. Such serial correlation in the error term can translate into biased standards errors when OLS is used to estimate the model. A Durbin-Watson test of my model detected serial correlation, making OLS linear regression unsuitable.\textsuperscript{135} Accordingly, I estimated the model using Newey-West (1987) autocorrelation- and heteroskedasticity-consistent standard errors, which produce estimated coefficients identical to those produced by OLS, but with standard errors that are robust to autocorrelation.

The results of the private environmental litigation model suggest that the effect of the EPA’s creation of a robust system of environmental pollutant data and regulations on rates of private environmental litigation filed in the US District Courts is positive and significant at p<0.000 (see Tables 4.1 and 4.2). The estimated coefficient indicates that the EPA’s creation of a

\textsuperscript{134} Data on the annual manufacturing output is available from the Federal Reserve Bank.

\textsuperscript{135} A Dickey-Fuller test also indicated the presence of nonstationarity in my variables. Following the analysis provided in Chapter 3, I tested for cointegration before opting for the more traditional, but less theoretically appealing, alternative of removing the nonstationarity from the time series by running a regression on the first differences of the variables (see Chapter 3, fn 109). Using a Dickey-Fuller test to check for nonstationarity in model’s residuals, I found the residuals of the EPA model to be stationary, meaning there was no need to run the regression with first-differenced terms.
system for issuing regulations and collecting and maintaining pollutant data that could be tapped for litigation discovery resulted in an increase in the annual predicted rate of private environmental litigation filing by about 104 environmental lawsuits. This is a substantial increase considering that only 45 private environmental lawsuits were filed each year, on average, in the pre-1978 period, and that the highest value that the dependent variable takes over the entire 1970-2008 period is 1,332 lawsuits filed in 2001.

The estimated coefficients on most of the control variables were also in the predicted direction. While the effects of general litigiousness and manufacturing output each failed to reach statistical significance, each was estimated by the model to have a positive effect on the annual rate of private environmental litigation filings, findings which are consistent with the expectations of this analysis. The estimated coefficient on congressional ideology also behaved as predicted, with private environmental litigation rates expected to increase during years with a more liberal Congress. While the findings suggest that congressional ideology may have a quite substantial effect on private environmental litigation rates – with a one unit change in congressional ideology leading to a difference of about 236 environmental lawsuit filings – the coefficient was not estimated precisely enough to achieve conventional levels of statistical significance. Only the estimated coefficients on judicial delay and judicial ideology failed to perform as expected. While this analysis predicted that each of these variables would have a negative effect on the predicted rate private environmental legal actions, the results suggest that judicial delay and a conservative judicial ideology are each positively correlated with private

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136 This result suggests other possible perspectives on how judicial ideology might affect the motivations of private action on environmental claims. One such perspective might be that judicial ideology moves with larger ideological trends in civil society. Under such conditions, we would expect to see moments of higher levels of environmental policy violations coincide with moments of conservative judicial ideology. If this is the case, a positive relationship
environmental litigation rates, but with the coefficient on judicial delay failing to achieve statistical significance.

As a final complement to the historical account presented in the preceding section of this chapter, this statistical analysis confirms that – even after controlling for the influence of external political institutions, characteristics of the litigation process, and pollution levels – the EPA's strategy for motivating private environmental litigation has a substantively and statistically significant effect on private environmental litigation rates.

IV. Discussion and Conclusion

By the start of the Clinton administration, EPA strategies to encourage the regulatory benefits of private litigation enforcement were fully integrated into the agency's enforcement efforts. By then, the EPA had developed an informal policy of "encourag[ing] the filing of citizen suits" and instructed personnel to only on rare occasions preempt citizen suits with agency filings on the same violation, granting citizen suits the space to engage in environmental protection without agency interference (Ringquist 1995: 357). Speaking before the Senate Subcommittee on Clean Water, Fisheries, and Wildlife in 1993, the EPA Assistant Administrator of Enforcement, Steven Herman, recognized "the crucial contributions made by citizens in enforcing against polluters." With a "vigorous citizen enforcement presence" in place, Herman applauded that violators of environmental statutes would now have to contend with "an additional deterrent to noncompliance" in the form of the citizen environmental suit. Noting that citizen suits have "played an important role in assisting…federal enforcement by developing
extremely favorable legal precedent," the EPA pledged its continued assistance to citizen suits and "to continuing a positive, mutually beneficial relationship with citizen enforcers."

Moving through the 1990's, protection and promotion of this highly effective alternate enforcement strategy would remain a high priority for the Agency. But, as we have seen throughout this chapter, the road to securing the regulatory role of the private environmental suit has been a long one, and one that has been contextually-situated within the larger process of the agency's institutional development and shifting political tides. Indeed, the story of the EPA's relationship with private environmental litigation speaks to the importance of incorporating historical development and temporal specificity into our assessments of the tools available to and utilized by regulatory agencies. Citizen environmental suits, though statutorily permitted in nearly all pollution control legislation and, from the agency's formative moments, on the radar of EPA leadership as a potentially useful – but parallel – tool for augmenting the agency's own enforcement efforts, were not popularly employed until the agency issued clear standards on environmental violations and developed a system of data collection and dissemination. With this structure of standards and data for lawsuit development in place, private environmental litigation could then be used more forcefully when the agency's administrative capacity to carry out basic enforcement efforts was called into question. At those moments when the EPA leadership defected from the agency's clearly defined goal of enforcing environmental protection, middle-level agency personnel still had the ability – and the impetus – to look for creative solutions to administrative weaknesses, and use its collection of environmental data to motivate interest in what was once a highly underutilized enforcement strategy located in the private legal actions of

citizen groups. Upon its use, this enforcement strategy gained recognition and legitimacy as a useful environmental regulatory tool inside the agency and out – a tool which could be more forcefully leveraged by and integrated into the formal enforcement strategies of subsequent agency administrations.

In the next chapter, I will explore the institutional conditions under which a regulatory agency might be less likely to utilize the enforcement potential of private litigation. As we have seen in the cases of the EPA and EEOC, a strong agency mission unifies agency personnel around the implementation of agency-administered statutes, giving them the institutional license and motivation to develop and utilize creative approaches to the enforcement of public policy. What happens when this license is removed, however, will be a question of central concern in the next chapter, as we begin to explore the conditions under which private litigation enforcement might be excluded from an agency’s repertoire of regulatory tools.
References


List of Figures

Note: In each figure, vertical dotted lines mark the periodization scheme outlined in this chapter. The foundational period runs through the end of the Ford Administration, which is followed by a period of concentrated interest in the development of agency information systems continuing through the end of the Carter administration. The brief Gorsuch period follows, from 1981-1982, and is immediately followed by a renewed interest in the enforcement potential of private environmental litigation spearheaded under Ruckelshaus' second term as Administrator. For comparison, I include data for years (1993-2009) that extend past the temporal scope of the historical analysis of this chapter. I will reserve comment on these years for now, except to include them as a preliminary look at how the formal partnerships established between the EPA and private litigants under the second Ruckelshaus term translated to the Clinton and George W. Bush eras.

Figure 4.1 Private environmental litigation filed in the US District Courts, 1972-2009. Source: 'Federal Court Cases: Integrated Database' available from the Inter-University Consortium for Political and Social Research.

Figure 4.2 Civil environmental lawsuits referred to the Department of Justice by the EPA, 1972-2009. Source: EPA Annual Enforcement and Compliance Reports.

Figure 4.3 Administrative actions initiated by the EPA, 1970-2009. This measure includes administrative compliance orders, administrative penalty order complaints, penalties, and field citations issued each year. Source: EPA Annual Enforcement and Compliance Reports.

Figure 4.4 Annual budget of the EPA, adjusted to Year 2000 dollars, 1970-2009. Source: EPA Budget Authority, EPA Budget Division, found on 'Environmental Health and Safety Online' website.

Figure 4.5 Size of the EPA workforce, 1970-2009. Source: EPA Budget Authority, EPA Budget Division, found on 'Environmental Health and Safety Online' website.
Table 4.1 Tools Used by the EPA to Promote Private Environmental Litigation

<table>
<thead>
<tr>
<th>Administrative Process</th>
<th>Shape Body of Law</th>
<th>Assist Plaintiffs' Bar</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Formative Period (1970-76)</strong></td>
<td>*Do not meet timetables for issuing standards and regulations ↓p</td>
<td>Fail to develop guidelines according to which courts can define, and issue finding of, environmental harm ↓p</td>
</tr>
<tr>
<td></td>
<td>*Monitoring data inadequate, out of date, and segregated according to different environmental programs ↓p, ↑C</td>
<td></td>
</tr>
<tr>
<td><strong>Constructing Architecture of Environmental Data (1977-1980)</strong></td>
<td>*Reorganize and integrate environmental programs and standard-setting ↑p</td>
<td>Intervention in citizen suits ↑p, ↓C</td>
</tr>
<tr>
<td></td>
<td>*Develop Toxics Integration Program ↑p</td>
<td>Encourage citizen groups to intervene in government suits ↑p</td>
</tr>
<tr>
<td></td>
<td>*Make standards and regulations clear ↑p</td>
<td>File amicus briefs to advance legal interpretations ↑p</td>
</tr>
<tr>
<td></td>
<td>*Collect and disseminate monitoring data through comprehensive system; organize Interagency Toxic Substances Data Committee ↑p, ↓C</td>
<td></td>
</tr>
<tr>
<td></td>
<td>*Develop EPA Information Clearinghouse containing inventory of data ↑p, ↓C</td>
<td></td>
</tr>
<tr>
<td></td>
<td>*Develop publicly accessible Chemical Regulation and Guidelines System ↑p</td>
<td></td>
</tr>
<tr>
<td><strong>Dismantling Federal Enforcement (1981-1982)</strong></td>
<td>*Develop roadblocks for the collection and analysis of data at the agency ↓p, ↑C</td>
<td>Dismantle agency’s litigation program and refer fewer cases to DOJ ↓p</td>
</tr>
<tr>
<td></td>
<td>*Attrition of agency researchers and reduced research budget ↓p, ↑C</td>
<td></td>
</tr>
<tr>
<td></td>
<td>*Freeze on new regulations and standards ↓p</td>
<td></td>
</tr>
<tr>
<td></td>
<td>*Develop Integrated Risk Information System ↑p, ↓C</td>
<td></td>
</tr>
</tbody>
</table>

* Denotes those tools which this study's archival and statistical analyses suggest are particularly pivotal in enhancing or dismantling the EPA’s strategies for private litigation enforcement.
Table 4.2  Table of standardized coefficients (solid circles) and confidence intervals based on Newey-West autocorrelation-consistent standard errors (lines). The interpretation of the standardized coefficients is not always straightforward, but they can be useful in interpreting the relative magnitude of the effects of the independent variables. The scale on the top of the table indicates that a one standard deviation increase in the independent variables will lead to an increase in the dependent variable equal to the product of the coefficient and standard deviation of the dependent variable. Diagnostics: N=39, $p(F)=0.00$

<table>
<thead>
<tr>
<th>Dependent Variable: Private Litigation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Standardized Coefficients</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>EPA PLE</td>
</tr>
<tr>
<td>Judicial Delay</td>
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<tr>
<td>Judicial Ideology</td>
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<tr>
<td>Congressional Ideology</td>
</tr>
<tr>
<td>Litigiousness</td>
</tr>
<tr>
<td>Manufacturing Output</td>
</tr>
</tbody>
</table>

![Standardized Coefficients Graph](image)
Table 4.3 Table of (unstandardized) coefficients and Newey-West autocorrelation-consistent standard errors. Dependent variable: Log(Private Environmental Litigation)

<table>
<thead>
<tr>
<th>Coefficients and Newey-West Standard Errors</th>
</tr>
</thead>
<tbody>
<tr>
<td>EPA PLE</td>
</tr>
<tr>
<td>1.035*</td>
</tr>
<tr>
<td>(.514)</td>
</tr>
<tr>
<td>Judicial Delay</td>
</tr>
<tr>
<td>.0313</td>
</tr>
<tr>
<td>(.0336)</td>
</tr>
<tr>
<td>Judicial Ideology</td>
</tr>
<tr>
<td>4.208*</td>
</tr>
<tr>
<td>(2.011)</td>
</tr>
<tr>
<td>Congressional Ideology</td>
</tr>
<tr>
<td>-2.356</td>
</tr>
<tr>
<td>(2.189)</td>
</tr>
<tr>
<td>Litigiousness</td>
</tr>
<tr>
<td>9.74E-6</td>
</tr>
<tr>
<td>(6.92E-6)</td>
</tr>
<tr>
<td>Manufacturing</td>
</tr>
<tr>
<td>0.000546</td>
</tr>
<tr>
<td>(0.0003688)</td>
</tr>
<tr>
<td>Constant</td>
</tr>
<tr>
<td>-58299.07*</td>
</tr>
<tr>
<td>(21678.07)</td>
</tr>
<tr>
<td>N</td>
</tr>
<tr>
<td>39</td>
</tr>
<tr>
<td>p(F)</td>
</tr>
<tr>
<td>0.000</td>
</tr>
</tbody>
</table>

Standard errors in parentheses; *p < 0.05
Chapter 5

A Missed Opportunity:
Fair Housing Enforcement under the Department of Housing and Urban Development

"One year ago I came to HUD, persuaded that it wanted a strong and creative Civil Rights Program…[But] the indisputable fact is that [equal opportunity] instead of being at the center of HUD activities – in the mainstream – is off center and on the sidelines…Of all the Civil Rights agencies HUD is the one which had the best opportunity to implement the policy of an open community. It has the power, but unfortunately it does not have the will."

- Robert J. Affeldt, former Director of the Conciliation Division in HUD's Office of Equal Opportunity, September 18, 1970.¹

I. A Familiar Compromise: The Structure of the Fair Housing Litigation Process

The enactment of Title VIII of the Civil Rights Act of 1968 marked the first federal effort to contain widespread housing discrimination through the implementation of clear federal policy prohibiting racially segregated housing in the private sector. Prior to the passage of Title VIII, federal efforts to combat housing discrimination were limited in scope and effectiveness. President Kennedy's 1962 Executive Order on Equal Opportunity in Housing was the first such attempt, but applied only to newly constructed housing that would receive federally insured funds from the FHA or VA ("The Federal Fair Housing Requirements" 1969: 748-9).² Housing owned prior to the enactment of the Order, or that which would not make use of federal funds, fell outside of the protections of the Order. The second, and more ambitious, attempt was contained within Title VI of the Civil Rights Act of 1964.³ This provision prohibited


² Executive Order No. 11,063, 3 C.F.R. 652 (1959-63 Comp.)

discrimination in any program which received federal financial assistance, including most activities spearheaded by the Department of Housing and Urban Development, such as public housing. While violations of Title VI and the Order were penalized through the denial of future federal funding, these provisions affected a mere four percent of the housing market (749), leaving a considerable majority of real estate transactions vulnerable and open to discriminatory practices.

The limited coverage and effect of these federal housing provisions prompted civil rights advocates to lobby for more effective and encompassing national equal housing opportunity legislation, which would take shape in Title VIII of the Civil Rights Act of 1968.\(^4\) Passed just four years after the employment protections located in Title VII of the Civil Rights Act of 1964, the compromises that defined the legislative plan for fair housing enforcement looked quite similar to those reached during the floor debates over the regulation of employment discrimination (Farhang 2010: 119; Graham 1990: 273-4). Much like the congressional debate that took place four years earlier over how much authority was to be granted to the new EEOC, the congressional debate over Title VIII in the 90th Congress was also marked by bitter hostility between liberal Democrats, on the one hand, who shared civil rights advocates' desires for a strong, centralized bureaucratic authority that could quash discriminatory housing practices, and conservative Republicans and southern Democrats, on the other, who opposed centralized statebuilding activities that concentrated regulatory power at the federal level, especially – for the southern Democrats – on social issues pertaining to race (Lieberman 2002; Katznelson 2005;)

\(^4\) 42 U.S.C.A. §§ 3601-3619 (Supp. 1969). In 1966, the House passed housing legislation in the form of Title IV of the Civil Rights Act of 1966 (H.R. 14765, 112 Congressional Record 18739-40, 1966). The provisions of Title IV were similar to those contained in Title VIII of the 1968 Civil Rights Act, but the bill died in the Senate after two failed attempts to defeat cloture – a hurdle that would continue to trouble the 1968 bill, and which would only be surmounted through a creative legislative compromise.
Farhang and Katzenelson 2005; Katzenelson and Mulroy 2012). When S. 1358 was first introduced in the Senate by Walter Mondale (D-MN) in 1968, it contained provisions for strong administrative enforcement powers to combat housing discrimination. The bill granted the already existing Department of Housing and Urban Development the authority to issue cease-and-desist orders, which civil rights advocates considered essential to the containment of growing trends of residential segregation. But after a failure to achieve cloture by a 55-37 vote, the liberal Democrats were forced to offer concessions that would ensure the passage of a housing bill (Dubovsky 1969: 155).

These concessions took the form of the Dirksen (R-IL) compromise, which was similar in many respects to the scope of that offered by the Republican Senator on equal employment protections in 1964. Even Senator Dirksen was not spared feelings of déjà-vu as he offered his amendment to the housing bill, reminding members of the chamber that "we labor today precisely as we did in 1964 because I am in almost the identical position…[and] it was no easy chore to keep that bill." After several attempts to vote for cloture – the final success of which hinged on a culmination of events, including the successful lobbying of civil rights advocates to ensure that liberal Democrats were present for the vote, the release of the Kerner Commission Report, and the assassination of Martin Luther King Jr. just one week prior to its passage – the compromise bill became law. Much like the final version of the Civil Rights Act of 1964, the approved housing measure offered concessions to southern Democrats and Republicans in the

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5 114 Congressional Record at S1454 (daily ed. February 20, 1968). The Senate rules at this time required two-thirds of votes cast to invoke cloture.


7 The National Advisory Commission on Civil Disorders, Report (1968). The Kerner Commission recommended that the federal government address the country's pervasive racial segregation through legislation that proscribed discriminatory practices in the sale or rental of all housing.
form of reduced administrative enforcement powers, which were supplemented with private litigation provisions.  

In place of cease-and-desist powers, HUD was granted the authority to investigate and conciliate housing discrimination complaints. Congress once again relegated a great portion of civil rights enforcement to the courts, outside the confines of the agency responsible for enforcing the legislation. While the Justice Department was granted the sole authority to bring pattern-and-practice suits in the courts, citizens were also given standing to litigate Title VIII claims if administrative remedies proved ineffective or unsatisfactory. But unlike the EEOC, HUD would be less successful in carving out an expanded and effective role for itself in this legal enforcement scheme. HUD’s new Office of Equal Opportunity – the most recently created of several established offices within the agency with quite disparate regulatory goals and responsibilities – would act as the federal government's recipient of complaints of housing discrimination. Pursuant to Title VIII, a victim of discriminatory practices in the sale or rental of housing was granted the right to file a complaint with the Secretary of HUD within 180 days of the act. If the agency found state and local fair housing laws and procedures to be "substantially

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8 Active and on-the-ground comparisons between the enforcement of employment discrimination by the EEOC and housing discrimination by HUD would not end there. Fair housing enforcement, rather, has been continuously compared to the EEOC's enforcement efforts in government reports, correspondence, and agency memoranda (Memorandum, Charles B. Markum, Re: A "Plans for Progress"-Type Program in Housing, November 1970, NPM, WHCF: SMOF: Garment, Alpha-Subject Files, Box 94, Equal Housing [3 of 3][CFOA 863]; Report, "The Reluctant Guardians: A Survey of the Enforcement of Federal Civil Rights Laws" prepared for OEO by The Philip A. Randolph Institute, December 1969, NARA, RG 207, Corres File 70; Acc. # 75-0045, Box 8. Survey of the Enforcement of Federal Civil Rights Laws; Testimony of Arthur S. Fleming (Chairman, U.S. Commission on Civil Rights) before the House Judiciary Committee, Subcommittee on Civil and Constitutional Rights, 7 June 1978, NARA, RG 207, Executive Secretariat; Microfiche for Secretaries Patricia R. Harris and Moon Landrieu, 1979-1981, Box 1S, Rel 6-2 79-1).

9 The final provisions of Title VIII exclude the sale or rental of single-unit homes where the owner owns less than three single-unit homes at one time (this was believed to cover about 10.8 percent of the total real estate market at the time of debate of the bill) and owner-occupied homes which house less than four other families (accounting for another 8 percent of the market). Title VIII, therefore, covered over 80 percent of the housing supply available at the time of the bill's debate ("The Federal Fair Housing Requirements" 1969: 752-3).
equivalent" to those outlined in the Fair Housing Act, it could refer the complaint to a regional office for processing. Otherwise, the Department was responsible for investigating the charge itself, with the goal of achieving a non-binding conciliation within 30 days of the receipt of the complaint. If conciliation failed, the claimant was given the right to bring his or her action in the appropriate federal district court within 30 days, and HUD could refer a pattern-and-practice claim to the Department of Justice for prosecution.  

Alternatively, private citizens were permitted to bypass HUD's complaint procedures and directly file a civil action in court within 180 days of the discriminatory act. According to Title VIII, a successful civil action could result in actual damages, a maximum of $1,000 in punitive damages, and attorney fees for plaintiffs who were unable to assume the court costs on their own.

A. How Can HUD Mobilize Private EHO Litigation?

Following the legislative compromise on Title VIII, Congress once again proposed and sanctioned a now familiar hybrid regulatory strategy for civil rights enforcement. Resembling the

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10 The 1988 Amendments to Title VIII of the Civil Rights Act of 1968 expanded HUD's possible range of actions to include mandatory enforcement actions. Under the 1988 amendments, if the agency fails to reach a settlement in the conciliation stage, it can then issue a determination of whether or not discrimination occurred ("cause determination"). If the agency finds cause that discrimination occurred, the case can be heard in an administrative hearing within 120 days (unless the parties elect to go to court). The administrative law judge reviews the evidence and can award actual damages, injunctive relief, and attorneys' fees, and order the defendant to pay the federal government a civil penalty (of a maximum of $16,000 for the first violation and $65,000 for a third violation that occurs within seven years). In the face of years of inadequate enforcement of Title VIII, this chapter will explore how and why Congress came to endorse administrative, over more legal, enhancements of housing discrimination regulation (as opposed to say, the litigation-centered reforms contained in the employment discrimination provisions of the Civil Rights Act of 1991).

11 Summary and Short Explanation of Title VIII (Fair Housing) of the Civil Rights Act of 1968, n.d., NARA, RG 207, Subject Correspondence, 1968, Box 40, Rel 6-2 Equal Opportunity in Housing, May 7-Jun 13, 1968.

12 The Fair Housing Provisions of the Civil Rights Act of 1968, 42 U.S.C.A. § 3612. This attorney fee provision, proposed by Senator Robert Byrd (D-WV), applies only to instances in which the plaintiff is unable to pay the attorneys' fees. Far more restrictive than the attorneys' fees provisions applying to employment cases – for which awards of attorneys' fees can be granted even if the plaintiff is able to pay them on their own – this provision marked another concession to southern Democrats in the Fair Housing Act.
congressional plan for equal employment opportunity enforcement, Title VIII prescribed two possible pathways for addressing housing discrimination, pairing stripped-down administrative powers with private regulatory action in the courts. Under the first course of action, an individual can file a complaint of discrimination with HUD in an effort to reach a resolution through the agency's investigation and conciliation process. Given that this course comes at little or no financial cost to the claimant, it provides an attractive retribution strategy for a victim of housing discrimination – provided, that is, that the enforcement outcomes are satisfactory.

But while HUD was statutorily charged with developing an administrative process to offer relief to victims of housing discrimination, the agency was given very little in terms of authority and resources to do so. With no cease-and-desist powers of its own, the agency could only engage in non-binding mediation that, more often than not, ended without conciliation. In the first decade, the agency was able to reach conciliation on an average of only 13.6 percent of the charges it received each year (see Figure 5.4). And with prosecutorial powers firmly placed with the Department of Justice, HUD had little recourse to order settlements with the force of law. Rather, HUD relied on the Justice Department to file pattern-and-practice lawsuits on those charges that it recommended for litigation, which prosecuted "only a handful of Title VIII cases" in the first couple decades following the enactment of the Fair Housing Act (Armstrong 1991: 910, fn 8).

Under the second possible course of action, however, an individual can bypass this administrative process and file a civil action in the federal district courts. Given the weak administrative powers granted to HUD, this legal course of enforcement can provide a potential alternative for redress, but it is not, it should be noted, engaged in without considerable economic cost, C. While Title VIII's restrictions on attorneys' fees recoveries ensured that the financial
The burden of bringing housing discrimination suits would ultimately rest with the plaintiff – as opposed to the guilty defendant – the statutorily limited punitive damages and historically inadequate compensatory damages awarded to plaintiffs meant that most private fair housing litigation remained financially undesirable and practically out-of-reach (Lichtman 1976; Armstrong 1991; Kushner 1989: 1078). To add insult to injury, homeowners and landlords have also had much greater resources and access to data and evidence to respond to fair housing lawsuits, further stacking the odds against plaintiffs and reducing the expectation of their lawsuits prevailing, p.

Though HUD was statutorily stripped of the commanding regulatory powers that would have made administrative enforcement of Title VIII possible and effective, roadblocks also served to undercut the success and desirability of private litigation as a viable and effective course of Title VIII enforcement. What is an agency to do under such conditions? As we saw in the previous two chapters, constrained administrative conditions prompted the EEOC and EPA to alter the course of their enforcement efforts from administrative to legal channels by developing incentive structures that created more attractive and financially viable conditions for private citizens to engage in litigation on the statutes administered by the agencies. But, as we will see in this chapter, while HUD would also have many opportunities in the early moments of its formation to craft and utilize an alternate pathway of equal housing opportunity enforcement through the encouragement of private legal actions, these opportunities were – more often than not – not seized or utilized by the agency. Rather than concentrate administrative attention, power, and resources on the organization of internal administrative processes, the development of a body of housing discrimination law, or the creation of a formidable housing discrimination bar that would advance the viability of private Title VIII suits (see Table 5.1), the leadership at
HUD, conflicted by multiple competing agency missions and goals, would instead restrict fair housing enforcement efforts to the more formal administrative functions statutorily granted to its Office of Equal Opportunity. How and why did HUD miss this opportunity to enhance its reach over Title VIII enforcement and promote private fair housing enforcement activity? This will act as the motivating question of this chapter, which will engage in an historical analysis of the formative moments of HUD's fair housing enforcement efforts to explore the conditions under which an agency might be less likely to turn to the enforcement powers provided by private litigation.

II. A Historical Account of FHEO Capacity

A. HUD's Lost Cause: The Secondary Status of Fair Housing Efforts at HUD

Following the passage of Title VIII, HUD faced the difficult task of developing an effective enforcement apparatus for the regulation of housing discrimination. While Title VIII charged HUD with the responsibility of "affirmatively" advancing the fair housing purposes of the law, the Department was denied the administrative cease-and-desist powers and legal prosecutorial powers necessary to effectively sanction and deter discriminatory housing practices. Reduced to engaging in non-binding mediation on Title VIII claims, the Department's range of formal enforcement powers was limited to ineffective and diluted conciliation efforts, the effects of which a future HUD Secretary would liken to "asking the discovered lawbreaker whether he wants to discuss the matter."13

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But even outside of these statutorily-imposed restrictions on the formal powers of the agency, HUD would face obstacles in getting even its most basic administrative functions off the ground and running. Organizing an effective and efficient system for processing Title VIII charges would prove to be one the Department's most difficult – and lasting – challenges. By the time Samuel Simmons, the Department's first Assistant Secretary for Equal Opportunity, came to office, he found that "only a very few interim arrangements for implementing Title VIII had been undertaken" and that "orders for the organization of my [Equal Housing Opportunity] office and the regional offices, although issued, had not been effectuated."14 Once these initial organizational hiccups were resolved and the Department's charge processing system was in place, however, it became quite clear that HUD would face difficulties processing all of the Title VIII claims that flooded into its intake services in a complete and timely manner.

After months of delayed investigations, failed conciliations, and growing backlogs, complaints from core civil rights organizations began to surface in the media and in correspondence with the Department.15 A report issued by the US Commission on Civil Rights on "The Federal Civil Rights Enforcement Effort" in 1971 warned that "HUD continues to have a staff grossly inadequate to deal with the complaints it received under Title VIII of the Civil Rights Act of 1968, Title VI of the Civil Rights Act of 1964, and Executive Order 11063."16

Three years after the enactment of Title VIII, HUD had a "total field staff of 42 people

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handl[ing] the full volume of Title VIII complaints for the entire country," making it "impossible," HUD contended, "to initiate the conciliatory process immediately on the completion of a Title VIII investigation," and causing processing times to range from six months to a year for most charges – a far cry from the statutorily imposed charge processing timeline of 30 days. At the end of its first year of complaint processing, the Office of Equal Opportunity was already facing a pending inventory of 301 charges, a backlog which grew to 1,830 charges by 1973 (see Figure 5.5).

Of those complaints it was able to process, HUD also reported a dismal record of successful conciliations. Noting that "a longer time span between investigation and conciliation decreases the chance of a successful conciliation," the US Commission on Civil Rights reported that HUD conciliated only 28 percent of the charges received in 1969 and 1970 and completed investigations on only half. Of those that reached the conciliation stage, only half (318 complaints) were resolved by the end of 1970, or 15 percent of the total number of complaints. Conceding that his office would "never [have the funds and resources necessary to] fully service the expected volume of Title VIII complaints," Assistant Secretary for Equal Opportunity, Samuel Simmons, began to "seriously consider" bringing in outside help to process the housing discrimination complaints and "seeking the cooperation of the Assistant Secretary for Mortgage Credit in order to identify and train selected FHA insuring office personnel to investigate and conciliate Title VIII cases."  

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17 See also Justice in Housing Study by David Dulles, January 1971, NPM, WHCF: SMOF: Garment, Box 93, WHCF: SMOF: Garment, Alpha-Subject Files, Housing - Tony Down's Material [4 of 5] [CFOA 864].

Given this unimpressive record of enforcement through the administrative remedies provided in Section 810 of Title VIII, civil rights advocates and officials within HUD began to turn their attention to the provisions for private legal remedies contained in Section 812. As the Fair Housing Bill was being debated, HUD emphasized the Administration's position in correspondence with private civil rights organizations that "the problem of eliminating racial segregation and other unfair housing practices is one that must be attacked jointly by Federal, State, and Municipal authorities as well as by private citizens' groups working in concert with these Governmental authorities" and that "no one authority, Federal or otherwise, can accomplish these goals alone." With HUD enforcement activities "limited to conference, conciliation, and persuasion," citizens working in housing discrimination recognized that the "burden" for Title VIII enforcement would "fall…largely on the complainant to serve as a 'private attorney general' and enforce public law by bringing a private suit" (McGrew, et al. 1984: 1321).

Though the Department did not have the power to bring lawsuits in court itself, officials within the Office of Equal Opportunity recognized the regulatory potential of private housing litigation and suggested proposals for protecting and promoting the private right of action in the courts. Given the enforcement shortcomings of the Department's own administrative process, the Office of Equal Opportunity suggested that "HUD should take extra efforts to assist Title VIII complainants whom the Department has been unable to assist through the conciliation process."21

19 Henry Minton Francis (Administrative Assistant to the Secretary) to James Griffin (Chairman, Baltimore CORE), 20 May 1966, NARA, RG 207, Subject Correspondence, 1966-1973, Box 8, 133A President's Committee on Equal Opportunity in Housing Complaints.

20 Memorandum, H.C. McKinney, Jr. to George Romney (Secretary), 24 February 1971, NPM, WHCF: SMOF: Garment, Alpha-Subject Files, Box 94, Equal Housing [3 of 3] [CFOA 863].

21 The proposal stipulated, however, that the material should not be made available until after the conclusion of the investigation and that only summary material, not raw data, should be provided to the complainant and their attorneys ("the material made available shall be limited to factual information gathered as a result of the investigation and should not include filings, recommendations or possible courses of corrective action")
One such proposed method was to give complainants a head start on their litigation process by making administrative "information developed as a result of civil rights investigations pursuant to complaints available to parties and their attorneys." Rather than a failed conciliation marking the end of the agency's administrative responsibilities, Simmons stressed the importance of the Office of Equal Opportunity releasing such information in order to ensure that the complainant is "in a position where he and his counsel can evaluate the potential for litigation."

Administrators within the Office of Equal Opportunity were equally concerned about ensuring private judicial rights and remedies on those housing discrimination complaints that were referred to state and local fair housing agencies. In accordance with Title VIII's statutory requirement that state and local Title VIII enforcement efforts be "substantially equivalent" to those offered at the federal level, HUD Equal Opportunity officials insisted that these standards be extended to state and local provisions of private legal rights and remedies, as well. Insisting that "full protection against discrimination in housing must include both administrative and judicial rights and remedies," agency officials suggested "fram[ing]… regulations so as to indicate the extent to which judicial rights are reserved in Title VIII complaints" so that "in the case of any State or local law which, on its face, has [the] effect of limiting judicial rights on a referred complaint to a greater extent than they would be limited if the complaint were not

(Memorandum, Samuel J. Simmons (Equal Opportunity) to All Assistant Secretaries, General Counsel, and Administrator, FIA, 1 July 1970, Re: Summary and Explanation of Attached Draft Policy on Disclosure of Civil Rights Investigative Reports, NARA, RG 207, Corres File 70; Acc. # 75-0045, Box 7, Policy and Procedures 1970). See also Samuel J. Simmons (Equal Opportunity) to Dudley F. Spiller, Jr. (Legal Aid Society of Baton Rouge), 26 March 1971, NARA, RG 207, Subject Correspondence, 1966-1973, Box 121, Rel 6-2 Equal Opportunity in Housing Mar 16-June 11, 1971; Memorandum, Samuel J. Simmons (Equal Opportunity) to Norman C. Roettger (General Counsel), 2 December 1970, NARA, RG 207, Corres File 70; Acc. # 75-0045, Box 3, Civil Rights Act of 1964, Title VI 1970.


23 Memorandum, Samuel J. Simmons (Equal Opportunity) to George Romney (Secretary), 27 October 1969, Re: Goals and Objectives in the Administration of Title VIII, NARA, RG 207, Office of the Under Secretary: Reading File of G. Richard Dunnells, 1969, Box 24, Equal Opportunity 1969, Part I (1 of 2).
referred, we could not find substantial equivalency." This interest in preserving the private right to sue on those Title VIII claims referred to the state and local level extended to concerns over the claims processes of these regional agencies, as well. Wary of the potential for backlog in the complaint processes at the regional level – and the negative consequences that such delay could have on private lawsuits – Simmons warned regional administrators that his office would monitor their progress as it was "deeply concerned about meeting the requirements of Title VIII in regard to notice and completion of the administrative process within the required time limits in order that no legal rights are lost to the complainant."  

In fact, staff members in the Office of Equal Opportunity believed so strongly in the regulatory potential of private Title VIII litigation, that they suggested extending the provision of a private right of legal action to general revenue sharing programs under Title VI. Insisting that "the promise of effective civil rights compliance cannot be realized without effective enforcement machinery," Simmons proposed that "an alternative enforcement procedure to the cumbersome time-consuming administrative process of Title VI" be offered in the form of "allowing individuals to file civil actions in Federal court for appropriate relief, including injunctions," and with the liberal provision that "suits…be allowed without exhaustion of administrative remedies so that direct relief can be obtained."  

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24 Note, David E. Blum to Irving P. Margulies (General Counsel), 2 September 1970, Re: Proposed Title VIII Issuances, NARA, RG 207, Subject Correspondence, 1966-1973, Box 100, Rel 6-2 Equal Opportunity in Housing, Sept 1-Dec 8 1970.

25 Memorandum, Samuel J. Simmons (Equal Opportunity) to Richard C. Van Dusen (Under Secretary), et al., 25 May 1970, Re: Proposed Two-Day Seminar on Title VIII Administration, NARA, RG 207, Corres File 70; Acc. # 75-0045, Box 4, Conference Interm Office Jan 1970.

Administrators and staff of HUD's Office of Equal Opportunity considered private legal action on housing discrimination to be a promising and potentially effective tool in the fight against racial segregation, and offered several proposals to help promote and preserve the private legal rights and remedies provided in Title VIII. Yet, despite these suggestions and propositions, the Office of Equal Opportunity remained but one of many offices organized within HUD, each promoting a diverse set of programs with varied goals.27 Within HUD's portfolio of programs, fair housing objectives and enforcement represented but a small fraction, with the bulk of the Department's resources and strategic planning targeted towards programs like mortgage lending, community planning and development, the construction and management of public housing, and the administration of housing grants to local authorities – programs that directly contributed to the agency's primary objective of providing housing for low income Americans. Given the diversity of the objectives and functions of the Department – and the fair housing program's relative marginalization within it – early administrators at the Office of Equal Opportunity stressed the importance of securing the ability of the fair housing staff to "cross program lines as situations require in order to identify and focus HUD's attention on serious shortcomings of program operations and the need to firm up its policies, procedures, and practices as they relate to the attainment of HUD's equal opportunity objectives."28

27 For examples and lists of the diverse programs and objectives contained within HUD, see Memorandum, Charles J. Orlebeke to George Romney (Secretary), 18 August 1969, Re: Staff report on New Program and Policy Initiatives, NARA, RG 207, Subject Files of Assistant Secretary Samuel C. Jackson, 1968-1973, Box 1, Agenda Items for Secretary's Staff Mtgs.; Note, Fred McLaughlin to Mr. Jackson, 30 September 1969, Re: Consensus Report on Departmental Goals, NARA, RG 207, Subject Files of Assistant Secretary Samuel C. Jackson, 1968-1973, Box 10, 1976 Goals.

28 Memorandum, Walter B. Lewis to Frank H. Buntin (Equal Opportunity Staff, Region I), 31 January 1968, Re: Field Trip to Boston, Massachusetts, NARA, RG 207, Subject Correspondence, 1968, Box 38, Rel 6 Racial and Intergroup Relations, Jan 1-Feb 7, 1968.
But despite this hope that the Office of Equal Opportunity might be able to transcend program boundaries and institutionalize its fair housing objectives into the day-to-day operations of HUD's other programs, fair housing remained a secondary – and at times even conflicting – interest at the Department (Bonastia 2000: 539). As the Office of Equal Opportunity worked to impede and sanction discriminatory housing practices, it engaged in regulatory activity at odds with the "pro-segregative legacy" of much of the Department's programs (537). The Federal Housing Administration, for instance, had a history of engagement in operations that encouraged segregation. In early years, the Federal Housing Administration refused to offer mortgages to homebuyers in inner city or integrated neighborhoods; and then later, after congressional programs enabled inner-city lending, the Administration promoted inner-city mortgages to the detriment of fair housing objectives to integrate the suburbs (Gelfand 1975; Jackson 1985; Massey and Denton 1993; Bonastia 2000). Equal housing opportunity objectives also ran counter to the agency's low income housing construction and local grant programs. By providing funding and construction projects to city authorities, whose administrations and electoral interests were often invested in the continuation of urban segregation, the Department worked against its own fair housing objectives.

In this institutional organization – where fair housing goals and staff were buried in a tangle of heterogeneous and sometimes conflicting agency programs – anti-discrimination objectives regularly took a secondary position to the Department's larger prioritized programs. HUD authorities maintained that "while an 'open communities' policy is – and must be – pursued, HUD must…continue to produce and maintain center city housing" and that "funds and
attention must be focused on the areas of immediate need.” Such marginalization of housing objectives did not go publicly unnoticed. Robert Affeldt, a former director of the conciliation division in HUD's Office of Equal Opportunity who made considerable headlines after resigning from his position in protest of the Department's "indifference" and "active opposi[tion]" to fair housing, exposed the "indisputable fact…that EO [Equal Opportunity objectives] instead of being at the center of HUD activities—in the mainstream—is off center and on the sidelines."

Affeldt claimed that during his tenure at the Department, his efforts to establish fair housing enforcement procedures were undermined by superiors at HUD who prioritized the production of new housing construction and protected it from being slowed down by fair housing enforcement. Affeldt insisted that "despite sweet rhetoric [on the part of the Department] to the contrary," he had reached the "firm conclusion that Secretary Romney is a [housing] production man, not a civil rights man," and that civil rights objectives would continue to be subordinated to housing production goals at the Department.

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29 Memorandum, Emil Frankel to George Romney (Secretary) and Richard C. Van Dusen (Under Secretary), 24 August 1970, Re: Airlie House Conference (August 1970), NARA, RG 207, Subject Files of Assistant Secretary Samuel C. Jackson, 1968-1973, Box 1, Airlie House Conference.


31 This departmental prioritization coalesced with the Nixon Administration's own positions on fair housing enforcement. Though the administration recognized that a "failure to demonstrate even apparent concern on [fair housing]—or, worse, a posture which could be interpreted as a pronounced lack of concern -- could prove a fatal liability" in the 1972 elections (Memorandum, Samuel C. Jackson (Metropolitan Planning and Development) to Richard C. Van Dusen (Under Secretary), 18 November 1970, NARA, RG 207, Subject Files of Assistant Secretary Samuel C. Jackson, 1968-1973, Box 7, Fair Housing 2 of 3), it took a more moderate and cautious position on the enforcement of equal housing opportunity law in the hopes of achieving a low political profile on such a contentious and electorally divisive issue (Memorandum, Tom Stoel to Leonard Garment, 11 March 1971, Re: Fair Housing Options, NPM, WHCF: SMOF: Garment, Alpha-Subject Files, Box 94, Equal Housing Additional Info; Note, Samuel C. Jackson to Leonard Garment, 9 February 1971, NPM, WHCF: SMOF: Garment, Box 91, WHCF: SMOF: Garment, Alpha-Subject Files, Housing [1 of 3][CFOA 863]; Memorandum, John D. Ehrlichman to the President, n.d., NPM, WHCF: SMOF: Garment, Alpha-Subject Files, Box 94, Equal Housing [2 of 3][CFOA 863]; Discussion
Program directors outside of the Office of Equal Opportunity were, likewise, reticent to withhold grant money from cities and neighborhoods that sanctioned segregation, refusing to let civil rights concerns interfere with their housing objectives. Such tensions were highlighted in a heated exchange that took place between the Office of General Counsel and HUD fair housing administrators who were exploring the legality of utilizing grant-withholding to promote equal opportunity objectives. After the Office of General Counsel proposed rather restrictive conclusions concerning the ability of HUD to withhold grants for fair housing considerations, a member of the fair housing staff released a memo challenging the General Counsel's conclusions and offering a more liberal interpretation providing HUD "with more options in the equal opportunity field within the framework of existing law and regulations than many [administrators] believe[d]" they possessed. In response, the Office of General Counsel circulated a scathing memo characterizing the tone and interpretations of the fair housing memo as "emotional" and "inflammatory." To HUD fair housing staff, this scornful reaction by the General Counsel's Office only "typifie[d] the problems" that Department staff faced daily "in attempting to administer federal programs affirmatively to accomplish the stated objectives of civil rights legislation."

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32 Memorandum, Samuel C. Jackson (Metropolitan Planning and Development) to George Romney (Secretary), 2 February 1971, Re: Congressional Intent as to Title VI and Title VIII, NARA, RG 207, Subject Files of Assistant Secretary Samuel C. Jackson, 1968-1973, Box 1, Alternate Budget '72; Washington Post Article "Top Nixon Aides Urged Housing Shift," 12 June 1971, NPM, WHCF: SMOF: Garment, Box 91, WHCF: SMOF: Garment, Alpha-Subject Files, Housing Background Material [1 of 4][CFOA 863]).

33 Memorandum, David O. Maxwell to George Romney (Secretary), 11 February 1971, Re: Congressional Intent as to Title VI and Title VIII, NARA, RG 207, Subject Files of Assistant Secretary Samuel C. Jackson, 1968-1973, Box 7, Fair Housing 2 of 3.

34 Memorandum, Samuel C. Jackson (Metropolitan Planning and Development) to George Romney (Secretary), 12 February 1971, Re: The General Counsel's Memorandum of February 11, NARA, RG 207, Subject Files of Assistant Secretary Samuel C. Jackson, 1968-1973, Box 7, Fair Housing 2 of 3.
Within this hostile Departmental climate, fair housing enforcement actions at HUD were limited. Constrained by core – and sometimes conflicting – departmental goals and objectives, anti-discrimination activities were largely confined to those administrative powers enumerated in Title VIII, leaving equal opportunity staff with little flexibility to experiment with and institutionalize alternative tools for enforcement, like private litigation. Rather, much to the chagrin of the Office of Equal Opportunity, Departmental Title VIII enforcement actions were largely limited to the charge processing system. A survey conducted for the Office of Economic Opportunity on the Enforcement of Federal Civil Rights Laws in 1969 reported that while "to some extent [Title VIII] law confines agencies to the complaint procedure," even in those enforcement areas where the law does not, the Department "sometimes show[ed] a lack of initiative" to affirmatively "push for fair housing" as Title VIII instructed.35 In testimony before the House Subcommittee on Civil Rights Oversight, the US Commission on Civil Rights likewise spurned the Department for being "less than vigorous" in discharging its clear-cut congressional mandate to "affirmatively" administer the intent of Title VIII, and for instead "relying on complaints and a case-by-case approach in enforcing Title VIII."36 While Equal Opportunity staff warned that depending on individual complaints to eliminate discrimination was akin to "rely[ing] upon a teaspoon for emptying the Potomac,"37 the marginalization of fair housing objectives within HUD deprived the Office of Equal Opportunity of the institutional

35 Memorandum, Samuel J. Simmons (Equal Opportunity) to Norman C. Roettger (Deputy General Counsel, 2 December 1970, Re: Disclosure of Reports of Investigation in Civil Rights Matters, NARA, RG 207, Corres File 70; Acc. # 75-0045, Box 3, Civil Rights Act of 1964, Title VI 1970.


freedom to address fair housing enforcement problems with creative solutions outside of those strictly provided by the complaint process outlined in Title VIII.

This lack of institutional freedom had dire consequences for the Office of Equal Opportunity's ability to step outside its formal role as a charge processer, and promote and protect private legal rights and remedies under Title VIII. To the degree that the Office was limited in promoting creative equal housing opportunity initiatives, it could not produce fair housing regulations, legal interpretations, and procedures that would benefit private fair housing litigation. Ten years after the passage of Title VIII, for instance, no new substantive fair housing regulations – besides procedural regulations dictating how charge processing was to be handled – had been passed by the Department. In an intradepartmental clash that grabbed headlines, Assistant Secretary for Equal Opportunity Samuel Simmons accused the Department's Office of General Counsel of thwarting efforts to pass new fair housing regulations. Warning that such delays could have disastrous results for fair housing enforcement, Simmons suggested that his own equal opportunity staff should take over the legal work on formulating and passing new regulations.


39 Newspaper Article by Sanford Watzman, "HUD Dragging Feet on Fair Housing," 5 March 1970, NARA, RG 207, Office of the Under Secretary: Reading File of G. Richard Dunnells, 1969, Box 25, Equal Opportunity 1970 Part II (2 of 2). This call for greater administrative authority, in fact, became a common anthem at the Office of Equal Opportunity. Unable to trust that other HUD offices would place fair housing directives before their own program objectives, the equal opportunity staff suggested that enforcement authority on fair housing – like the creation of agency guidelines and the authority to withhold funding from housing projects engaging in discriminatory actions – should lie squarely with the Office of Equal Opportunity (Washington Post Article, "HUD Official Quits, Assails Rights Policies," 19 September 1970, NARA, RG 207, Office of the Under Secretary: Reading File of G. Richard Dunnells, 1969, Box 25, Equal Opportunity 1970 Part II (1 of 2)).
The absence of swift and bold departmental regulations on fair housing issues not only made it difficult for HUD staff to take aggressive administrative actions, but also deprived the courts, legal representatives, and private litigants of creative Departmental legal interpretations that could serve to bolster Title VIII claims in court.\(^{40}\) Though the courts were enthusiastic to support agency efforts to combat widespread housing discrimination in the late 1960s and early 1970s (Bonastia 2006: 93) – and even, at times, went so far as to construe and reference obscure statements contained in Office of Equal Opportunity memoranda in a desperate grasp for expansive agency legal interpretations that the courts could 'defer' to\(^{41}\) – official Departmental legal positions, largely shaped by HUD leadership's case-by-case approach to handling discrimination claims, offered restrictive interpretations on the extent of Title VIII law that did little to enhance the viability of private fair housing litigation. While Equal Opportunity staff, external governmental organizations, and civil rights advocates warned HUD leadership that depending on this case-by-case, "piecemeal approach to assuring compliance with fair housing statutes" was "unlikely to uncover or eradicate" more "widespread institutional patterns or practices of discrimination,"\(^{42}\) the leadership at HUD and the Nixon Administration insisted on a more restrictive interpretation of Title VIII's mandate\(^{43}\) which served to preclude – rather than expand – opportunities for private claims in court.

\(^{40}\) Glensa G. Slone (Chairwoman, Housing Task Force) to Jay Janis (Undersecretary, HUD), 19 August 1977, NARA, RG 207, Subject Correspondence, 1974-1978, Box 38, Rel 6 Racial Relations.


\(^{43}\) Memorandum, Leonard Garment to John D. Ehrlichman, 26 February 1971, NPM, WHCF: SMOF: Garment, Alpha-Subject Files, Box 94, Equal Housing [2 of 3][CFOA 863].
Unlike the EEOC, which looked past its case-by-case processing system to issue creative guidelines and legal interpretations in support of class action and pattern-and-practice private suits alleging discriminatory effects, HUD's Office of Equal Opportunity was confined by legal opinions within the agency which defined Title VIII violations in terms of individual acts of intentional discrimination. Given the enormous evidentiary and financial burden of proving discriminatory intent in suit after suit before the courts, fair housing advocates historically favored a model of civil rights enforcement based on disparate impact theory. Rather than requiring victims of housing discrimination to supply evidence of discriminatory intent to prove fair housing violations, disparate impact theory claims that acts which do not exhibit a discriminatory motive may still result in disproportionate effects that fall within the scope of prohibitions contained in civil rights law. Such cases are not only less costly and burdensome to prove – as plaintiffs can use aggregate data to uncover patterns of behavior rather than relying on the collection of typically quite elusive evidence of intent – but disparate impact cases are also, according to civil rights advocates, necessary for rooting out long-standing and deeply-rooted patterns of behavior in society which disproportionately affect a protected group. But while staff at HUD's Office of Equal Opportunity "clearly wanted the agency to pursue" and treat such practices and patterns as Title VIII violations (Bonastia 2006: 102), the leadership at HUD balked at suggestions that "mere effects" can be used as "prima facie evidence of racial discrimination." Fearing that agency opinions on this legal interpretation could be overturned by private litigation in the courts, the Nixon administration even suggested that steps must be taken to counter and "regain the initiative from courts and private plaintiffs" who aimed to "push…the law in undesirable directions" and carve a role for disparate impact theory through private litigation.⁴⁴

⁴⁴ Memorandum, Eugene A. Gulledge (Assistant Secretary-Commissioner) to Samuel C. Jackson (Assistant
HUD's administrative focus on individual, intentional acts of discrimination came at a cost to the promotion of a legal strategy that utilized the courts to address group-based, disparate impact cases. While the statutory language, itself, was silent on whether disparate impact claims were actionable under Title VIII, without a clear agency mandate on whether a showing of discriminatory effect was enough to constitute prima facie evidence of a fair housing violation, HUD only contributed to a muddied case history that was characterized by highly divided court opinions on the matter (Bonastia 2006: 103; Mahoney 1998: 425) and which served to undercut the success of rooting out housing discrimination through private litigation.\footnote{The US Supreme Court has never ruled on this issue and appeals court decisions have been highly divided, with some accepting that fair housing cases can rely exclusively on disparate impact claims, others denying that a showing of discriminatory effect is enough, and still other district and circuit courts having yet to take up the issue (Mahoney 1998: 425, fn. 54). See, e.g. Brown v. Artery Org, Inc. 654 F. Supp. 1106, 115 (D.D.C. 1987) ("the plaintiff-tenants will be deemed not to have proved a violation of the Fair Housing Act if they demonstrate no more than the defendant's actions have had or will have a discriminatory effect or impact: some proof of discriminatory intent...is necessary."); as compared to NAACP v. Town of Huntington, 844 F. 2d 926 (2d Cir. 1988) (recognizing a disparate impact cause of action under Fair Housing Act). In the absence of clear legal opinions on whether a showing of disparate effect is enough to develop a prima facie case of discrimination, the courts and fair housing advocates have even turned to precedent that reads a disparate impact standard into Title VII as a guiding principle.}
Fair housing advocates were equally upset with the Department's delay in providing private fair housing groups and individual litigants with the evidentiary statistics necessary for bringing these suits. While the EEOC quickly established a national employer reporting system which collected the workforce data required to prove more generalized forms of discriminatory practices – like those addressed by pattern-and-practice suits and disproportionate impact arguments – HUD experienced significant delay in establishing a system for collecting comparable data on housing and making it available to the public (Bonastia 2006: 117). For its first several years, the Department failed to develop studies "on the nature and extent of discriminatory housing practices in representative communities" as per its statutory responsibilities under Section 803(c). The Department was particularly slow to publicly produce statistics on neighborhoods in which HUD housing programs were based, presumably in order to protect competing HUD housing production objectives. When it finally issued nationwide data four years after the enactment of the Fair Housing Act, HUD still "indicated some reluctance to furnish…data on a local community basis" – which was critical for proving the existence of discriminatory real estate patterns in a neighborhood or development in private fair housing suits (Schwemm 1992: 224).

Constrained by fair housing opinions issued outside the Office of Equal Opportunity, the Department failed to issue guidelines, legal interpretations, and a statistical reporting system that would make private fair housing litigation a more viable and attractive option for private citizens and legal representatives alike. Ever conscious of the degree to which fair housing issues were

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placed on the back burner at HUD, relationships between the Department and fair housing
groups and civil rights leaders quickly soured. But, recognizing the importance of private
enforcement efforts in the battle against housing discrimination, the Office of Equal Opportunity
took measures to repair this relationship and extend a helping hand to private groups and
individuals bringing Title VIII cases in court. Acknowledging that "it is clear that the advice and
assistance of the National Committee Against Discrimination in Housing, the NAACP, the
Urban League…will enable us to have a far greater impact in educating the public and changing
real estate practices that we could ever accomplish unaided," Simmons worked to incorporate the
voice of private housing groups into advance planning of HUD programs and fair housing policy
through the development of an Equal Opportunity Citizens Advisory Committee. The Office of
Equal Opportunity conversed regularly with housing groups and members of the private bar at
conferences and meetings in order to discuss fair housing policy, law, the Department's
complaint processing system, and citizen participation in the courts.

48 Memorandum, Acting Assistant Secretary for Equal Opportunity to the Secretary, 15 February 1973, Re: Status of the Department's Relationship with the National Association for the Advancement of Colored People and the National Urban League, NARA, RG 207, Subject Correspondence, 1966-1973, Box 143, Rel 6 Racial and Intergroup Relations; Memorandum, Samuel J. Simmons (Equal Opportunity) to the Secretary, 7 June 1971, Re: Formal Communication with National Civil Rights Organizations on Equal Housing Opportunities, NARA, RG 207, Office of the Under Secretary: Reading File of G. Richard Dunnells, 1969, Box 25, Equal Opportunity 1971 Part III; Memorandum, Samuel J. Simmons (Equal Opportunity) to Eugene A. Gulledge (Assistant Secretary for Housing Production and Mortgage Credit-FHA Commissioner, 15 April 1970, Re: Charlotte, North Carolina, NARA, RG 207, Office of the Under Secretary: Reading File of G. Richard Dunnells, 1969, Box 25, Equal Opportunity 1970 Part II (2 of 2).

49 Memorandum, Samuel J. Simmons (Equal Opportunity) to George Romney (Secretary), 21 November 1969, Re: HUD Equal Opportunity Citizens' Advisory Committee NARA, RG 207, Corres File 70; Acc. # 75-0045, Box 6, Minority Groups January 1970.

50 Memorandum, P.N. Brownstein (Assistant Secretary-Commissioner) to Walter B. Lewis (Director, Office of Equal Opportunity), 3 October 1968, Re: National Conference Sponsored by Department of Housing and Urban Development-Office of Equal Opportunity, NARA, RG 207, Equal Opportunity Standards and Regulations Division: Original Complaint and Compliance Review Case Files, 1963-1968, Box 1, Brownstein - Lewis Corres; P. N. Brownstein (Assistant Secretary-Commissioner) to Edward Rutledge (Executive Director, National Committee Against Discrimination in Housing), 18 November 1966, NARA, RG 207, Equal Opportunity Standards and Regulations Division: Original Complaint and Compliance Review Case Files, 1963-1968, Box 2, Brownstein Correspondence - 1966; Kenneth F. Holbert (Director, Housing Opportunity) to Emanuel Margolis (Chairman,
Pursuant to its responsibilities under Section 808(e) of the Fair Housing Act, the Office of Equal Opportunity also directed efforts towards educating the public and fair housing groups on housing discrimination, which the Office extended to training and developing a new legion of lawyers to take on private fair housing enforcement efforts in court. Given that Title VIII law was in its nascent stages and there was little of a housing discrimination bar to speak of following the enactment of the Fair Housing Act, the Office of Equal Opportunity arranged legal
seminars designed to inform attorneys about civil litigation in housing discrimination. The Office solicited bar associations for invitations to their annual meetings and encouraged them to include a housing law panel at which Equal Opportunity staff could come and give presentations on housing law.

But while carrying out its statutory responsibilities to educate, train, and incorporate the participation of private groups engaged in Title VIII work, efforts within the Office of Equal Opportunity to take formal stances in support of equal housing litigation were met with resistance from the leadership at HUD. After Assistant Secretary Simmons recommended that the Department issue a report developed by the Chicago Leadership Council, a "Guide to Practice Open Housing Under Law," as a HUD publication, the proposal met major opposition from leadership at the agency. While conceding that the guide would be "a useful compilation of materials for an attorney interested in this type of litigation," higher-ups in the Department "question[ed] the wisdom (politically) of the Department issuing this material" given that the

53 Memorandum, Assistant Secretary for Equal Opportunity to the Secretary, 18 June 1974, Re: Region V Equal Opportunity Regional Seminar, NARA, RG 207, Subject Correspondence, 1974-1978, Box 8, Rel 6 Racial and Intergroup Relations; Memorandum, Assistant Secretary for Equal Opportunity to the Secretary, 24 January 1974, Re: Equal Opportunity Regional Seminars, NARA, RG 207, Subject Correspondence, 1974-1978, Box 8, Rel 6 Racial and Intergroup Relations; Memorandum, Assistant Secretary for Equal Opportunity to the Secretary, 9 April 1974, Re: Denver Equal Opportunity Regional Seminar, NARA, RG 207, Subject Correspondence, 1974-1978, Box 8, Rel 6-2 Equal Opportunity in Housing, Jan-Apr 1974; Memorandum, Assistant Secretary for Equal Opportunity to the Secretary, 30 May 1974, Re: Equal Opportunity Regional Seminar – Kansas City, NARA, RG 207, Subject Correspondence, 1974-1978, Box 8, Rel 6-2 Equal Opportunity in Housing, May-July 1974.

54 Kenneth F. Holbert (Director, Housing Opportunity) to Robert Ruberg (Chairman, Annual Meeting Committee of Kentucky State Bar Association, 16 December 1970, NARA, RG 207, Corres File 70; Acc. # 75-0045, Box 4, Conference Aug 1970.

implication of its "issuance would have to be the encouragement of this type of law suit."
Doubting "whether the education of the legal profession on how to prepare and try 'open housing'
lawsuits is the proper function of the Department," HUD leadership made it clear that it did not
consider public encouragements of private litigation to be a proper role for the Department.
Rather, HUD leadership found the need to "insulate the Department…from criticism" that would
evolve from such an activist intervention in, and promotion of, private fair housing litigation.

Staff members at the Office of Equal Opportunity were, likewise, engaged in a
continuous battle with Administration forces which wanted HUD to take a more hands-off
approach to private lawsuits. The White House issued blanket statements discouraging
administrative efforts to intervene in fair housing lawsuits on the behalf of plaintiffs, asserting
that "Justice Department interventions in litigation involving acts of alleged discrimination by
individuals or communities should be pursued with great restraint as a matter of sound
departmental policy."\textsuperscript{56} Urging a more moderate legal presence in fair housing litigation, the
Attorney General, for instance, recommended – contrary to the stated positions of HUD or the
Justice Department – that the government not intervene in a "particularly clear case of
manipulative zoning designed, for racial reasons, to exclude a HUD-approved low and moderate
income housing project" in Blackjack, Missouri,\textsuperscript{57} preventing the Office of Equal Opportunity
from extending helpful legal support to private suits in court.

Constrained from acting much outside of its charge processing role, the Office of Equal
Opportunity was unable to forge a viable pathway for private Title VIII enforcement through the

\textsuperscript{56} Memorandum, Leonard Garment to John Ehrlichman, 26 February 1971, Re: Fair Housing, NPM, WHCF:
SMOF: Garment, Alpha-Subject Files, Box 94, Equal Housing [2 of 3][CFOA 863].

\textsuperscript{57} Ibid; see also Note, Samuel C. Jackson to Leonard Garment, 9 December 1971, NARA, RG 207, Subject Files of
Assistant Secretary Samuel C. Jackson, 1968-1973, Box 7, Fair Housing 2 of 3.
courts in the years following the enactment of Title VIII. In this far-from-receptive environment, private fair housing litigation failed to flourish as a regulatory tool for Title VIII enforcement. Given the lack of Departmental support or legal guidance, coupled with the restrictive statutory limitations on the amount of damages and attorneys' fees that private litigants could collect, an annual average of only 291 lawsuits were filed in the US District Courts in the first eight years after the enactment of the Fair Housing Act – a far cry from the immediate surge that equal employment litigation enjoyed during the EEOC's formative administrations (see Figures 5.1 and 5.2).

While HUD's Equal Opportunity staffers, like early administrators at the EEOC, recognized the regulatory potential of private litigation, their enforcement goals conflicted with more prioritized programs within the Department, limiting their ability to develop and engage in creative solutions to fair housing enforcement problems. Rather, HUD considerations of ways to enhance and expand Title VIII enforcement during this period were largely limited to cries for legislative reform granting more formal administrative authority to the Department in the form of cease-and-desist powers; an authority which, the Department argued, was necessary to release private citizens from the burden of bringing costly and time-consuming litigation. This

58 While, as other accounts suggest (e.g. Johnson 2011), these legislative impediments played a significant role in constraining the development of fair housing litigation, even after many of these restrictions were lifted by the 1988 Amendments, fair housing litigation continued to falter as an effective, and widely-used, enforcement mechanism. This lends credence to more encompassing explanations of the failure of fair housing litigation, which consider the larger role played by multiple historical, institutional, and political factors in shaping the character of private fair housing litigation over time.

conversation over how best to enhance fair housing enforcement – whether through administrative or legal means – would continue well after this formative period of Title VIII enforcement. In the next section, I will briefly explore the considerations of these two approaches to fair housing regulation – considerations which are illuminating when compared to those that governed debates on equal employment opportunity enforcement.

B. Afterword: A Continued Focus on Legislative Enhancements of Administrative Powers for Fair Housing Enforcement

This historical account of fair housing enforcement during the Nixon administration provides a good starting point for considering the conditions under which an agency might be less likely to be able to utilize the enforcement powers provided by private litigation. Restricted by competing agency missions and priorities, the fair housing staff at HUD was never granted the institutional license to make fair housing enforcement a priority, nor the institutional freedom to enact creative and informal processes that would help achieve housing discrimination regulation. And, with fair housing enforcement securely trapped within the patchwork of programs and objectives that characterized the goals and mission at HUD, future fair housing enforcement would continue to occupy a secondary position within the Department, extending the barriers to the enactment of private litigation enforcement schema.

Acc. # 75-0045, Box 5, Legislation 1970; Memorandum, Lloyd Davis (Assisted Programs) to Samuel J. Simmons (Assistant Secretary), 2 November 1970, Re: 1971 Federal Legislation, NARA, RG 207, Corres File 70; Acc. # 75-0045, Box 5, Legislation June 1970; Kenneth F. Holbert (Equal Housing Opportunity) to Samuel J. Simmons (Assistant Secretary), 29 October 1970, NARA, RG 207, Corres File 70; Acc. # 75-0045, Box 5, Legislation June 1970; Note, Ed Lovett to Mrs. Spencer, 21 October 1969, Re: Cease and Desist Amendment, NARA, RG 207, Corres File 70; Acc. # 75-0045, Box 7, U.S. Senate.
While the new Carter appointees at the Department insisted that fair housing was "one of the most immediate priorities...at HUD" – a common promise also made by Nixon-era HUD leadership (Bonastia 2006: 124) – obstacles continued to obscure the path of creative fair housing enforcement at HUD. Conceding, amidst complaints from the US Commission on Civil Rights about Departmental fair housing enforcement, that "HUD's Fair Housing and Equal Opportunity responsibilities received very little support from previous Administrations and...that little in the way of program advocacy, regulatory authority, financial or other resource support was given to HUD's civil rights programs," Carter appointees outlined a plan for "rebuilding the Fair Housing program" which entailed administrative improvements like the reorganization of the complaint processing system. They proposed reforms to move HUD's fair housing enforcement focus away individual-level complaint processing, and towards goals like the development of agency systemic discrimination units to take on pattern and practices cases and the promulgation of the first substantive departmental regulations under Title VIII. The enactment of these programs, however, met substantial delays. Admitting that progress on the rebuilding plan did "not equal" her "original hopes and expectations," HUD Secretary Patricia

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60 Patricia Roberts Harris (Secretary) to Arthur S. Fleming (Chairman, U.S. Commission on Civil Rights), 31 January 1979, NARA, RG 207, Executive Secretariat; Microfiche for Secretaries Patricia R. Harris and Moon Landrieu, 1979-1981, Box 1S, Rel 6-2 79-1.

61 It should be noted that while reforms to the complaint processing system at the EEOC had direct effects on the viability of equal employment opportunity litigation (since the complaint process was a statutorily required first-step in the litigation process), this is not the case for fair housing claims. Rather, since fair housing claimants could go directly to the courts before going through HUD's Title VIII complaint processing system, the two processes are not as inextricably linked; this means that reforms to make HUD's complaint processing system more efficient and effective do not necessarily bear as direct of an effect on the viability of fair housing litigation.

62 Moon Landrieu (Secretary) to Arthur S. Fleming (Chairman, U.S. Commission on Civil Rights), 6 September 1980, NARA, RG 207, Executive Secretariat; Microfiche for Secretaries Patricia R. Harris and Moon Landrieu, 1979-1981, Box 1S, Rel 6-2 80-2; Patricia Roberts Harris (Secretary) to Harrison Wellford (Executive Associate Director for Reorganization and Management, Office of Management and Budget), 10 February 1979, NARA, RG 207, Executive Secretariat; Microfiche for Secretaries Patricia R. Harris and Moon Landrieu, 1979-1981, Box 1S, Rel 6 79-1.
Harris claimed that limited resources and delays associated with the agency's other housing and community development programs slowed the pace of the realization of these fair housing goals. Given these delays, much of this ambitious plan was not fully implemented. It was not until the last year of the Carter administration that HUD finally established a pilot program for implementing its systemic discrimination plan and issued its first substantive regulations on Title VIII, which were shortly repealed after Reagan appointees took office and instituted their own plan to dismantle much of HUD's fair housing enforcement efforts (Kushner 1989: 1086).

In the years following the Nixon administration, fair housing enforcement at HUD was plagued by many of the same problems, namely, according to Bonastia, the absence of "political will, and desegregation becoming a top priority…in HUD agency-wide" (2006: 146). In this hostile institutional environment, where fair housing authorities had very little wiggle room to creatively forge alternate pathways of enforcement, most expressions of interest in enhancing HUD's regulatory powers centered squarely on legislative expansions of the agency's more formal administrative powers. Even with the agency's own aforementioned ambitious plans to

63 Patricia Roberts Harris (Secretary) to Arthur S. Fleming (Chairman, U.S. Commission on Civil Rights), 31 January 1979, NARA, RG 207. Executive Secretariat; Microfiche for Secretaries Patricia R. Harris and Moon Landrieu, 1979-1981, Box 1S, Rel 6-2 79-1. Secretary Harris referred, specifically, to delays and ramifications stemming from the 1973 moratorium on all federal housing subsidies issued by President Nixon. After allegations of corruption and scams in HUD's FHA programs surfaced, Nixon issued a moratorium on federal housing subsidies which put not only HUD's housing development programs in jeopardy, but also its fair housing objectives. Bonastia (2000, 2006) argues that the scandal, which rocked the agency's primary program, "tarred" (2006: 135) the Office of Equal Opportunity's own reputation, backpedalling any progress that the office had made in satisfying fair housing objectives. And, to add insult to injury, Nixon's swift and blunt subsidies freeze only exacerbated the damage to fair housing objectives by shutting down the agency's prioritized method of addressing its wide-range of housing objectives, including segregation. As Harris notes in the quote above, this moratorium, which technically applied to a separate HUD program, would have lasting effects on agency fair housing enforcement efforts – effects that, again, did not so much stem from the agency's actual handling of fair housing objectives, but which were rooted in the failures that marked the agency's more prioritized programs.

64 Mario Obledo (Secretary, Health and Welfare Agency) to Moon Landrieu (Secretary), 5 May 1980, NARA, RG 207, Executive Secretariat; Microfiche for Secretaries Patricia R. Harris and Moon Landrieu, 1979-1981, Box 1S, Rel 6-2 80-2; Moon Landrieu (Secretary) to Arthur S. Fleming (Chairman, U.S. Commission on Civil Rights), 6 September 1980, NARA, RG 207, Executive Secretariat; Microfiche for Secretaries Patricia R. Harris and Moon Landrieu, 1979-1981, Box 1S, Rel 6-2 80-2.
secure fair housing enforcement, Secretary Harris insisted that it was her "firm belief that one of the greatest obstacles to the enforcement of fair housing in the United States is the lack of direct enforcement authority in Title VIII of the 1968 Civil Rights Act."\textsuperscript{65} As the agency lobbied for new legislative proposals granting HUD cease-and-desist authority on Title VIII claims, Secretary Harris' successor, Moon Landrieu, confirmed the sentiment within the agency that "the future effectiveness of Title VIII enforcement will depend, at least in part, upon the enactment of new legislation providing HUD with direct enforcement authority."\textsuperscript{66}

Over an eleven year period from 1978 to 1989, a number of fair housing bills were proposed in Congress to remedy what Senator Evan Bayh (D-IN) called the "empty promise [made to] the American people in 1968."\textsuperscript{67} Critical of Title VIII's provisions for an ineffective administrative conciliation process, after which "the Government withdraws its heretofore helpful arm and leaves the plaintiff to his own devices," these legislative proposals weighed the relative strengths and weaknesses of administrative and judicial measures for securing fair housing enforcement. After failing to achieve cloture on a liberal 1979 bill which would have authorized HUD to make findings of probable cause on housing discrimination complaints and

\textsuperscript{65} Patricia Roberts Harris (Secretary) to Arthur S. Fleming (Chairman, U.S. Commission on Civil Rights), 31 January 1979, NARA, RG 207, Executive Secretariat; Microfiche for Secretaries Patricia R. Harris and Moon Landrieu, 1979-1981, Box 1S, Rel 6-2 79-1; see also Patricia Roberts Harris (Secretary) to Arthur S. Fleming (Chairman, U.S. Commission on Civil Rights), 2 March 1979, NARA, RG 207, Executive Secretariat; Microfiche for Secretaries Patricia R. Harris and Moon Landrieu, 1979-1981, Box 1S, Rel 6-2 79-1.

\textsuperscript{66} Moon Landrieu (Secretary) to Arthur S. Fleming (Chairman, U.S. Commission on Civil Rights), 11 December 1979, NARA, RG 207, Executive Secretariat; Microfiche for Secretaries Patricia R. Harris and Moon Landrieu, 1979-1981, Box 1S, Rel 6-2 80-1. In a sharp contrast to the Title VII reforms contained Civil Rights Act of 1991 that focused predominately on the enforcement powers of private litigation, even outside groups exploring the potential of private fair housing litigation pointed to the need for stronger agency administrative powers. While a contracted report entitled "An Analysis of Remedies Through Litigation of Fair Housing Cases: Title VIII and the Civil Rights Act of 1866" (Ward 1978) found that fair housing lawsuits "have proved to be a viable alternatives when federal, state, and local governmental agencies have been unable to provide adequate relief to victims of housing discrimination" (vii), the report still insisted that the conferral of cease-and-desist authority to the agency was critical to fair housing enforcement.

\textsuperscript{67} Fair Housing Amendments Act of 1979: Hearings on S. 506 before the Senate Subcommittee on the Constitution of the Committee of the Judiciary, 96\textsuperscript{th} Congress, 1\textsuperscript{st} Session (1979): 2; in Lamb 1982: 1134.
granted HUD-appointed administrative law judges the authority to order fines and issue cease-and-desist orders, Democrats in Congress faced off with Republicans once again in a race to define the proper role of the federal government in fair housing enforcement. In response to Democratic proposals, which rooted fair housing enforcement in the conferral of more command-and-control administrative powers to HUD, Republicans issued their own proposal in 1983 which emphasized a court-centered approach to fair housing enforcement (Rice 1984; Graham 2000). The Republican sponsored Equal Access to Housing Act of 1983 (S. 140) and the Administration's own bill ("The Fair Housing Amendments Act of 1983," S. 1612) each encouraged the settlement of housing disputes through individual litigation before the courts, authorizing federal authorities to commence civil suits in court on behalf of claimants and also raising the amount of civil penalties that could be awarded to plaintiffs (Rice 1984).

Congressional Democrats, however, warned that relying on judicial enforcement of Title VIII disputes was not going to address fair housing concerns, primarily because the "private right of [court action] against housing discrimination…had manifestly failed" (Graham 2000: 223). Unlike employment litigation, fair housing litigation activities had never gotten off the ground. Without clear agency guidelines and interpretations that served to enhance the viability of private litigation, and with the heavy financial burdens that were placed on private litigants by the statutory limits on damages and attorneys' fees recoveries, private Title VIII litigation faltered. Citing the "costly and time-consuming [process of going] to federal district court" where "delays of up to two years are not uncommon" Senator John Glenn (D-OH) warned on the floor of Congress that "once in court, there is no guarantee of success."68 Under such conditions, James Kushner found that "private attorneys, upon whom enforcement rests, have almost universally

refused to represent potential litigants" and that "only in the isolated cases where victims were aware of the discriminatory treatment, knowledgeable about legal remedies, desirous to gain access where they were unwelcome, successful in locating counsel, and willing to commit themselves to the litigation process was a private suit brought" (Kushner 1988: 354-5). Facing these great odds, parties with fair housing claims overwhelmingly filed Title VIII complaints in HUD's (categorically ineffective) administrative conciliation process rather than embark on Title VIII litigation, at an annual average rate of one private housing litigation filing for every twelve HUD complaints (See Figure 5.2; Schwemm 1992: 748).

At the expense of a court-centered approach, therefore, Democrats pressed for the authorization of strong administrative fair housing enforcement powers at HUD. Their 1983 counterproposal to the Administration's bill emphasized the use of hearings run by independent administrative law judges, which were "designed to discourage the use of federal and state courts as forums for settling housing discrimination disputes" (Rice 1984: 273). Opting to put the competing fair housing proposals on hold until the Democrats recaptured the Senate, the Democrats revisited the issue in 1987 (Graham 2000: 224). Once again, Democrats and fair housing advocates promoted their administrative law judge proposal, with Senator Kennedy citing the need to "put real teeth into the fair housing laws by giving HUD real enforcement authority" - an approach which the Reagan administration and HUD continued to oppose.70

In a compromise negotiated between civil rights advocates and the National Association of Realtors, the final version of the Fair Housing Amendments Act of 1988 balanced

69 100th Congress, 2nd Session, 134 Congressional Record S10455 (1988); in Schwemm 1992: 748.

70 J. Michael Dorsey to Senator Joseph R. Biden, Jr. (Chairman, Senate Committee on the Judiciary), 9 June 1987, NARA, RG 207, Official HUD Correspondence Files for Secretary Samuel Pierce, Box 8, 167800-167899; see also Samuel R. Pierce, Jr. (Secretary) to George Bush (President of the Senate), 1 March 1988, NARA, RG 207, Official HUD Correspondence Files for Secretary Samuel Pierce, Box 26, 173500-173599.
administrative and judicial enforcement options (Graham 2000: 225; Schill and Friedman 1999). While the act aimed to secure the private right of action by expanding opportunities for the recovery of attorneys' fees and allowing judges to award unlimited actual and punitive damages to plaintiffs, it also significantly expanded the formal administrative powers of HUD by authorizing the agency to issue cause findings to charges during the investigation phase and to represent claimants before an administrative law judge (ALJ), who was authorized to grant compensatory damages, injunctive relief, and civil penalties, ranging up to $50,000 for those respondents who commit three offenses within seven years.

Placed squarely within the Department, the ALJ system provided HUD with enhanced regulatory powers, solidifying an administrative approach to fair housing regulations which proves striking when contrasted with the employment discrimination enforcement provisions that Congress enacted under the Civil Rights Act of 1991. Passed only three years after the 1988 Fair Housing Amendments Act, as we can recall from Chapter 3, the Civil Rights Act of 1991 provided for expanded employment litigation incentives, in lieu of granting the EEOC strong cease-and-desist enforcement powers. Following years of successful private employment litigation, which was only buttressed by EEOC strategies to make private litigation a more viable option for Title VII claimants, the ideological positioning on the Civil Rights Act of 1991 was quite the opposite of that on Title VIII enforcement, with Democrats strongly favoring private litigation remedies over the more formal administrative expansions of power that Republicans proposed. That congressional Democrats believed so strongly in administrative remedies for rebuilding the government's fair housing program is intriguing in this context, and has much to

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say about the fungibility of partisan positions on the question of whether to promote regulation through administrative or judicial enforcement mechanisms. An institutionalized structure of support for private litigation and a historical reliance on private litigation as an effective tool of enforcement go far in legitimating private litigation enforcement as a compelling regulatory strategy. Without these factors, considerations of how to enhance the scope of fair housing enforcement continued to focus on the administrative, and how formal bureaucratic powers could be strengthened.

III. Discussion and Conclusion

Fair housing enforcement offers a compelling case for seeking to understand the conditions under which an agency might be restricted from pursuing more creative means of enforcement and, in turn, how this can shape a federal government approach to administrative, versus judicial, enforcement. Sandwiched within a diversified agency program with highly prioritized housing production goals, the Office of Equal Opportunity faced difficulties in trying to creatively forge alternate pathways of fair housing enforcement. Rather, weighing other program objectives, HUD acted within its statutorily defined range of possible enforcement actions, and restricted considerations of expansions of its role in promoting fair housing goals to those that were enumerated in Title VIII. HUD certainly faced a number of obstacles in its attempts to fulfill its fair housing objectives – for instance, weak administrative powers in the face of public opinion that was highly opposed to residential integration, just to name a couple – but these factors were not enough to preclude effective civil rights regulation on employment practices. By placing fair housing enforcement within an already existing agency with departmental objectives that were tangentially related (at best) or incompatible (at worst) with
residential integration goals, the Office of Equal Opportunity faced insurmountable hurdles in implementing forceful, and creative, desegregation enforcement strategies.

As several fair housing advocates within and outside the agency have suggested, the key to effectively implementing federal desegregation policy lies in the reorganization of fair housing enforcement efforts under a separate bureaucratic structure. As Christopher Bonastia notes, fair housing staff at HUD suggest that given the agency's diversified workload and objectives, it is not easy for fair housing objectives to climb to "the top of the heap [at HUD] even with the most committed leadership" (Bonastia 2006: 159).73 In 2008, on the 40th anniversary of the passage of the Fair Housing Act, two former HUD secretaries and several civil rights organizations – including the National Fair Housing Alliance, the NAACP Legal Defense Fund, the Leadership Conference on Civil Rights Education Fund, and the Lawyers' Committee for Civil Rights under Law – came together to form the National Commission on Fair Housing and Equal Opportunity and to discuss implementation problems affecting fair housing enforcement. Citing "HUD's conflict of interest in enforcing the law while maintaining partnerships with members of the housing industry that may be in violation of the Fair Housing Act" (National Fair Housing Alliance 2009: 7), a report issued by the Commission recommended that "preparation begin immediately to support the establishment of an independent fair housing enforcement agency that can provide the country with a powerful force that supports fairness and fair housing choice in a unified and systemic way" (National Commission on Fair Housing and Equal Opportunity 2009: 19).

73 From a private conversation between Christopher Bonastia and Sara Pratt (Director of the Office of Enforcement in HUD's Office of Fair Housing and Equal Opportunity (formerly the Office of Equal Opportunity)), 31 March 2004.
Without such reforms, fair housing enforcement at HUD continues to be restricted by competing agency objectives – objectives which prevent fair housing staff from engaging in not only effective administrative regulatory behavior, but also from exploring creative approaches to the enforcement of Title VIII. In the absence of concerted agency support for the creation and maintenance of alternative pathways of fair housing enforcement – like that offered by private litigation – the implementation of federal desegregation politics remains an elusive goal, through both administrative and judicial approaches to regulation.
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**Cases Cited**

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Trafficante v. Metropolitan Life Insurance, 409 U.S. 205 (1972)
List of Figures

Note: For the figures below, I also include data for additional years that extend past the temporal scope of the historical analysis of this chapter. I will reserve comment on these years for now, except to include them as a preliminary look at how fair housing litigation and agency actions developed through the end of the 20th Century and the beginning of the 21st.

Figure 5.1 Private fair housing litigation filed in the US District Courts, 1970-2008. Source: 'Federal Court Cases: Integrated Database' available from the Inter-University Consortium for Political and Social Research.

Figure 5.2 Private fair housing litigation (thin line with hollow points) and private equal employment opportunity litigation (thick line with solid points) filed in the US District Courts, 1970-2008. Source: 'Federal Court Cases: Integrated Database' available from the Inter-University Consortium for Political and Social Research.

Figure 5.3 Title VIII charges filed with HUD's Office of Equal Opportunity, 1970-2008 (thick line with solid points). For comparison, private fair housing litigation filed in the US District Courts is provided by the thin line with hollow points running along the bottom of the figure. Source: Title VIII charge data is located in the HUD Statistical Yearbook (1969-1979) and HUD Annual Reports (1980-2008). Litigation data is available in the 'Federal Court Cases: Integrated Database' available from the Inter-University Consortium for Political and Social Research.

Figure 5.4 Percentage of Title VIII charges achieving successful conciliation, 1969-1983. Source: HUD Statistical Yearbook (1969-1979) and HUD Annual Reports (1980-1983).

Figure 5.5 Pending inventory of Title VIII charges at the Office of Equal Opportunity at HUD, 1970-1979. Source: HUD Statistical Yearbook.
Table 5.1  HUD Office of Equal Opportunity’s ("OEO") Failure to Secure Tools to Promote Private Fair Housing Litigation

<table>
<thead>
<tr>
<th>Administrative Process</th>
<th>Shape Body of Law</th>
<th>Assist Plaintiffs’ Bar</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Formative Period (1968-76)</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Use 'substantial equivalency' language to ensure states also protect judicial rights of claimants ↑p</td>
<td>Issue few legal interpretations for civil rights friendly courts to defer to ↓p</td>
<td>Arrange legal seminars on fair housing law for lawyers ↑p</td>
</tr>
<tr>
<td>Make investigation material available, but only after its conclusion and limit to summary materials ↓p</td>
<td>HUD leadership espouses restrictive legal interpretations ↓p</td>
<td>Delay in collecting and disseminating fair housing data necessary for bringing pattern and practice suits ↓p, ↑C</td>
</tr>
<tr>
<td>HUD leaderships directs OEO to focus on processing individual complaints ↓p</td>
<td>Contrary to OEO wishes, leadership defines discrimination in terms of the individual ↓p</td>
<td>OEO restricted from issuing HUD sponsored publications for training attorneys in fair housing law ↓p</td>
</tr>
<tr>
<td>Office of General Counsel thwarts OEO efforts to issue substantive fair housing regulations ↓p</td>
<td>OEO restricted from addressing pattern-and-practice discrimination ↓p</td>
<td>HUD leadership restricts public encouragement of private litigation ↓p</td>
</tr>
<tr>
<td></td>
<td>Nixon administration seeks to restrict private litigation pursuing discriminatory effects claims ↓p</td>
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<td></td>
<td>Nixon Administration discourages interventions in private lawsuits on behalf of plaintiffs ↓p, ↑C</td>
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</tbody>
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Chapter 6  
Conclusion and Discussion  
Private Litigation and Regulation in the American State

"The era of big government may be over, but the era of regulation through litigation has just begun."
- Robert B. Reich (1999), former Secretary of Labor under President Clinton

I. Reconceptualization of Bureaucratic Regulatory Capacity

Within both public and academic circles, there is now recognition that the effective enforcement of many federal regulatory statutes depends largely on the efforts of private citizens in the courts. Since 1964, private equal employment opportunity litigation has become one of the most prolific areas of litigation, at times composing up to 10 percent of the US District Court's docket, and spurring the growth of an increasingly popular private employment bar. Private environmental litigation, while not achieving the level of pervasiveness in the courts enjoyed by equal employment opportunity litigation, has still increased thirty-fold between 1972 and 2010, supporting the growth of a professionalized legal industry specializing in bringing such scientifically complex cases. As rights-oriented litigation has become a more entrenched and common component of court dockets, private-corporate relations, and the activities of the private bar, media accounts have pointed a finger at a deeply "litigious society" (Skoning 1994; see also Glazer 1976; Manning 1977; Kagan 1996) that, in the face of inadequate governmental enforcement, has "stepp[ed] in where the public entities are falling down" (Maher 2006).

But what such accounts often fail to recognize are the very real ways in which the development, availability, maintenance, and utility of these private efforts are strategically and purposefully shaped and enhanced by state actors in response to institutional and political conditions. As this project has demonstrated through an historical and statistical analysis of the
enforcement capacities of several regulatory agencies, the private enforcement of public policy does not exist outside of, or beside, bureaucratic management. Rather, it is intricately woven into an agency's institutional structure and strategic considerations of periodized endeavors to enhance its own regulatory capacity despite – and in response to – administrative constraints. Far from exemplifying the impotence and weakness the APD literature has traditionally affixed to the American bureaucracy, the EEOC and EPA provide promising examples of dynamic regulatory agencies which forge alternative mechanisms of policy enforcement when they are unable to effectively regulate state policy through purely formal administrative means.

Such claims have broad consequences for how we think about state capacity in the context of the American bureaucracy. First, this project's focus on the bureaucratic construction of incentive structures that encourage private litigation coincides with recent calls for the reconceptualization of state capacity and how it might be measured. While the APD literature has traditionally relied on a strong-weak dichotomy to assess the administrative capacity of the American state, it is more difficult to adjudge where enforcement strategies like bureaucratically-managed private litigation might fit on such a scale. Private litigation does not adhere to the formal notions of bureaucratic regulatory power that are typically required of a strong state, nor is it liberally applied by the citizenry, free from bureaucratic manipulation, support, or incentives. The utilization of private litigation enforcement by state actors, quite differently, challenges us to reconceptualize assessments of state strength not in terms of the strong-weak divide, but according to a more multidimensional conception of state capacity which can account for the many ways the state exists in relation to its society: as an enforcer from the top-down, as a manager from the bottom-up, and in the untold combinations of the two (Katzenelson 2002;
Nettl 1968). In doing so, studies of American political development will be rewarded with more honest assessments of the complicatedly structured capacity of the American state.

II. Towards an Understanding of Situated Capacity

In addition, this project presents a conception of bureaucratic regulatory capacity that reflects both the more enduring aspects of its development, defined and fixed by institutionalized options and structures, but also, in contrast to more traditional accounts, the ways in which it can dynamically expand and contract in response to external political conditions. The regulatory capacity of each of the agencies explored by this analysis, rather than being statically defined by the formal administrative powers enumerated in its authorization legislation, was contextually shaped by the utilization (or lack thereof) of the alternate, informal pathway of policy enforcement available through private litigation. While each of these agencies was administratively constrained from the moment of its formation – whether from a lack of formal administrative powers at the EEOC and HUD, or from a lack of resources to carry out its more formidable administrative authority at the EPA – agency personnel at the EEOC, EPA, and the Office of Equal Opportunity at HUD, in cooperation with several other political actors in the courts and private organizations, would attempt to take actions at the early stages of their development to create enduring institutional protections and opportunities for private litigation to flourish as a realistic and effective enforcement strategy. But the boundaries of this early decision making at the EEOC, EPA, and Office of Equal Opportunity at HUD were also shaped by political factors which defined the institutional landscape in which each agency would operate. Indeed, it is in the interaction between these institutional and political factors that we
can begin to understand the conditions under which a regulatory agency will engage in private litigation enforcement.

A. Formative, Institutional Conditions

Institutional conditions, first, shaped the landscape for the formation of private litigation enforcement. The EEOC took advantage of the institutional freedom that resulted from its lax administrative instructions to pursue these alternative strategies of enforcement. While the lack of clearly enumerated cease-and-desist or litigation powers in the 1964 Civil Rights Act weakened the formal administrative authority of the agency, it also "created a great deal of slack in its political and administrative environment," allowing the agency to "seek other means of influence" over employment discrimination in civil society (Lieberman 2002: 146). Ill-defined and weak specifications of agency regulatory powers, in other words, provided both the need for, and the institutional freedom to, utilize alternative mechanisms of policy enforcement.

The character and quality of this alternative mechanism of enforcement, likewise, was very much defined by the institutional significance of the legal system to civil rights advocates and the enforcement of civil rights issues prior to (and concurrent with) the passage of Title VII. At the moment of the EEOC's formation, a perfect storm of characteristically sympathetic courts, legally trained civil rights advocates, and new legislation expanding the powers of private litigation were establishing a pathway for an effective legal means of remedying employment discrimination. That the EEOC was born into this historical juncture placed the option of private litigation enforcement, specifically, on its roster of possible enforcement activities.

Given these formative conditions, the upper management at the EEOC was able to make early decisions to foster and promote private litigation as an alternate strategy of enforcement.
With such clear mission directives (Bonastia 2000, 2006), and yet with so much institutional slack, bureaucrats at the EEOC enjoyed the freedom to establish coalitions with outside private actors in the legal system, and also to develop protections and support for private litigation into the administrative processes and programs that became institutionalized into the very enforcement structure of the agency. The choice to assign the private right of action an elevated position in its charge processing system, to give reasonable cause determinations legal credence, and to issue guidelines in order to shape discrimination law established a set of enforcement activities that the EEOC could turn back to, time and again, to encourage private litigation.

The EPA, likewise, enjoyed institutional conditions that were favorable to the development of an alternate pathway of environmental policy enforcement utilizing private litigation. While the EPA was granted considerably more administrative authority than the EEOC, it was able to flexibly apply this authority to the construction of a body of incentives that would encourage private citizens and groups to engage in private environmental litigation. Given that the high cost of assembling and analyzing scientific data presented a major impediment to potential litigants of environmental lawsuits, the EPA was able to use its statutorily granted powers of issuing regulations and collecting data to develop an architecture of information that could be publicly accessed for bringing environmental suits. But even though these activities were statutorily granted, the development of this structure of information dispersal was not a given. As we saw, during the Nixon and Ford administrations, the EPA was more exclusively focused on sharpening its teeth and building a public reputation as a strong enforcer (in the more traditional command-and-control model of bureaucratic regulation). Only during the Carter administration, however, did the EPA place this traditional model of regulation to the side (initiating the least number of enforcement actions up until that point), and focus its
administrative efforts on cultivating regulations and a data system that members of civil society could turn to for enforcing environmental statutes through the courts.

The ability of EPA administrators to direct their efforts toward the development of this architecture of information, however, was also very much grounded in the EPA's clear mission statement. Early deliberations surrounding the organization of the agency were strictly concerned with preserving a singular and uncompromised mission at the agency. Efforts to combine the regulation of natural resource markets with the implementation of environmental protection statutes were quickly discarded, and the EPA was instead assigned a primary mission of integrating a thus far dispersed and fragmented system of environmental protection programs. This singular mission allowed the agency to prioritize the development of a comprehensive data system including up-to-date and integrated information on the agency's wide-range of environmental programs, which was key for providing private actors with the resources to identify environmental violations and build private environmental lawsuits. So while the EPA did not enjoy the same levels of institutional freedom experienced by the EEOC, it was still able to prioritize some of its administrative duties over others, and trade a model of strong, top-down regulation for directed efforts at building a structure of scientific information and analysis that would provide an investment in continued private environmental litigation.

Institutional conditions surrounding the formation of the Office of Equal Opportunity at HUD, however, were not so auspicious. While the Office of Equal Opportunity suffered from a lack of strong enforcement powers and clear directives similar to that experienced by the EEOC, the fair housing staff, finding their administrative goals in conflict with those of other administrators in the agency at large, were unable to take advantage of this institutional slack to effectively develop and institutionalize incentive structures to encourage private citizens to
engage in fair housing litigation. This was not for lack of trying. Early administrators at the Office of Equal Opportunity went head-to-head with agency leadership, laying out a clear plan for fair housing enforcement that would have incorporated the development of agency legal interpretations, procedures, and direct litigation support to improve the viability of fair housing litigation – efforts that were encouraged and would have been supported by the civil rights-friendly courts at the time. But fair housing administrators at HUD grappled with more prioritized agency goals that were often in conflict with the Office's fair housing objectives.

Rather than develop a new agency to fulfill the fair housing responsibilities stipulated in the Civil Rights Act of 1968, Congress placed fair housing responsibilities within the Department of Housing and Urban Development – an established agency which was organized around the implementation of housing production goals. These goals, which were more clearly centered on community development and the construction and management of public housing, were separately implemented from, if not in direct conflict with, the fair housing objectives of the newly established Office of Equal Opportunity. As such, agency leadership often thwarted the efforts of the fair housing administrators to develop more robust and creative pathways of enforcement, instead limiting the Office of Equal Opportunity to carrying out its more formal powers of developing and managing a largely overburdened and ineffective charge processing and conciliation system. Despite the institutional slack that was statutorily granted to the agency, and the legal presence of a courts system that was quite friendly – and even solicitous – of agency legal interpretations that would have enhanced the viability of private fair housing litigation, the Office of Equal Opportunity was unable to forcefully and creatively forge regulatory alternatives that utilized the regulatory behavior of private victims of housing
discrimination, forcing it, instead, to rely exclusively on its ineffective administrative enforcement procedures.

**B. Variable Political Conditions and the Institutionalization of Regulatory Tools**

More enduring agency structures and formative circumstances, therefore, defined the institutional conditions under which these agencies were able to carve an effective regulatory role for private litigation enforcement. But as the narrative borne by the historical analysis of the EEOC demonstrates, the utilization of this set of tools for promoting private litigation was not static or fixed by these institutional conditions but, quite differently, took on a more dynamic and periodized nature. While the EEOC, in the early moments of its development, forged an alternate pathway for EEO enforcement via private employment discrimination claims in the legal system, it still was not locked into engaging in this legal strategy *at every historical moment*. Rather, the EEOC engaged in or retreated from this alternate pathway under different political conditions.

As we saw during the Reagan administration, for instance, the EEOC did not to turn to the alternative mechanism of equal employment opportunity enforcement provided by private litigation when the administration was unsympathetic to the agency's antidiscrimination goals. As a testament to the growing recognition of the effectiveness and utility of private litigation as an enforcement strategy, the EEOC, under the leadership of Chairman Thomas, disengaged from the agency's systems and processes that had been established to create incentives for private litigation in the past, and instead, detained charges within its weak and ineffective administrative process, where it could better control (and diminish) the results of enforcement activities. These systems would not be reengaged until two critical political developments occurred: first, the reinstatement of agency leadership which was sympathetic to civil rights concerns into the upper
management positions at the EEOC, and second, the passage of legislation by an ideologically-opposed Congress that would reverse years of court opinions which adversely affected the viability of Title VII claims in the courts. Without the legislation, an EEOC committed to enforcing its antidiscrimination goals would lack a market to which it could appeal with its litigation incentives; and without the transfer of power to agency leaders who were sympathetic to civil rights enforcement, the new market for private employment litigation created by the Civil Rights Act of 1991 would have been stymied and defeated by Commission procedures.

While features of the EEOC's formation shaped early agency decisions that would institutionalize the development of a set of tools for encouraging private litigation – and thereby enhancing the agency's regulatory capacity – the utilization, scope of effectiveness, and character of this set of tools would be temporally contingent on a constellation of political conditions related to the ideological position of the agency's leadership, the deference, or lack thereof, given to broad interpretations of civil rights law by the courts, and the introduction of different versions of civil rights legislation by Congress over the years. Incorporating these enduring and temporally-linked elements, we see that rather than the capacity of the EEOC being 'locked in' after its first formative years, at some historical periods, the EEOC aggressively pursued private litigation enforcement as a viable and effective tool for regulation, and at others, retreated back from this path, confining itself to carrying out its limited formal administrative powers.

The cultivation of private litigation enforcement approaches to environmental protection at the EPA, however, followed a much different path. While private litigation enforcement at the EEOC fluctuated under different political conditions, at the EPA, the incentives developed for motivating private environmental litigation had a more enduring impact. After the EPA focused its administrative efforts on the development of a system of regulations and data collection
during the Carter administration (at the expense of more top-down administrative regulatory actions), this system continued to be accessed by private litigants, and utilized by middle-level agency bureaucrats, even after changes in the agency leadership provided for a more hostile institutional setting for the enforcement of environmental protection statutes. While Reagan's appointed leadership at the EEOC managed to stall Title VII enforcement through both administrative and private litigation-based mechanisms, the Reagan appointees at the EPA had less success dismantling the agency's incentive structures for private environmental litigation. Already armed with a now more comprehensive, complete, and formidable data base and collection of regulations, middle-level career bureaucrats at the agency, who were sympathetic to the agency's clear environmental protection objectives, could make this information available to the public for the identification of environmental violations and the development of private environmental suits.

While this system of data management and regulation development was likely not invulnerable to prolonged periods of dismantlement – surely a well-orchestrated and long-term reorganization of the agency's information systems could eventually prevent private litigants from gaining access to current and pertinent data or delay the development of regulations necessary for bringing environmental lawsuits – this attack on the EPA's environmental enforcement apparatus was cut-short by the (forced) resignation of Anne Gorsuch. During Gorsuch's two year reign, private litigants still had access, through middle-level bureaucrats, to relatively current regulations and data collected under the Carter administration's integrated data system. And after the reappointment of EPA veteran William Ruckelshaus, the agency once again reengaged its standard-setting and data management gears, and made even more open and concerted efforts to court the enforcement help of private citizens and environmental groups.
This suggests, therefore, that the EPA's incentive structures for enhancing the viability of private litigation were relatively well insulated from fluctuations in the ideological positions of the appointed agency leadership. While Gorsuch was able to ensure that the agency retreated from more formal administrative enforcement actions, the incentive structures aimed at encouraging private environmental litigation established under the Carter administration were preserved and continued to be utilized by a cooperative regulatory alliance of private litigants and middle-level EPA bureaucrats. What can this tell us about the ability of regulatory agencies to insulate and preserve their strategies for encouraging private litigation?

The degree to which the utilization of private litigation enforcement strategies is more enduring, or periodized, at an agency over time has much to say about the characteristics of the set of tools developed by an agency, but also about the organization of the agency itself. The periodization of the EEOC's utilization of private litigation enforcement was very much linked to how integrated these private litigation strategies were into the agency's day-to-day operations. Private litigation enforcement, under the EEOC, involved a combination of creative bureaucratic approaches to encouraging litigation (approaches which were not statutorily defined or outlined in Title VII (e.g. issuing agency legal interpretations; filing amicus briefs; providing funding to private litigants; training attorneys in employment law)) and statutorily defined administrative procedures that were refashioned to enhance the viability of private suits (sometimes even at the expense of the agency's more formal administrative responsibilities (e.g. allowing claimants to file a suit before the administrative conciliation process was complete; reducing backlog in the agency charge process; more liberally granting cause determinations to bolster private claims in court)). This meant, however, that agency leadership had more direct control over the implementation of this private enforcement scheme. Newly appointed leadership coming into the
agency could also take advantage of the institutional slack in the Commission's enforcement program to disengage from the more creative and innovative approaches developed under previous administrations, while also, given the agency's purported hierarchical organization (Wood 1990), restructuring the agency's formal administrative processes to create a more hostile environment for private litigation. These institutional incentive structures could be reengaged, and were (during the Clinton administration, for instance), by reverting back to lessons learned under previous models of private litigation enforcement. But with a significant amount of control over the agency's day-to-day operations, this also meant that appointed agency leadership could just as easily disengage from these incentive structures, and dismantle the bureaucratic apparatus of private litigation enforcement.

In contrast, appointed leadership at the EPA had less direct control over the day-to-day operations of its many environmental programs and staff, but also over the types of tools that were cultivated to encourage private environmental litigation. The greatest obstacle to private environmental litigation remained the collection and analysis of expensive scientific data – evidence which would have been difficult if not prohibitively costly for most lay individuals, environmental groups, or attorneys to assemble. While the protection and promotion of private employment litigation came to permeate much of the EEOC's wide-range of day-to-day operations, the EPA's efforts to encourage private environmental litigation were more directly targeted toward the development of an integrated system for the collection and dispersal of environmental data. But while EPA leadership was able to restrict formal enforcement actions through directives and defunding measures, with less hierarchical control over agency operations (Wood 1988), it was less able to control the subversive acts of middle-level bureaucrats or to reverse the years of directed agency efforts that had gone into the collection and analysis of an
impressive array of environmental data. While the EEOC's tools for encouraging private employment litigation were precariously integrated into day-to-day agency activities which could be swiftly adjusted with the appointment of new agency leadership, the EPA's incentive structures for cultivating private environmental litigation had already produced a tangible resource that agency leadership had a difficult time preventing its middle-level managers from sharing with private litigants. As such, measures developed under the Carter administration to encourage private litigation were more permanently insulated from short-term fluctuations in political control at the EPA.

C. Situating Capacity

As we uncover variations like these across regulatory agencies, we can begin to devise a model for explaining how and when regulatory agencies are more likely to mobilize private litigation enforcement efforts, a model which incorporates a more situated concept of bureaucratic capacity that is shaped by both institutional and political factors. Through historical, in-depth examinations of how institutional conditions can shape the development of alternate pathways of policy implementation at regulatory agencies and dictate the degree to which private litigation enforcement schemes are insulated from short-term and variable fluctuations in political conditions, we can begin to develop a more deeply informed conception of how very "situated" the capacity of a bureaucratic agency is in the institutional and political conditions which govern the development of formal and informal regulatory tools, alike (Pedriana and Stryker 2004). Bureaucratic capacity, under this rubric, is not a static indicator of the strength of an agency's more formal administrative processes, but a moving measure that might expand and
contract over periods of time as an agency engages in (or disengages from) creative and
oftentimes hidden regulatory relationships with members of civil society.

This historical development of private litigation enforcement tells us much about not only
shifts and changes in the regulatory capacity of American agencies, but also how these
transitions between more formal and informal enforcement strategies take place. As this project
demonstrates, American regulatory agencies, far from being limited to the use of formal
administrative authorities, can and do utilize tools found in the nexus of civil society and the
American legal system. Citizens' (and citizen groups') legal standing to act as private attorneys
general on a significant swath of regulatory law can confer a partnership status between citizen
regulators and state regulations, and this regulatory partnership can come in several forms
dictated by the institutional and political conditions which define an agency's capacity to develop
and utilize private litigation incentive structures. Private litigation enforcement, first, might be a
little-used enforcement strategy at an agency. As we saw in the historical analysis of HUD's
Office of Equal Opportunity, agency personnel might not have the need, ability, or desire to
promote private litigation as an enforcement alternative. Under this model, rather than
developing and utilizing private litigation incentives schemes as an alternate pathway of policy
enforcement, an agency relies more on formal administrative measures in line with traditional
notions of command-and-control bureaucratic regulation.

Alternatively, private litigation enforcement might exist as a corollary tool, quite beside
that offered by more formal administrative enforcement measures, but a tool that is pivotal to the
implementation of public policy, nonetheless. This model best describes the form taken by
private litigation enforcement at the EPA in the late 1970s. Citizen environmental suits were a
tool that the agency recognized and institutionally encouraged through incentivizing strategies,
but these strategies were not intimately integrated into the very fabric of the agency's day-to-day formal administrative strategies. Enforcement under this model requires a trade-off between more traditional and alternate regulatory strategies: building a system of scientific data analysis and management required the EPA to place some of its more ambitious Weberian enforcement goals at bay. This trade-off, however, paid off for the EPA. After this initial investment in the construction of a data system that would enhance the viability of private litigation, the agency had an enduring private litigation enforcement structure in place, allowing it to develop close alliances with private litigants and attorneys over time, and more intimately integrate private litigation incentives into its day to day operations.

Which brings us to the final model of regulatory partnership: under this alternative, private legal enforcement strategies can be woven into the more formal administrative actions of an agency until they cannot be easily separated. This alternative is best represented by the private litigation enforcement scheme implemented by the EEOC under the Johnson, Carter, and Clinton administrations. Granted very few formal administrative powers, the EEOC learned early on how to structure and organize these powers to best enhance the viability of private suits. While the agency was limited to processing and conciliating charges of employment discrimination without the force of law, the EEOC re-imagined this ineffective administrative process and organized its charge processing procedure to protect and promote the private right of action in the courts. Through the development of administrative goals and structures that enhance the viability of private legal enforcement efforts, under this alternative, administrative and legal mechanisms of enforcement become married under one enforcement strategy that provide agencies with a double-edged sword of policy enforcement.
Within the stories of the shifting and malleable capacity of these agencies, situated as they are among a constellation of factors related to an agency's institutional development and its interactions with outside political institutions and civil society, we find clues that indicate how we might understand bureaucratic choices to use more traditional or creative enforcement tools. As we have seen, the choice of regulatory agencies between these different enforcement strategies need not be permanent or confining. Rather, regulatory agencies with a clear mission and uncompromised directives, and in a flexible display of not only regulatory capacity but the manipulation and development of that capacity, can move between these different models of regulation given changes in political conditions, or shifts in agency priorities. Answers to if, how, and when agencies move between these different models of enforcement, as we have just seen, are located in the institutional and political conditions that shape the boundaries of agency regulatory behavior, but also, more broadly, can be found in the historical curiosities and specificities that shape the narrative of private litigation in the late 20th Century. By identifying and exploring how private litigation has evolved into one the most trusted tools of the state, we gain a more complete picture of the capacity of American regulatory agencies.

III. The Narrative of Private Litigation, Statebuilding, and Partisanship

Throughout these historical analyses tracing the regulatory capacity and development of private litigation enforcement in the EEOC, EPA, and HUD's Office of Equal Opportunity runs a common narrative – a narrative which tells the larger story of the growth of private litigation and how state actors have come to recognize and utilize its policy enforcement powers. For most scholarship, this story begins in the early 1960s. As the demands of a rights-centered society grew more fervent in the absence of available federal bureaucratic remedies, an increasing
number of activists turned to the courts to secure rights on a growing number of issues, particularly those pertaining to civil rights. The courts, which were quite friendly to these rights claims at the time, provided a hospitable environment for private citizens to secure government action on social problems. After the Supreme Court's unanimous decision in *Brown v. Board* (1954) to reverse the separate-but-equal doctrine (*Plessy v. Ferguson* 1896), civil rights advocates, "awakened…to moral needs which, made visible, could not be denied" (Stone 1974: 53 in Rosenberg 1991: 272), flooded the courts system with civil rights litigation. Environmental activists, likewise, saw an analogue in the success of the civil rights court strategy. Claiming that "the judiciary is the one social institution already structured to provide the wise responses that may enable us to avert ecological disaster" (Cameron 1970: 175 in Rosenberg 1991: 271-2), environmental litigators recognized a common struggle with the civil rights movement and approached the courts to argue for a constitutional right to a clean environment which, if achieved, "would stand alongside *Brown v. Board* in the history of constitutional law" (Esposito 1970: 51 in Rosenberg 1991: 272).

In response to this growing legal activism, which helped push public opinion in favor of greater legal protections for minorities and the environment, Congress and the Executive Branch began to unveil a federal response in the mid-1960s. In a quick succession of large-scale bureaucratic statebuilding that took place within a six year period, Congress authorized the creation of the EEOC with the Civil Rights Act of 1964 and imparted new fair housing responsibilities to HUD with the Civil Rights Act of 1968, and in 1970, President Nixon transmitted an executive order creating the EPA. But as a federalized bureaucratic response to growing civil rights and environmental demands began to emerge in the 1960s and early 1970s, this tried-and-true judicial approach for addressing societal claims was not displaced or
discarded, but incorporated into the larger administrative response that grew out of the enacting legislation.

While advocate groups and Democrats in Congress pushed for the creation of strong administrative enforcement powers for each of these agencies, Republican filibusters or threats of resource constraints kept such bureaucratically empowered regulation models at bay. In the congressional debates surrounding the creation of the EPA, Democrats in Congress worried aloud that the agency would never have the necessary resource levels to carry out its vast enforcement responsibilities, and ensured that the private right of action was included in the statutory language as an additional protection in the face of inadequate bureaucratic capacity to implement environmental statutes. And, in floor debates over the Civil Rights Acts of 1964 and 1968, while civil rights advocates and Democratic members of Congress insisted that the EEOC and HUD's Office of Equal Opportunity be granted cease-and-desist powers to carry out their fair employment and fair housing responsibilities, Republicans members, wary of the growing reach of a centralized federal bureaucracy, quashed these provisions through filibusters and offered the private right of action in the court as a compromise measure.

Imbued with a history of enforcement through the judicial system, and conscious of their own administrative limitations to carry out their legislative responsibilities, early administrators at the EEOC, EPA, and the Office of Equal Opportunity at HUD looked to private litigation as a stopgap measure to ensure the implementation of agency administered statutes. While there was general consensus among liberal activists that "the whole purpose of delegating enforcement powers to administrative agencies [as opposed to leaving regulation to the courts] was to provide
a faster and broader means for correcting violations,"¹ as it became more and more clear that ambitious bureaucratic statebuilding goals would likely not be realized, administrators and legislators sympathetic to civil rights and environmental protection regulation turned to the potential enforcement powers provided by private litigation. In the case of employment discrimination regulation, for instance, while Democrats and civil rights advocates failed again to legislatively secure cease-and-desist powers for the EEOC in 1972, legislative and administrative attempts to motivate private employment litigation had been highly successful, spurring the growth of an employment bar which achieved its own institutional momentum and producing a proliferation of equal employment suits in the courts. Given this history of enforcement – one that spoke to the limitations of enacting an administratively empowered bureaucracy, but also to the achievements of motivating private attorneys general – Democrats and civil rights advocates lobbied for greater employment litigation protections in the Civil Rights Act of 1991, in lieu of stronger enforcement powers for the EEOC (as was proposed by Republicans in Congress).

Contrary to popular mythology, then, it has not been Democrats alone who have spearheaded private litigation protections. As observed in the case of the EEOC, Democrats and Republicans have each alternately supported private litigation enforcement over time. Rather, as private litigation has become a more formidable tool for employment discrimination enforcement, Democrats have adopted a new model of regulation: one that provides room for private regulatory behavior to supplement the enforcement achieved by more conventional administrative powers. And Republicans, in a testament to the growing effectiveness of private

litigation enforcement, have come to embrace a more administrative model of Title VII enforcement.

Consider the example provided by fair housing enforcement. In a reversal of the ideological story offered by the EEOC, Democrats in Congress came to support greater administrative enforcement powers for HUD's Office of Equal Opportunity in 1988, with Republicans, instead, supporting litigation incentives. Given twenty years of unimpressive private fair housing litigation rates – stemming from legislative restrictions and the failure of HUD's Office of Equal Opportunity to develop incentive structures for the motivation of private fair housing litigation – civil rights advocates and Democrats in Congress opted for a more traditional command-and-control model of regulation in this case.

The story of private litigation enforcement, therefore, is not one dominated by Democrats or Republicans (see also Farhang 2010: 228-30), but one that has evolved alongside shifts in the federal narrative of statebuilding in the US. As conceptions of what constitutes strong federal regulation have changed over the years in both academic and political circles, so too has the prominence of private litigation as a federal tool for the enforcement of specific policies. In the face of failed attempts to create administratively empowered bureaucratic agencies, political actors sympathetic to the regulation of public policy have dynamically responded by putting state power behind the creation and motivation of promising alternate enforcement mechanisms. While such bureaucratic behavior might, as Robert Reich (1999) claims, mark the end of "the era of big government" as we know it, it also prompts us to consider the many forms that state regulation can take, and to, especially, recognize those in which state power might be hidden behind the actions of private citizens.
IV. Concluding Remarks on Generalizability and Directions for Future Research

This research project offers a new perspective on an old question which asks, how weak is the American bureaucracy? Through historical examinations of the regulatory capacity of the EEOC, EPA, and HUD's Office of Equal Opportunity, I argue that the capacity of American regulatory agencies is not strictly defined by their formal administrative powers, but is creatively, strategically, and consciously shaped by bureaucrats through the development of alternate pathways of policy enforcement. The scope of this study, however, hardly completes an investigation of this relatively new conceptualization of bureaucratic capacity. Rather, this project provides room, and indeed, should be seen as a jumping-off point, for future studies on this topic. Applying the questions posed by this analysis to other regulatory agencies will help with the construction of a more fully-realized model of the institutional and political factors that lead regulatory agencies, broadly, to turn to private litigation as an alternate means of enforcement.

Promises for future research also lie in exploring the applicability of this multidimensional concept of state capacity to other nation states outside of the US. What happens, for instance, if we cross national boundaries, and move outside of the characteristically weak American state and towards the more traditionally "strong" administrative states of other Western democracies? Are alternate mechanisms of policy enforcement, like state-motivated private litigation, unique to the comparatively weak American regulatory system? Or do variants on regulatory strategies exist outside of the boundaries of the American state? Robert Lieberman (2002, 2005) has explored these questions in his cross-national analysis of employment discrimination enforcement in the US, Britain, and France, and similar projects on other policy issues will certainly provide fruitful opportunities for better understanding the relationship.
between conventional notions of state strength and the development of alternate pathways of policy enforcement in a state.

The enforcement of regulatory laws through the utilization of bureaucratically-managed private litigation is a topic that promises a rich research agenda for the discipline. The story of the development of these agency strategies for encouraging and utilizing private litigation enforcement efforts is just one – yet, one illuminating – piece of the puzzle for exploring the means by which regulatory agencies can enhance their enforcement capacity beyond the confines of their formally granted administrative powers. As an example of bureaucratically-encouraged private enforcement, these bureaucratic frameworks for supporting private litigation challenge traditional notions of state capacity and strength. Coming together to construct a study of an enforcement strategy responsive to historical moments of ideological, policy, and legal changes, these cases provide a model for the complexities of bureaucratic regulatory behavior and the enhancement (and contraction) of state capacity in relation to interbranch interactions. The historical narrative and statistical analyses offered by this project provide a starting point for how we might begin to consider these topics of importance to political science, public policy, public administration, and public law; a starting point that argues that the development of the bureaucratic management of private litigation is as much a state capacity story and a political story, as the creation and development of the formal administrative capacities of regulatory agencies, themselves.
References


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*Plessy v. Ferguson,* 163 U.S. 537 (1896).