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Civil Rights Administration

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Abstract. Civil rights enforcement is often imagined as the work of lawyers in court. But over the course of the twentieth century, the administrative state quietly emerged as one of the most significant arenas for civil rights adjudication. In 2023 alone, individuals filed more civil-rights-related complaints with the Department of Housing and Urban Development, the Equal Employment Opportunity Commission, and the Department of Education than were filed across the entire federal court system. Yet today, the legal foundations and institutional infrastructure supporting administrative civil rights enforcement are crumbling. This Essay seeks to assess what is at stake in that collapse. It offers an account of what administrative civil rights adjudication does (or once did), the tools it provides, the enforcement possibilities it creates, and its comparative strengths and limitations. This account suggests there may be good reason to return some civil rights enforcement authority to private litigants and the courts. But it also shows that what may be lost in the administrative realm is not easily replaced: the state's own capacity to recognize, respond to, and remedy inequality.

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Introduction

Ours is a nation of private attorneys general. Rather than relying primarily on government to administer and enforce civil rights mandates, the American legal system has long depended on individual citizens to identify and challenge civil rights violations through the courts.[1] These private litigants and their lawyers—functioning as de facto enforcers of public norms—were central to the civil rights movement's transformation of equality into a foundational principle of American law in the twentieth century.[2] Some, like Thurgood Marshall, Charles Hamilton Houston, Pauli Murray, Robert L. Carter, and Constance Baker Motley, were so effective in this role that their names have become familiar to generations of law students.

And yet, despite our system's deep emphasis on private litigation as the primary venue for civil rights enforcement, federal agencies today may lay claim to being the largest single site of civil rights adjudication in the country. In the fiscal year 2024, federal agencies collectively received over 110,000 civil-rights-related complaints[3]—far outpacing the approximately 46,000 such complaints filed in the federal courts during the same period.[4] These agency complaints spanned a broad range of issues: Parents alleged that school disciplinary policies or library censorship discriminated against their children; communities challenged environmental siting decisions that disproportionately exposed them to pollution; workers of different races, genders, and sexual orientations claimed discriminatory treatment in hiring, promotion, or termination. In short, the full spectrum of civil rights

1. *See* SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. 12-14 (2010); *cf.* Olatunde C.A. Johnson, Essay, *Lawyering That Has No Name: Title VI and the Meaning of Private Enforcement*, 66 STAN. L. REV. 1293, 1311 (2014) (discussing the role of private lawyers in the executive enforcement, as well as the courts' enforcement, of Title VI).

2. *See* FARHANG, *supra* note 1, at 12-14; *see also* Pamela S. Karlan, Lecture, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 186 (describing "the private attorney general" as "one of the primary mechanisms Congress has used for enforcing civil rights").

3. *See, e.g.*, *Enforcement and Litigation Statistics*, U.S. EEOC, https://perma.cc/M3VD-3BUU (archived Feb. 10, 2026) (to locate, select "Tables and Downloads") (counting 88,531 complaints filed with the EEOC in 2024); NAT'L FAIR HOUS. ALL., 2025 FAIR HOUSING TRENDS REPORT 8 (2025), https://perma.cc/45WR-85AG (counting 1,566 complaints filed with the Department of Housing and Urban Development in 2024, as well as 6,754 filed with the Department's state and local agency partners); 2024 DEP'T EDUC. OFF. FOR C.R. ANN. REP. 8, https://perma.cc/VDH6-4JDU (counting 22,687 complaints filed with the Department of Education Office for Civil Rights in 2024).

4. *See* U.S. CTS., TABLE C-2: U.S. DISTRICT COURTS—CIVIL CASES COMMENCED, BY BASIS OF JURISDICTION AND NATURE OF SUIT, DURING THE 12-MONTH PERIODS ENDING SEPTEMBER 30, 2023 AND 2024, at 2 (n.d.), https://perma.cc/WSL5-BKQP (counting 45,781 civil rights cases commenced in federal district courts).

grievances—from education to environment to employment—flows into the administrative state. The result is a kind of national clearinghouse for civil rights concerns, where people seek remedies not only in courtrooms but also through bureaucracies that increasingly shape the boundaries of rights and remedies.[5]

In this Essay, we analyze the administrative state's resolution of civil rights claims through the lenses of its historical development and its contemporary practice. Our focus is primarily on anti-discrimination claims, due to their volume. That the administrative state would be such a prominent site for the adjudication of these claims was not an inevitable feature of the federal bureaucracy; it was the result, in part, of the efforts of civil rights advocates to institutionalize federal enforcement power.[6] The result was that over time, the administrative state emerged as both an alternative and overlapping institution of civil rights enforcement.

Today, however, much of this infrastructure is in shambles. The relatively gradual erosion of the legal foundations that once supported administrative civil rights adjudication—such as the steady narrowing of disparate impact liability[7]—has now converged with a wave of bureaucratic turbulence.[8] While the federal government continues to enforce civil rights laws in some areas, that enforcement increasingly reflects presidential priorities rather than a meaningful commitment to resolving the thousands of individual

5. For more on the "adjudicative state" and its interaction with judicial review, see generally Adam B. Cox & Emma Kaufman, Feature, *The Adjudicative State*, 132 YALE L.J. 1769 (2023), which observes that "[r]esolving individual claims is at least half of what the administrative state does," *id.* at 1772.

6. *See* Sophia Z. Lee, *Racial Justice and Administrative Procedure*, 97 CHI.-KENT L. REV. 161, 165-69 (2022) ("The [Administrative Procedure Act (APA)] was not designed to advance racial justice. Nonetheless, over subsequent decades, civil rights advocates made use of administrative procedure, both under and around the APA, to try to counter racist practices of government agencies and those they regulated."); *see also* FARHANG, *supra* note 1, at 98-100 (describing civil rights advocates' efforts to secure even more robust administrative enforcement of Title VII than the employment statute ultimately provided).

7. *See* Louisiana v. U.S. EPA, 712 F. Supp. 3d 820, 866 (W.D. La. 2024) (enjoining the Department of Justice and the Environmental Protection Agency (EPA) from enforcing Title VI's disparate impact requirements against any entity in Louisiana); Exec. Order No. 14281, 90 Fed. Reg. 17537, 17537 (Apr. 28, 2025) ("It is the policy of the United States to eliminate the use of disparate-impact liability in all contexts to the maximum degree possible to avoid violating the Constitution, Federal civil rights laws, and basic American ideals.").

8. *See* Samuel R. Bagenstos & Ellen D. Katz, *The Dismantling of Civil Rights Protections and Thoughts on Rebuilding* 2-7, 14-17, 21-32 (Univ. of Mich. Pub. L. Rsch. Paper, Paper No. 25-023, 2026), https://perma.cc/6QLM-GKZB. As we describe, the seemingly rapid shifts of the second Trump Administration reflect longer-term trends. *See infra* Part I.B.

discrimination complaints submitted each year.[9] What remains is a system that still bears the name of civil rights enforcement but often functions less as a venue for adjudicating individual harms than as an instrument of executive discretion and presidential prerogative.[10]

To understand these shifts, we need a clear account of what civil rights adjudication actually entails: what functions it performs, where it proves relatively effective, and where it falls short. In other words, we need a comparative institutional analysis that considers the unique capacities—and limitations—of administrative civil rights enforcement within the broader legal ecosystem. Our analysis, which spans questions of cost, institutional design, and enforcement capacity, is more granular than the broader debate between public and private enforcement.[11]

We divide the administrative state's efforts to expand civil rights enforcement into three separate functions. First, the federal government's involvement in a civil rights complaint can operate as a subsidy for low-value claims that would otherwise be hard to bring.[12] Second, such involvement can enable novel or experimental civil rights theories and claims through specific substantive enforcement authorities or remedial possibilities.[13] And third, it can bring additional power to the enforcement of civil rights claims by increasing the sanctions available for a civil rights violation and putting the executive's imprimatur on certain efforts at rights enforcement.[14] These are

9. *See* Nikole Hannah-Jones, Essay, *How Trump Upended 60 Years of Civil Rights in Two Months*, N.Y. TIMES MAG. (June 27, 2025), https://perma.cc/2K9X-3U7E.

10. *See* Alexander Reinert, Joanna C. Schwartz & James E. Pfander, *New Federalism and Civil Rights Enforcement*, 116 NW. L. REV. 737, 747 (2021) ("[W]e also see a more subtle potential for federal tyranny in the enormous concentration of power in the President of the United States to enforce civil rights protections.").

11. For discussion of the "renewed debate about the choice between public and private enforcement as regulatory tools and renewed interest in understanding the core attributes of each," see David Freeman Engstrom, *Private Enforcement's Pathways: Lessons from Qui Tam Litigation*, 114 COLUM. L. REV. 1913, 1920 (2014).

12. *See infra* notes 121-24, 140-60 and accompanying text.

13. *See, e.g.*, Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881, 883 (2016) ("[T]hrough the interpretation and implementation of legal obligations relating to sexual violence and sex discrimination, the federal bureaucracy is now regulating sex itself."); Jacob Gersen & Jeannie Suk Gersen, *The Six Bureaucracy* 3 (Harvard Pub. L. Working Paper, Paper No. 25-20, 2025), https://perma.cc/8GKA-GYHE ("[A] statute [Title VI] that does not prohibit discrimination on the basis of religion came to be understood to prohibit discrimination against Jews and Arab Muslims, and to protect against antisemitism and Islamophobia.").

14. *See, e.g.*, Wayne C. Turner, Note, *Title IX and Its Funding Termination Sanction: Defining the Limits of Federal Power over Educational Institutions*, 17 IND. L. REV. 1167, 1173 (1984) ("In order to serve the purpose of Title IX best, the administrative agencies must be able to wield the threat of fund termination in the most effective manner."); Reinert et al., *supra* note 10, at 747-48 (describing the "outsized role" of presidents today "in

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not hermetically sealed models of operation—they often overlap in a single effort by the federal government to resolve an individual civil rights complaint—but they nonetheless usefully help us cluster and identify the resources, capacities, and possibilities that constitute civil rights adjudication.

Other accounts have examined the scope of substantive rights as delineated through agency guidance, regulations, and enforcement practices,[15] as well as the bureaucratic structures that have emerged to administer and enforce those rights.[16] Identifying the basic features of civil rights adjudication within the administrative state offers a frame through which to evaluate how best to structure that adjudication. In particular, maximizing overall enforcement capacity by increasing the power available to the executive branch may be less important—perhaps even less desirable—today than it was fifty years ago given the existence of a broader and more decentralized civil rights legal movement that is generally capable of challenging the most salient or visible rights violations.[17] By contrast, claims subsidies—mechanisms through which agencies lower the costs of filing and pursuing complaints—may still offer the only efficient and effective avenue of redress for many individual complainants.[18]

An institutional framework, we hope, allows us to write beyond the contingencies of the current moment. The troubling directions of current civil rights enforcement may reflect the persistent challenge of designing race-conscious legal protections that truly serve the interests of racial minorities. But these shifts may also stem from broader structural forces—such as the collapse of legal constraints within the executive branch.[19] Our institutional account is informed by, and responsive to, critiques of how executive civil

deciding which laws to enforce, which groups to target for investigation, and which to let slide").

15. *See, e.g.*, Benjamin Eidelson & Deborah Hellman, Essay, *Antisemitism, Anti-Zionism, and Title VI: A Guide for the Perplexed*, 139 HARV. L. REV. F. 1, 8-9, 19-22 (2025) (analyzing whether universities have violated their obligations to Jewish students under Title VI).

16. *See, e.g.*, Gersen & Gersen, *supra* note 13, at 21 (tracing the emergence of the Title IX compliance bureaucracy within universities); Johnson, *supra* note 1, at 1315-16 (detailing how the Department of Transportation expanded its administrative capacity to enforce Title VI).

17. For an empirical account of the broader growth of public interest lawyering at the end of the twentieth century, see Laura Beth Nielsen & Catherine R. Albiston, *The Organization of Public Interest Practice: 1975-2004*, 84 N.C. L. REV. 1591, 1605-09 (2006).

18. *See infra* Part II.A.

19. *See, e.g.*, Aziz Z. Huq, *Structural Logics of Presidential Immunity*, 75 DUKE L.J. 565, 618 (2026); Ashraf Ahmed, Lev Menand & Noah A. Rosenblum, *The Making of Presidential Administration*, 137 HARV. L. REV. 2131, 2133, 2137 (2024).

rights authority can be misused.[20] Yet it also aims to stand independently as a framework for understanding the enduring possibilities and limitations of administrative civil rights governance.

This Essay proceeds in three parts. Part I traces the rise and ongoing unraveling of administrative civil rights adjudication. Part II provides a comparative institutional analysis of what, exactly, the administrative state contributes to the adjudication of civil rights claims, highlighting its unique capacities and constraints. Part III situates administrative adjudication within the broader arc of the civil rights movement and the evolution of the modern administrative state.

I. The Rise and Fall of Civil Rights Administration

Civil rights enforcement and adjudication in the United States have never been the province of courts alone. Since the Reconstruction era, various parts of the administrative state have been engaged in this work.[21] But the federal government's efforts to help implement civil rights protections have been uneven, fragile, and fiercely contested.[22] The rise of civil rights administration reflects a long and evolving interplay between federal authority, constitutional ideals, grassroots advocacy, and private enforcement. The recent erosion of the federal government's civil rights infrastructure by courts and governmental actors reflects a shift toward more limited, yet still powerful, forms of enforcement.

A. Rise

The roots of civil rights enforcement through federal administrative structures stretch back to Reconstruction, and in particular, to the Bureau of

20. *See* Reinert et al., *supra* note 10, at 747 ("The Trump Administration's approach to the oversight of police departments illustrates these problems of concentrated power."); Gersen & Gersen, *supra* note 13, at 12, 29 ("While driving out discrimination on the basis of sex, race, ethnicity, or shared ancestry is a laudable goal, the mechanisms chosen to pursue those ends for the sake of the educational environment may also produce far ranging negative consequences that go to the heart of the academic mission, some predictable and some less so.").

21. *See* George Rutherglen, *Private Rights and Private Actions: The Legacy of Civil Rights in the Enforcement of Title VII*, 95 B.U. L. REV. 733, 744 (2015) ("Throughout the early years of Reconstruction, administrative enforcement through the Freedmen's Bureau, established within the War Department, co-existed with enforcement through judicial proceedings.").

22. *See* ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION 7-8 (2019) ("[S]ignificant obstacles confronted those seeking to implement the idea of equal rights for black Americans. Racism, perhaps slavery's most powerful legacy, was one.").

Refugees, Freedmen, and Abandoned Lands (Freedmen's Bureau).[23] Although the Bureau crumbled, twentieth-century developments in enforcement and adjudication within the administrative state would prove more durable.

1. Reconstruction and the fragile beginnings of administrative justice

The story of civil rights administration likely begins with the Freedmen's Bureau. Created by Congress in 1865 near the end of the Civil War,[24] the Freedmen's Bureau represented a radical departure from the prevailing norms of federal governance. It was a national institution explicitly designed to protect Black freedom and provide support during the transition from slavery to citizenship,[25] yet it operated in a nation that remained deeply hostile, racially divided, and economically dependent on the vestiges of slavery.[26] To carry out its mandate, the Bureau undertook a broad and ambitious mission—overseeing the enforcement of labor contracts,[27] assisting with education,[28] securing land rights,[29] responding to racial violence,[30] and investigating and adjudicating disputes involving recently freed Black people.[31] The Bureau was among the earliest administrative efforts to embed civil rights protection in the federal administrative state, creating a model of racial justice enforcement outside the courts.[32] The establishment of a federally administered apparatus

23. *See* Karen M. Tani, *Administrative Constitutionalism at the "Borders of Belonging": Drawing on History to Expand the Archive and Change the Lens*, 167 U. PA. L. REV. 1603, 1611-12 (2019) (noting the Freedmen's Bureau's "broad and demanding task of handling all issues relating to refugees and freed persons").

24. Act of Mar. 3, 1865, ch. 90, 13 Stat. 507 (creating the Bureau of Refugees, Freedmen, and Abandoned Lands).

25. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 68-70 (1988).

26. *See* FONER, *supra* note 22, at 32-33, 40.

27. Randall M. Miller, *Introduction* to THE FREEDMEN'S BUREAU AND RECONSTRUCTION: RECONSIDERATIONS, at xiii, xvi (Paul A. Cimbala & Randall M. Miller eds., 1999).

28. *Id.* at xxvii.

29. *Id.* at xxi-xxii.

30. *See* Brooks D. Simpson, *Ulysses S. Grant and the Freedmen's Bureau*, *in* THE FREEDMEN'S BUREAU AND RECONSTRUCTION: RECONSIDERATIONS, *supra* note 27, at 1, 3-4.

31. *See* AMALIA D. KESSLER, INVENTING AMERICAN EXCEPTIONALISM: THE ORIGINS OF AMERICAN ADVERSARIAL LEGAL CULTURE, 1800-1877, at 267-69 (2017).

32. W.E. BURGHARDT DU BOIS, BLACK RECONSTRUCTION IN AMERICA: AN ESSAY TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860-1880, at 219 (World Publ'g Co. 1964) (1935) ("The Freedmen's Bureau was the most extraordinary and far-reaching institution of social uplift that America has ever attempted."); WILLIAM J. NOVAK, NEW DEMOCRACY 229-30 tbl.6.1 (2022) (listing the Freedmen's Bureau as an early administrative agency).

for racial equity in a country where race-based subjugation had only just been formally abolished—and where white supremacy remained deeply entrenched in political institutions, cultural attitudes, and economic structures—was nothing short of revolutionary.

The Bureau bore many of the defining features of modern civil rights agencies. It operated as both a provider of direct services and as an enforcer of federal protections for a targeted, historically marginalized group.[33] Its legal interventions were especially significant: The Bureau provided legal representation, assisted freed people in navigating court systems,[34] and helped assert claims to wages,[35] property,[36] and marriage.[37] It also functioned as a buffer between Black communities and white hostility, often stepping in to shield Black people from retaliatory violence and coercion.[38]

To be sure, the Bureau was far from perfect. As a result of sustained political opposition, the Bureau remained chronically underfunded and understaffed.[39] Scholars have also criticized aspects of the Bureau's operations, including the extent to which they reinforced exploitative labor arrangements.[40] Yet despite these shortcomings, the Bureau's mission—and its early efforts to enforce civil rights through administrative means—were transformative.[41] Indeed, the Freedmen's Bureau embodied an early, if

33. *See* James W. Fox, Jr., *Democratic Citizenship and Congressional Reconstruction: Defining and Implementing the Privileges and Immunities of Citizenship*, 13 TEMP. POL. & C.R.L. REV. 455, 469-70 (2004) (noting the Bureau's assistance in "health, education, and basic welfare" and its work "litigating important cases, including the cases challenging the neo-slavery apprenticeship contracts and laws").

34. *See* Miller, *supra* note 27, at xxvi.

35. *Id.* at xxv.

36. *Id.* at xx-xxi.

37. *See, e.g.*, Certificate of Matrimony for Isaac Kelly and Catherine Kelly of Nashville, Tennessee (Feb. 26, 1866) (on file with Nat'l Archives Catalog, Records of the Bureau of Refugees, Freedmen, and Abandoned Lands, Record Group 105, Freedmen's Marriage Certificates).

38. *See* Simpson, *supra* note 30, at 3, 11-12 ("[T]he use of the Freedmen's Bureau, military courts, and military commissions protected blacks when southern state legislators, local authorities, and civil courts proved unable or unwilling to meet that challenge.").

39. *See* Daniel Backman, Note, *"A Vast Labor Bureau": The Freedmen's Bureau and the Administration of Countervailing Black Labor Power*, 40 YALE J. ON REGUL. 837, 846-47, 859 & n.146 (2023) ("The Bureau was also underfunded and understaffed from the start.").

40. *See, e.g.*, Tani, *supra* note 23, at 1614 ("Bureau agents strongly encouraged freed persons—especially men—to enter labor contracts, in a context in which the balance of power favored employers and in which many employers were eager to replicate the conditions of slavery.").

41. Paul A. Cimbala & Randall M. Miller, *Preface* to THE FREEDMEN'S BUREAU AND RECONSTRUCTION: RECONSIDERATIONS, *supra* note 27, at ix, x ("Simply by being there to oversee a labor contract or hear the complaint of an ex-slave or a planter was to interrupt, even disrupt, the complete economic and social power claimed by whites

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incomplete, model of federal civil rights administration—one that combined social support with legal enforcement to advance a vision of civil rights through federal power.

The Bureau offered a radical reimagining of the federal government's role in protecting individual rights—especially in places where traditional legal systems were inaccessible, hostile, or complicit in racial subordination. The Bureau's very existence marked a profound shift: It seeded the idea that the federal government not only could, but must, play a proactive role in civil rights enforcement outside of the judicial system.[42] The Bureau supervised labor contracts,[43] established schools,[44] and operated quasi-judicial tribunals in regions where state courts refused to recognize Black testimony.[45] It distributed land and intervened in property disputes,[46] defended freed people against dishonest employers,[47] and created hospitals to serve communities excluded from Southern health systems.[48] By 1870, it had helped to create between 1,500 and 3,000 schools, serving up to 150,000 students, although estimates vary.[49]

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over blacks before emancipation. If nothing else, the Bureau showed that slavery was dead.").

42. *See* FONER, *supra* note 22, at 8 (describing this shift during Reconstruction more broadly).

43. Cimbala & Miller, *supra* note 41, at ix.

44. *Id.*

45. *See* Bureau of Refugees, Freedmen & Abandoned Lands, War Dep't, Circular No. 5, Rules and Regulations for Assistant Commissioners (May 30, 1865), *as reprinted in* H.R. EXEC. DOC. NO. 39-70, at 127 (1866) (directing the Bureau to seize judicial control over cases involving Black people in states "where there is an interruption of civil law, or in which local courts, by reason of old codes . . . disregard the negro's right to justice before the laws . . . in not allowing him to give testimony").

46. John M. Bickers, *The Power to Do What Manifestly Must Be Done: Congress, the Freedmen's Bureau, and Constitutional Imagination*, 12 ROGER WILLIAMS U. L. REV. 70, 75, 95-96 (2006).

47. *See* Randy Finley, *The Personnel of the Freedmen's Bureau in Arkansas*, *in* THE FREEDMEN'S BUREAU AND RECONSTRUCTION: RECONSIDERATIONS, *supra* note 27, at 93, 107 (describing a Bureau agent who "frequently forbade planters to sell a crop until he had investigated freedmen's claims of fraud").

48. *See* Ira C. Colby, *The Freedmen's Bureau: From Social Welfare to Segregation*, 46 PHYLON: ATLANTA U. REV. RACE & CULTURE 219, 227 (1985) ("Freedmen's Bureau hospitals were also available throughout the South. During one six-month period . . . 42 medical facilities cared for 45,898 freedmen.").

49. *See* Amanda Claybaugh, *Public Education and the Welfare State: The Case of the Freedmen's Schools*, OCCASION: INTERDISC. STUD. HUMANS., Dec. 20, 2010, at 1, 3 (reporting 3,000 schools serving 150,000 people in 1870); *The Rise and Fall of the Freedmen's Bureau*, NAT'L PARK SERV., https://perma.cc/7S58-3AYC (last updated July 18, 2025) (reporting "over 1,500 schools educating over 100,000 pupils").

The Bureau's decisionmaking helped lay the groundwork for what legal scholars now describe as "administrative constitutionalism": the process by which administrative agencies interpret, apply, and define constitutional principles through policy implementation and adjudication.[50] As Karen Tani has pointed out, the Freedmen's Bureau played an important role in interpreting and giving content to the Thirteenth Amendment, including the meaning of "involuntary servitude."[51]

In 1872, Congress formally terminated the Freedmen's Bureau, withdrawing its statutory authority and signaling the federal government's retreat from Reconstruction.[52] Long before its official abolition, however, the Bureau's practical capacity to act had already eroded under the combined weight of President Johnson's opposition, an exhausted political will, and relentless white supremacist resistance on the ground.[53] Even as its authority waned, it left behind a precedent for federal intervention on behalf of marginalized communities through administrative means. In this sense, the Freedmen's Bureau laid the conceptual groundwork for the twentieth-century civil rights infrastructure that would follow and demonstrated both the promise and the fragility of deploying federal administrative power in service of civil rights.

Between Reconstruction's collapse and the mid-twentieth century, the federal government largely retreated from civil rights enforcement. The time between the end of World War I and the beginning of World War II, particularly the New Deal era, ushered in an unprecedented expansion of the federal administrative state.[54] New agencies emerged to respond to economic collapse and social unrest, and existing agencies saw their authority vastly enlarged.[55] While this growth marked a turning point in the development of administrative governance, it did not translate into coherent or consistent civil rights enforcement.

New Deal administrative agencies were neither wholly progressive nor inherently democratic. They often acted not as neutral implementers of

50. *See* Tani, *supra* note 23, at 1604-05, 1611-13 (quoting Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799, 801 (2010)).

51. *See id.* at 1611-13.

52. EQUAL JUST. INITIATIVE, RECONSTRUCTION IN AMERICA: RACIAL VIOLENCE AFTER THE CIVIL WAR, 1865-1876, at 41 (2020), https://perma.cc/4RHJ-LJES.

53. *See id.* at 40-41.

54. *See, e.g.*, Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 424 n.9 (1987).

55. *See id.*; Daniel B. Rodriguez & Barry R. Weingast, *Engineering the Modern Administrative State: Political Accommodation and Legal Strategy in the New Deal Era*, 46 BYU L. REV. 147, 174-75 (2021).

national policy, but as institutional preservers of the racial status quo.[56] For example, the Home Owners' Loan Corporation (HOLC) and the Fair Housing Administration (FHA) adopted and institutionalized racially exclusionary practices that would shape residential segregation for generations.[57] The HOLC pioneered the practice of redlining—grading neighborhoods and systematically marking Black or racially mixed areas as high-risk for mortgage lending—which denied Black families access to credit and trapped them in declining housing markets.[58] By codifying racist assumptions about neighborhood desirability and creditworthiness, this practice kept Black residents from wealth-building opportunities.[59] The FHA followed suit, refusing to insure mortgages in integrated or majority-Black areas, thus making federal housing support contingent on racial segregation.[60] It also promoted restrictive covenants to keep communities segregated.[61] These policies, which ensured exclusively white suburban growth while starving Black neighborhoods of investment, were not marginal; they shaped mid-century homeownership and helped define the racial geography of American cities.[62] Thus, the New Deal agencies developed internal expertise, policy norms, and enforcement tools that sustained racially stratified outcomes—even as they operated under the banner of economic recovery or public interest.

Yet even as many agencies perpetuated racial subordination, civil rights advocates began to understand the potential of the federal administrative state as a platform for contestation and reform. Beginning in the 1930s and accelerating after World War II, lawyers and grassroots organizations lobbied agency officials and pressed for regulatory reforms to expand access to

56. *See* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 75 (2017).

57. *See* Megan Haberle & Sophia House, *Introduction* to POVERTY & RACE RSCH. ACTION COUNCIL, RACIAL JUSTICE IN HOUSING FINANCE: A SERIES ON NEW DIRECTIONS 2, 3 (Megan Haberle & Sophia House eds., 2021), https://perma.cc/FAX2-FLVK.

58. *See* ROTHSTEIN, *supra* note 56, at 64 ("The HOLC created color-coded maps of every metropolitan area in the nation, with the safest neighborhoods colored green and the riskiest colored red. A neighborhood earned a red color if African Americans lived in it, even if it was a solid middle-class neighborhood of single-family homes.").

59. *See id.* at 64-65.

60. *Id.*

61. *See id.* at 83-85.

62. *See id.* at 75 ("In 1973, the U.S. Commission on Civil Rights concluded that the 'housing industry, aided and abetted by Government, must bear the primary responsibility for the legacy of segregated housing. . . . Government and private industry came together to create a system of residential segregation.'" (alteration in original) (quoting U.S. COMM'N ON C.R., UNDERSTANDING FAIR HOUSING 3, 5 (1973))).

justice.[63] This shift reflected both the political context and structural realities: Congress was divided on racial issues, and the judiciary was often unwilling—or even hostile—to enforce civil rights protections.[64] Agencies, by contrast, possessed regulatory authority that could touch everyday life in housing, education, employment, and transportation.

This turn to agencies was also pragmatic. In some instances, regulators could prove more responsive to political pressure and public campaigns than courts.[65] For example, a "new political imperative" tied to "vocal protests" contributed to the establishment of the Department of Justice's Civil Rights Section, which, though modest in its reach, offered an early federal foothold for challenges to racial violence and voting restrictions.[66] Vesting enforcement in federal agencies also offered civil rights organizations the opportunity to control and entrench their views of the best paths forward for civil rights protection.[67] Over time, this strategic engagement helped build a civil rights infrastructure within the administrative state itself, transforming agencies into contested sites where the meaning of equality and citizenship would be debated and enforced.

63. *See, e.g.*, SOPHIA Z. LEE, THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT 153-54 (2014) ("[E]ven as the court-enforced Title VII struggled to get off the ground, the workplace Constitution blossomed in the post-New Deal administrative state."); *cf.* Joy Milligan, *Subsidizing Segregation*, 104 VA. L. REV. 847, 855 (2018) (noting civil rights advocates' efforts to challenge federal education funding for segregation).

64. *See* LEE, *supra* note 63, at 149-52; Reva B. Siegel, *The Supreme Court, 2012 Term—Foreword* REV. 1, 6 (2013) ("To limit the role of federal courts in the redress of segregation, the Burger Court constructed the law of discriminatory purpose on a thickly elaborated commitment to judicial deference.").

65. *See* Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897, 1928-29 (2013) ("Agencies . . . are constantly engaging with the public: with stakeholders and other parties affected by administrative action, social movement groups, business and industry associations, unions, and political representatives at all levels.").

66. *See* RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS 111-12 (2007) (noting the Civil Rights Section's "increased pursuit of involuntary servitude, lynching, police brutality, and voting rights cases on behalf of African Americans").

67. *See* David Freeman Engstrom, *The Lost Origins of American Fair Employment Law: Regulatory Choice and the Making of Modern Civil Rights, 1943-1972*, 63 STAN. L. REV. 1071, 1074-75 (2011) (tracing the ascendance of the Federal Employment Practices Committee (FEPC) as the centralized and "exclusive" adjudicator of employment disputes "to the peculiar midcentury political economy of civil rights and, in particular, strategic conflict among civil rights," in which "mainline civil rights groups . . . preferred FEPC because it entrenched a gradualist, individualized, and negotiation-based approach that fit better with the organizational imperatives and strategic goals" of these groups).

2. Expanding federal leverage

The creation of the administrative civil rights state was the result of landmark laws that required active enforcement. The Civil Rights Act of 1964[68] marked a watershed in modern federal civil rights enforcement. Title VI of that Act prohibits discrimination on the basis of race, color, or national origin in any program receiving federal funding.[69] Importantly, Title VI empowered federal agencies to enforce this prohibition through the denial of funds and administrative oversight.[70] That provision became the backbone of administrative civil rights enforcement, providing a legal hook and a structural mandate for federal agencies to investigate discrimination, withhold funding as a cudgel against discriminators, and adopt regulations to ensure compliance.[71] Importantly, Title VI did not solely assign enforcement authority to private citizens. It created additional federal bureaucracy to enforce the Act.[72] That bureaucracy's responsibility included not only responding to complaints but also proactively shaping the terms of equality in federally funded programs.[73]

Title VI created *both* a legal prohibition against discrimination on the basis of race, color, or national origin *and* a new administrative infrastructure for civil rights enforcement, with federal agencies such as the Department of Health, Education, and Welfare (HEW) and later the Department of Education developing rules, compliance regimes, and enforcement mechanisms to oversee desegregation efforts.[74] This enforcement was far from passive: For example, HEW issued detailed guidelines requiring school districts to submit desegregation plans, with escalating requirements throughout the mid-1960s.[75] These guidelines were not merely advisory: Noncompliant school districts risked the outright termination of federal funding for their education

68. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of the U.S. Code).

69. 42 U.S.C. § 2000d.

70. *See id.* § 2000d-1 ("Each Federal department and agency which is empowered to extend Federal financial assistance . . . is authorized and directed to effectuate the provisions of section 2000d . . . by issuing rules, regulations, or orders of general applicability . . . . Compliance . . . may be effected (1) by the termination of or refusal to grant or to continue assistance . . . or (2) by any other means authorized by law . . . .").

71. *See id.*; Milligan, *supra* note 63, at 855-56.

72. *See* Milligan, *supra* note 63, at 855-56; 42 U.S.C. §§ 2000d to 2000d-7.

73. *See* Johnson, *supra* note 1, at 1297-99.

74. *See* Milligan, *supra* note 63, at 923-27 (describing the "new institutional role" Title VI bestowed upon the precursor to today's Office for Civil Rights).

75. Johnson, *supra* note 1, at 1312.

programs.[76] The threat of losing federal funds gave administrative enforcement real teeth.[77]

The Title VI model catalyzed a broader transformation in civil rights governance by embedding enforcement authority within federal executive agencies. Crucially, this model enabled meaningful civil rights enforcement to occur through administrative channels in which private actors could file complaints and shape enforcement priorities.[78] This democratized enforcement approach created new pathways for accountability and impact.[79]

In the wake of the 1964 Act, multiple agencies developed specialized civil rights enforcement mechanisms that offered new forums for participation and new tools for advocacy. Title VII of the 1964 Act, for example, created a hybrid model of private and public enforcement of workplace antidiscrimination protections.[80] The Equal Employment Opportunity Commission (EEOC) lacked direct litigation authority until later amendments to the Act.[81] After these amendments, it quickly became a central venue for addressing employment discrimination claims, and administrative complaints often led to broader, systemic agency investigations.[82] Agencies like the Department of Housing and Urban Development (HUD), established in 1965,[83] and the Department of Education's Office for Civil Rights (OCR), formed after the 1979

76. *See* U.S. COMM'N ON C.R., DESEGREGATION OF THE NATION'S PUBLIC SCHOOLS: A STATUS REPORT 14 (1979).

77. *See* Johnson, *supra* note 1, at 1312 (noting that HEW's enforcement of Title VI is widely seen as a "significant contributing factor in the desegregation of Southern school districts"); *see also id.* at 1297-98 (noting that "the goal of Title VI's [enforcement] regime is securing compliance upon threat of termination of federal funds").

78. *See id.* at 1311.

79. *See, e.g.*, *id.* at 1311-26 (providing historical examples of how advocacy helped shape Title VI rules and guidance, as well as implementation and enforcement of the Act).

80. *See* Rutherglen, *supra* note 21, at 733-34.

81. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, secs. 4(a), 5, §§ 706(f)(1), 707(c)-(e), 86 Stat. 103, 105-07 (codified as amended at 42 U.S.C. §§ 2000e-5(f)(1), 2000e-6(c) to (e)); *see also* Sean Farhang, *The Political Development of Job Discrimination Litigation, 1963-1976*, 23 STUD. AM. POL. DEV. 23, 44 (2009) (describing the origins of the EEOC's litigation authority).

82. *See* Pauline T. Kim, Essay, *Addressing Systemic Discrimination: Public Enforcement and the Role of the EEOC*, 95 B.U. L. REV. 1133, 1139 (2015) (summarizing the EEOC's high-profile investigations and consent decrees following Congress's 1972 grant of broader authority to the agency).

83. Department of Housing and Urban Development Act, Pub. L. No. 89-174, § 3, 79 Stat. 667, 667-68 (1965) (codified as amended at 42 U.S.C. § 3532). HUD acquired civil rights responsibilities through the 1968 Fair Housing Act; later amendments expanded its adjudicative authority. Civil Rights Act of 1968, Pub. L. No. 90-284, § 808, 82 Stat. 73, 84-85 (codified as amended at 42 U.S.C. §§ 3608, 3533, 3535); Noah M. Kazis, *The Radical Fair Housing Act*, 111 VA. L. REV. 491, 504 (2025) (outlining HUD's history of civil rights enforcement).

reorganization of HEW, similarly emerged as vital sites of civil rights adjudication and enforcement.[84] The result was a new kind of infrastructure: not just highways and housing projects but regulatory guidance, enforcement regimes, and complaint systems that gave people new ways to assert their rights.

3. Community power and administrative constitutionalism

For generations, civil rights advocates have understood that they cannot give life to law only in courtrooms; justice must be pursued in every institution that shapes public life. So, of course, the development of civil rights enforcement within federal agencies was not solely a top-down process engineered by policymakers or bureaucrats. Advocates recognized that if the state could be a source of exclusion, it could also be a site of intervention—and that administrative systems, properly leveraged, could become vehicles for equity and inclusion.[85]

Civil rights lawyers and grassroots organizers played a vital role in pushing agencies to act and adopt more expansive interpretations of civil rights obligations.[86] These efforts were often strategic responses to the limits of litigation. Courtroom victories—while symbolically powerful—were often slow to achieve results, narrow in scope, and difficult to enforce.[87] In contrast, administrative agencies offered procedural flexibility and regulatory tools that were more nimble and, at times, more accessible to marginalized communities.[88] The complainant-driven nature of agency enforcement

84. *See, e.g.*, Johnson, *supra* note 1, at 1319-20 (describing the OCR's enforcement methods).

85. *See id.* at 1331 (highlighting the role of civil rights advocates in pressing administrative agencies to implement and enforce antidiscrimination laws).

86. *See, e.g.*, Lee, *supra* note 6, at 168 ("While it took some prodding, the federal government all but eliminated hospital segregation in the late 1960s, relying heavily on civil rights advocates' efforts."); *cf.* DYLAN C. PENNINGROTH, BEFORE THE MOVEMENT: THE HIDDEN HISTORY OF BLACK CIVIL RIGHTS 267-68 (2023) (describing broader efforts by Black people to enforce private rights on their own).

87. The canonical, if contentious, account of courts' relative weakness in creating social change, including in the context of civil rights enforcement, is GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991). *See also* Cristina Isabel Ceballos, David Freeman Engstrom & Daniel E. Ho, *Disparate Limbo: How Administrative Law Erased Antidiscrimination*, 131 YALE L.J. 370, 401, 428-29 (2021) (describing shortcomings of anti-discrimination litigation). Federal courts were also increasingly constrained by restrictive doctrines such as standing, sovereign immunity, and judicial deference to administrative expertise, which limited their ability to intervene proactively or broadly. *See id.* at 472.

88. *See, e.g.*, Johnson, *supra* note 1, at 1325-28 (describing how recent civil rights groups have sought to leverage Title VI's regulatory regime to define the public policy issues surrounding discriminatory discipline and the inaccessibility of elite education for

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processes allowed for engagement by individuals and community groups who might otherwise be locked out of traditional legal channels.[89] Through informal rulemaking petitions, investigations, and negotiated compliance processes, advocates could pressure agencies to respond to real-time community needs.[90] This strategy allowed civil rights advocates to operate not just in courts but in bureaucratic backrooms and regulatory hearings, where they helped shape the rules and standards by which equality would be measured.[91]

Ultimately, this multilateral strategy reflected a broader understanding of the state—not as a monolithic adversary but as a complex terrain where law, power, and justice were constantly contested and negotiated. By embedding civil rights enforcement in federal agencies, advocates created new sites of democratic accountability and expanded the infrastructure of rights protection beyond the courtroom.

4. The institutionalization of civil rights as governance

Over time, civil rights enforcement transformed from an external demand imposed upon government into an internal function of governance itself. What began as a grassroots struggle to compel the state to recognize and protect basic rights evolved into a complex bureaucratic apparatus embedded across federal institutions. This institutionalization marked a significant shift in both the character of civil rights work and the structure of the state.

As civil rights laws matured, compliance mechanisms became deeply integrated into the everyday operations of governance. Federal grant programs (for example, in housing) began conditioning funding on civil rights

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underserved groups); Engstrom, *supra* note 67, at 1085-86 (describing the perceived advantages of administrative procedure for 1940s labor advocates).

89. Lee, *supra* note 6, at 168 (describing the NAACP's use of administrative complaints to expand labor protections).

90. *See* Olatunde C.A. Johnson, *Beyond the Private Attorney General: Equality Directives in American Law*, 87 N.Y.U. L. REV. 1339, 1371-72, 1410 (2012) (describing how equality directives rely on administrative tools of conditioned spending and oversight); Metzger, *supra* note 65, at 1905-06 (explaining how agency decisionmaking can be influenced by social movements); Marianne Engelman Lado, *Toward Civil Rights Enforcement in the Environmental Justice Context: Step One: Acknowledging the Problem*, 29 FORDHAM ENV'T L. REV. 1, 21-23 (2017) (describing the EPA's and Department of Justice's discrimination investigations, compliance reviews, and voluntary compliance agreements as mechanisms for negotiated enforcement).

91. *See generally* LEE, *supra* note 63 (detailing the history of how advocates in the civil rights movement expanded the administrative state's understanding of civil rights, with a particular focus on labor and employment).

compliance.[92] Executive agencies developed internal civil rights offices, legal divisions, and investigatory units to implement statutory protections.[93] In many agencies, civil rights enforcement was not a standalone function, but it was woven into programmatic regulation, procurement processes, performance reviews, and administrative adjudication.[94]

This evolution professionalized the work of civil rights enforcement. Data collection and reporting systems tracking disparities in school discipline, for example, became standard tools for civil rights oversight.[95] While vulnerable to political interference and bureaucratic inertia, these administrative structures laid the foundation for a more proactive and institutionalized approach to enforcement.

Rather than undermining public institutions, civil rights enforcement helped to improve, expand, and legitimize them. The Voting Rights Act ushered in a regime of federal oversight and redistricting mandates, forcing state and local governments to confront and dismantle exclusionary electoral systems.[96] Titles VI and VII of the Civil Rights Act demanded institutional change and transformed bureaucracies.[97]

In this way, civil rights enforcement often required the state to build itself anew—to become a more capable, more democratic institution. Civil rights claims did not hollow out public infrastructure; they strengthened it. They pushed systems to be more inclusive and more procedurally fair. Through this lens, federal civil rights adjudication was not simply a mechanism for policing government—it was a project in cultivating government. It demanded a state that could deliver not just formal equality, but meaningful justice. And in

92. *See* Shariful Khan, Essay, *An Expansive View of "Federal Financial Assistance,"* 133 YALE L.J.F. 691, 695-96 (2024).

93. *See, e.g.*, Milligan, *supra* note 63, at 924-27 (describing Title VI's spur of monitoring- and investigation-related efforts within OCR's predecessor at HEW). *See generally* HUGH DAVIS GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960-1972 (1990) (describing the growth of mechanisms of civil rights enforcement within the administrative state).

94. *See* U.S. COMM'N ON C.R., TEN-YEAR CHECK-UP: HAVE FEDERAL AGENCIES RESPONDED TO CIVIL RIGHTS RECOMMENDATIONS? A BLUEPRINT FOR CIVIL RIGHTS ENFORCEMENT 16 (2002), https://perma.cc/SX68-ANZ2 (describing some agencies' efforts to decentralize enforcement "to fully integrate civil rights enforcement into all parts of the agency").

95. *See, e.g.*, *Civil Rights Data Collection*, U.S. DEP'T EDUC., https://perma.cc/VP2Z-7B3F (last reviewed Dec. 4, 2024) ("Since 1968, OCR has collected civil rights data related to students' access and barriers to educational opportunity from early childhood through grade 12."); Johnson, *supra* note 1, at 1325-26.

96. *See* Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.). *See generally* ARI BERMAN, GIVE US THE BALLOT: THE MODERN STRUGGLE FOR VOTING RIGHTS IN AMERICA (2015) (providing a comprehensive history of the Act).

97. *See* Johnson, *supra* note 1, at 1296-98, 1320-21.

doing so, it helped transform civil rights law from a shield against oppression into a foundation for a more equitable society.

B. Fall

We do not mean to suggest a straight-line path for the administrative state's engagement with civil rights enforcement. Quite the opposite. Over the past few decades in particular, civil rights administration has wobbled; parts of the scaffolding have come down entirely. Others have documented much of this fall,[98] so we will not belabor the point: A combination of judicial retrenchment and diminished resources has weakened federal agency involvement in some forms of civil rights enforcement and adjudication.[99] More recently, the current federal Administration has supercharged what had previously presented as gradual change.[100]

A variety of Supreme Court decisions have limited civil rights enforcement overall and constrained the federal government's own enforcement authority specifically. Since 2000, for instance, the Court has cut back on the availability of fees for civil rights lawyers,[101] limited civil-rights-related claims against federal government officials,[102] and elevated the showing necessary to prove discrimination in the voting rights context.[103] As consequentially, in *Alexander v. Sandoval*, the Court concluded that there was no private right of action to bring disparate impact challenges under Title VI.[104] And in cases from *Shelby County v. Holder* to *Louisiana v. Callais*, the

98. *See, e.g.*, Frank Dobbin & Alexandra Kalev, *The Civil Rights Revolution at Work: What Went Wrong*, 47 ANN. REV. SOCIO. 281, 293 (2021) (describing retrenchment in the EEOC and employment space); STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION 5-10 (2017).

99. *See, e.g.*, Siegel, *supra* note 64, at 11 (describing an "era of judicial retrenchment" beginning in the 1970s); Sonja B. Starr & Genevieve Lakier, *The Constitution and the War on DEI* 24 (Univ. of Chi. L. Sch. Pub. L. & Legal Theory Rsch. Paper, Paper No. 25-35, 2025).

100. *See* Starr & Lakier, *supra* note 99, at 2 (describing how the Trump Administration "has sharply curtailed traditional civil rights enforcement").

101. The most recent case is *Lackey v. Stinnie*, 145 S. Ct. 659, 671 (2025), which concluded that a party that wins a preliminary injunction is not a "prevailing party" entitled to attorney's fees under 42 U.S.C. § 1988(b).

102. *See, e.g.*, Goldey v. Fields, 145 S. Ct. 2613, 2615 (2025) (per curiam) (holding that federal prisoners cannot pursue Eighth Amendment excessive force claims under *Bivens*); Egbert v. Boule, 142 S. Ct. 1793, 1800 (2022) (declining to recognize a cause of action for damages against a federal agent for Fourth and First Amendment claims); Hui v. Castaneda, 559 U.S. 799, 804, 811-12 (2010) (holding that Public Health Service employees cannot be sued under *Bivens* for constitutional violations in their medical duties).

103. *See, e.g.*, Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2350 (2021).

104. 532 U.S. 275, 286, 293 (2001).

Court largely gutted the Voting Right Act by constraining the Department of Justice's enforcement of the Act and limiting its reach to only overt race-based discrimination in redistricting.[105]

At the same time, budgets for civil rights enforcement in the federal government largely flatlined.[106] Between 2000 and 2024, funding for the EEOC remained the same in real terms while overall staffing decreased by over 20%.[107] A similar budget dynamic played out at OCR: Its budget in real terms stayed essentially flat between 2000 and 2024 while staffing fell by nearly 20%, and complaints to the office more than tripled over roughly the same time period.[108]

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105. Shelby County v. Holder, 570 U.S. 529, 556-57 (2013) (invalidating the Department's preclearance authority under Section 5 of the Voting Rights Act); Louisiana v. Callais, No. 24-109, 2026 WL 1153054, at *13 (U.S. Apr. 29, 2026) ("In short, § 2 [of the Voting Rights Act] imposes liability only when the evidence supports a strong inference that the State intentionally drew its districts to afford minority voters less opportunity because of their race."). But not all cases cut against civil rights enforcement. *See, e.g.*, Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 545-46 (2015) (concluding that disparate impact claims are cognizable under the Fair Housing Act).

106. We have no way of determining the optimal amount of funding for civil rights enforcement by the executive branch. It is possible, for instance, that civil rights offices have become increasingly effective and efficient, as the current Administration claims. *See, e.g.*, Brooke Schultz, *Trump's Ed. Dept. Slashed Civil Rights Enforcement. How States Are Responding*, EDUC. WK. (Nov. 7, 2025), https://perma.cc/9R3T-SGL4 ("The Trump administration has said the civil rights reductions are part of a 'process of streamlining operations and delivering services at a lower administrative cost to the taxpayer' . . . ." (quoting Memorandum in Opposition to Plaintiffs' Motion for a Preliminary Injunction at 1, Victim Rts. L. Ctr. v. U.S. Dep't of Educ., 788 F.3d 70 (D. Mass. 2025) (No. 25-11042), 2025 WL 1808084, ECF No. 25)). There is also evidence that these offices are performing ever more extensive versions of the triage we describe below, with the result that enforcement is rationed. *See, e.g.*, Annie Ma, *How the Government Shutdown Will Affect the Already Shrunken Education Department*, PBS NEWS (Oct. 1, 2025), https://perma.cc/N5VG-ZZJU ("The [Department of Education's] own data has shown a decline in resolving civil rights cases, while new complaints from families have increased. During the shutdown, work on the pending cases will stop."). For historical context on a prior instance of agency triage, see discussions of Eleanor Holmes Norton's "rapid charge processing" efforts, for example, E. PATRICK MCDERMOTT, RUTH OBAR, ANITA JOSE & MOLLIE BOWERS, AN EVALUATION OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION MEDIATION PROGRAM § IV.C.1 (EEOC Order No. 9/0900/7632/2, 2000), https://perma.cc/4WT7-EPJ4.

107. *See* Anne Cullen, *"Devastating" Cuts Would Put EEOC Workforce at 45-Year Low*, LAW360: EMP. AUTH. (June 3, 2025, 7:24 PM EDT), https://perma.cc/FV9U-CZJ4; *EEOC Budget and Staffing History 1980 to Present*, U.S. EEOC, https://perma.cc/246S-CXRT (listing $281 million in appropriations in 2000 and $455 million in 2024).

108. *See* Rachel M. Perera, Commentary, *With Trump Back in Office, What's Next for the US Department of Education's Office for Civil Rights?*, BROOKINGS (Feb. 13, 2025), https://perma.cc/9D7C-B7MM (noting flat appropriations amid increasing complaints); *U.S. Department of Education Budget History*, U.S. DEP'T OF EDUC., https://perma.cc/D7H2-9ZS2 (to locate, click "Education Department Budget History

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Today, funding for these agencies may collapse. Amid the second Trump Administration's broader efforts to drastically reduce the size of the federal government,[109] civil rights enforcement faces disproportionate cuts. The EEOC, for example, expects to lose another fifth of its workforce in 2026.[110] The Department of Education's OCR appears to have cut more than half of its workforce in 2025.[111] The civil rights office at HUD appears to have lost more than 60% of its staff.[112]

Beyond deep cuts to the funding available for civil rights enforcement, the current Administration has capped enforcement across a variety of fronts. The President's Executive Order *Restoring Equality of Opportunity and Meritocracy* sought to "eliminate the use of disparate-impact liability in all contexts to the maximum degree possible to avoid violating the Constitution, Federal civil rights laws, and basic American ideals" and required agency heads to review existing investigations into discrimination claims involving disparate impact.[113] Within agencies, civil rights enforcement has slowed or ground to a halt. HUD leaders have frozen cases, issued fewer charges of discrimination than in prior years, and approved an unusually small dollar value of settlements.[114] OCR has similarly dismissed more civil rights complaints and

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Table: FY 1980-FY 2021 Congressional Appropriations") (listing $71.2 million in appropriations in 2000); 2023 DEP'T EDUC. OFF. FOR C.R. ANN. REP. 9, https://perma.cc/V84W-M4UH (counting 556 full-time-equivalent staff in 2023 and over 19,000 complaints); U.S. COMM'N ON C.R., FUNDING FEDERAL CIVIL RIGHTS ENFORCEMENT: 2000 AND BEYOND 8 (2001), https://perma.cc/DB5K-GLXP (counting 707 full-time-equivalent staff in 2000 and a five-year average of 5,000 complaints).

109. *See, e.g.*, *Fact Sheet: President Donald J. Trump Reduces the Federal Bureaucracy*, WHITE HOUSE (Feb. 19, 2025), https://perma.cc/Z56F-9ZZY ("President Trump's Executive Order is consistent with his Administration's policy to dramatically reduce the size of the Federal Government . . . ."); *see also Fact Sheet: President Donald J. Trump Works to Remake America's Federal Workforce*, WHITE HOUSE (Feb. 11, 2025), https://perma.cc/3LNT-DT3U ("President Donald J. Trump is committed to reducing the size and scope of the federal government.").

110. *See* Cullen, *supra* note 107.

111. *See* Naaz Modan, *Education Department Can Cut Half of OCR Staff for Now, Appeals Court Rules*, K-12 DIVE (Sept. 30, 2025), perma.cc/D7VZ-2LDS; Victim Rts. L. Ctr. v. U.S. Dep't of Educ., No. 35-2787, 2026 WL 374364, at *1 (1st Cir. Jan. 15, 2026) (voluntarily dismissing a lawsuit to reinstate the fired OCR employees); *see also* Brooke Schultz, *Ed. Dept. Layoffs Are Reversed, but Staff Fear Things Won't Return to Normal*, EDUC. WK. (Nov. 13, 2025), https://perma.cc/4DRV-CPJV (describing the reversal of a second set of layoffs during the government shutdown).

112. Debra Kamin, *Trump Appointees Roll Back Enforcement of Fair Housing Laws*, N.Y. TIMES (Sept. 22, 2025), https://perma.cc/8W57-ARKB.

113. Exec. Order No. 14281, 90 Fed. Reg. 17537, 17537-38 (Apr. 28, 2025).

114. Kamin, *supra* note 112. One Trump appointee directed HUD staff to deprioritize the "legally unsound" or "tenuous theories of discrimination" that had previously been core components of HUD's efforts to challenge redlining, reverse redlining, and other forms of housing discrimination. *Id.* (quoting Memorandum from John Gibbs, Principal

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favorably resolved fewer cases than it had during similar periods under prior administrations.[115]

Even diminished, federal agencies still have the capacity to investigate and adjudicate some civil rights claims and to profoundly transform civil rights enforcement.[116] But they can respond only to certain types of claims through a particular model of enforcement. Historical purposes, doctrinal determinations, and dollars do not account for what, exactly, this adjudicatory enforcement capacity addresses. We turn to these specifics in the next Part.

II. Civil Rights Adjudication Within the Administrative State

In this Part, we frame the administrative state's role in civil rights enforcement along two dimensions: the enforcement functions it performs and the kinds of claims it addresses. We then compare the goals, advantages, and limits of administrative enforcement with the baseline of private litigation, the default in public enforcement debates. We focus on three agencies: the Department of Education's OCR, the EEOC, and HUD. By volume of claims, these agencies make up the bulk of civil rights enforcement.[117]

Our aim is not to revisit well-worn debates over the comparative merits of public and private enforcement[118] or to rehearse the different ways those models may interact.[119] Instead, we focus at a more granular level on what it means for the administrative state to exercise adjudicatory power in the specific context of civil rights enforcement. This lens, though necessarily partial, provides a distinctive vantage point for evaluating broader normative questions: which types of claims the administrative state is best positioned to address, how those claims should be structured, and when alternative mechanisms might protect rights more effectively—or at least sufficiently.

Deputy Assistant Sec'y for Fair Hous. & Equal Opportunity, U.S. Dep't of Hous. & Urb. Dev., to Off. for Fair Hous. & Equal Opportunity Headquarters Staff, Off. of Enf't Staff, Reg'l Dirs., Field Supervisors 3, 6 (Sept. 16, 2025), https://perma.cc/DX4P-GESM).

115. *See* Bianca Quilantan, Rebecca Carballo & Juan Perez Jr., *Education Department Dismisses Thousands of Civil Rights Complaints at an "Unheard of" Pace*, POLITICO (July 8, 2025, 10:00 AM EDT), https://perma.cc/PEK7-NV75.

116. *See, e.g.*, Serena Mayeri & Amanda Shanor, *Antidiscrimination as Pretext: The Assault on Equality and Constitutional Democracy* 105 (Univ. of Pa. L. Sch. Pub. L. Rsch. Paper, Paper No. 25-43, 2026), https://perma.cc/RW77-LMBE.

117. *See supra* note 3 and accompanying text.

118. *See, e.g.*, Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282-84 (1976); Gary S. Becker & George J. Stigler, *Law Enforcement, Malfeasance, and Compensation of Enforcers*, 3 J. LEGAL STUD. 1, 14 (1974).

119. *See generally* David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616 (2013) (exploring how public and private enforcement mechanisms interact within complex regulatory regimes).

A. The Functions of Administrative Civil Rights Adjudication

In broad terms, agency involvement in civil rights enforcement increases and shapes civil rights enforcement.[120] But it can do so in different ways: First, it can subsidize claims that might otherwise not be brought. Second, it can facilitate the development of novel or experimental claims that might not be possible in federal court. And third, it can lend additional power to claims. These functions overlap—a single environmental justice complaint, for example, may implicate all three—but they illuminate distinct institutional dynamics. Aspects of these functions are of course present in other modes of civil rights enforcement, like Department of Justice litigation, but they may be particularly pronounced in the agency adjudication context amid a high volume of claims that are less likely to reach the federal courts. Framing enforcement this way helps clarify why, and under what conditions, we might prefer an executive forum to redress certain civil rights claims.

First, the federal government can subsidize claims that would be prohibitively difficult to pursue without its involvement. Rights violations are costly to redress.[121] By staffing agencies like HUD with investigators and creating accessible forums for adjudication, the federal government lowers the barriers to initiating and sustaining claims.[122] In this sense, the administrative subsidy operates much like the substantive prohibitions of the Fair Housing Act or its fee-shifting provisions[123]: Each reduces the cost of enforcement and thereby increases the likelihood that violations will be challenged.[124] Every

120. *See infra* Part II.B.

121. *See* Peter H. Huang, *A New Options Theory for Risk Multipliers of Attorney's Fees in Federal Civil Rights Litigation*, 73 N.Y.U. L. REV. 1943, 1945 (1998); *see also* Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of* Buckhannon *for the Private Attorney General*, 54 UCLA L. REV. 1087, 1091-92 (2007) (describing the effects of the Supreme Court's reduction of certain civil-rights-related attorney's fees on whether cases will be brought in first place).

122. *See supra* Part I.A.2 (discussing how the buildout of HUD's civil rights enforcement arm gave people new ways to assert their rights); LIBBY PERL, CONG. RSCH. SERV., R44557, THE FAIR HOUSING ACT: HUD OVERSIGHT, PROGRAMS, AND ACTIVITIES 4-5 (2021), https://perma.cc/842L-DX3Q (describing HUD investigatory and complaint resolution procedures).

123. 42 U.S.C. § 3612(p) (providing for attorney's fees in Fair Housing Act lawsuits).

124. For a canonical account of how litigation costs generally affect whether a potential legal violation is challenged, and to what extent, see Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 56 (1982). As Steven Shavell points out, "whether [a litigant] would be willing to go to trial depends on an ex ante evaluation of his chance of prevailing, on the probable magnitude of a judgment, and on the legal costs of going to trial and the method by which they are to be allocated." *Id.*; *see also* FARHANG, *supra* note 1, at 189, 200 (noting the "abrupt and steep increase in job discrimination lawsuits filed in federal courts immediately following enactment of the [Civil Rights Act] of 1991," which

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claim that passes through an agency benefits from this cost-lowering effect. But subsidization may be most salient at the margins—where the decisive factor in whether a claim is pursued is the availability of government resources. We assess that the availability of subsidies, at least in part, explains the volume of civil rights complaints processed annually by HUD, the EEOC, and the Department of Education and thereby shapes the modern civil rights enforcement landscape.

Second, the federal government can expand the scope of civil rights claims subject to adjudication. Its principal tool for doing so is the promulgation of regulations or forms of guidance that reinterpret substantive rights provisions in new contexts. For example, the EEOC took initial steps to establish that Title VII prohibits discrimination on the basis of sexual orientation in the lead-up to *Bostock v. Clayton County*.[125] The Department of Education has read Title IX to require universities to take affirmative steps to prevent sexual assault and harassment and, more recently, invoked Title VI to increase universities' protections for Jewish students;[126] HUD has at times relied on its mandate "affirmatively to further" fair housing[127] to extend obligations beyond traditional enforcement.[128] In each instance, an agency extended the reach of existing civil rights protections to new terrain. These regulatory extensions not only lay the groundwork for private litigation but also invite claimants to approach agencies directly and urge that their particular grievances fall within the newly recognized ambit of federal civil rights law.

Finally, civil rights adjudication can expand enforcement by amplifying the power available to correct rights violations. Power, of course, could be

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included an amendment to Title VII shifting certain costs to defendants in cases won by plaintiffs).

125. 140 S. Ct. 1731, 1754 (2020) (holding that discrimination on the basis of sexual orientation violates Title VII); *see* Sandra F. Sperino, Essay, Bostock *and the Forgotten EEOC*, 103 TEX. L. REV. 141, 142 (2024) ("[T]he EEOC played an important role in developing the idea that Title VII prohibits discrimination on the basis of gender identity. The EEOC . . . fil[ed] amicus briefs, litigat[ed] claims on behalf of litigants, us[ed] its charge-processing authority, and exercis[ed] its power to issue decisions in federal-sector cases that govern federal workers." (footnotes omitted)).

126. *See* Eidelson & Hellman, *supra* note 15, at 1-2, 5; Gersen & Gersen, *supra* note 13, at 1-2, 12, 16.

127. 42 U.S.C. § 3608(d) ("All executive departments and agencies shall administer their programs and activities relating to housing and urban development . . . in a manner affirmatively to further the purposes of [the Fair Housing Act].").

128. *See* Kazis, *supra* note 83, at 547-50 ("Covered entities must proactively build a fairer housing system. . . . But just what it means to affirmatively further fair housing is far from clear." (footnote omitted)); Heather R. Abraham, *Agencies "Shall Cooperate": A Blueprint for Affirmatively Furthering Fair Housing*, 57 UIC L. REV. 469, 478, 480-81 (2024) (describing a 2023 proposed rule creating a "specific HUD complaint process, which ha[d] never before existed," for affirmatively furthering fair housing).

considered a form of subsidization—the more unique sanctioning authority the executive has, the easier it is for the executive to challenge violations that might otherwise be too costly for private enforcement. But administrative power offers more than a subsidy: It carries the symbolic authority and credibility of the executive branch. An inquiry or finding of discrimination by a federal agency projects a level of institutional legitimacy that far exceeds the force of an individual complaint, especially one brought by an unrepresented litigant.[129] Just as importantly, agencies like HUD, the EEOC, and the Department of Education wield the threat of severe sanctions, including fund termination, that private litigants cannot readily impose.[130] This combination of symbolic authority and material sanctioning power underscores the distinctive leverage that executive branch adjudication brings to civil rights enforcement.

B. Adjudicatory Differentiation

One way to understand why particular claims end up before a given agency is to consider what differentiates an agency from a court. Sometimes the channeling is formal: Jurisdictional or quasi-jurisdictional requirements—such as Title VII's mandate that employees file a complaint with the EEOC before bringing suit—automatically direct large volumes of employment discrimination claims to that agency.[131] Other times, the channeling may be informal: Efforts to lessen administrative burdens on individuals, such as through the use of housing navigators or digital complaint guides, may shape how individuals perceive the agency as a forum for redress.[132] Our focus here,

129. More generally, empirical studies suggest that pro se litigants likely receive worse outcomes than represented litigants even when case strength is held constant. *See* D. James Greiner, Cassandra Wolos Pattanayak & Jonathan Hennessy, *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901, 925-32 (2013) (finding in a randomized control trial that legal representation yields significantly lower eviction rates and better financial outcomes for tenants); Victor D. Quintanilla, Rachel A. Allen & Edward R. Hirt, *The Signaling Effect of Pro Se Status*, 42 LAW & SOC. INQUIRY 1091, 1092-94 (2017) (reviewing literature and finding experimentally that lawyers offer lower settlements to simulated pro se plaintiffs).

130. *See, e.g.*, 42 U.S.C. § 2000d-1 (allowing the termination of funds for Title VI violations); Johnson, *supra* note 1, at 1297-98 ("Damages to individuals are not the typical remedy for a violation of Title VI; rather the goal of Title VI's regime is securing compliance upon threat of termination of federal funds.").

131. *See* 42 U.S.C. § 2000e-5(b), (f)(1).

132. *See, e.g.*, REBECCA L. SANDEFUR, AM. BAR FOUND. & THOMAS M. CLARKE, NAT'L CTR. FOR STATE CTS., ROLES BEYOND LAWYERS: SUMMARY, RECOMMENDATIONS AND RESEARCH REPORT 3 (2016) (evaluating the efficacy of housing navigator programs in New York courts); Pamela Herd, Thomas DeLeire, Hope Harvey & Donald P. Moynihan, *Shifting Administrative Burden to the State: The Case of Medicaid Take-Up*, 73 PUB. ADMIN. REV.

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however, is on more general determinants—namely, agencies' resources and enforcement authority—which structure both the types of claims they can attract and the ways those claims are resolved. As we discuss, the combination of resources and remedial possibilities drives the subsidy, experimental, and power functions that we've described in the previous Subpart.

1. Enforcement resources

One of the most obvious differences between agency adjudication of civil rights complaints and private litigation is, unsurprisingly, money.[133] As noted above, federal budgets for civil rights enforcement have generally flatlined over the past three decades—and current trends suggest they may fall even further.[134] Yet diminished as they are, and whether or not they are adequate to the scale of the task,[135] these funds represent a considerable investment in civil rights enforcement. For example, in 2023, Congress appropriated nearly $700 million for HUD's Fair Housing Office, OCR, and the EEOC combined.[136]

These funds affect civil rights claims in multiple ways. Unlike the adversarial model that dominates in the courts—where party presentation drives the process and litigants typically bear their own costs[137]—agency adjudication of civil rights complaints often operates in inquisitorial or quasi-inquisitorial fashion.[138] Even proceedings that retain adversarial features, such

S69, S70-77 (2013) (demonstrating the effects on Medicaid uptake of a variety of Wisconsin state agency efforts, including community engagement, to lower administrative burden).

133. Our focus is on the types of claims funding yields, but funding may also lower the costs for defendants under certain circumstances, such as those in which the informality of the proceedings coupled with relatively early case-resolution (whether via an administrative closure or a settlement) are more cost-effective than litigating the case. The challenge is to determine the proper baseline against which to assess costs for these defendants; as we note, many of these cases likely would not be brought in the first place absent the agency infrastructure. *See infra* notes 155-62 and accompanying text.

134. *See supra* notes 106-12 and accompanying text.

135. *Cf.* Letter from the Leadership Conf. on Civ. & Hum. Rts. et al. to Robert Aderholt, Chair, Subcomm. on Lab., Health & Hum. Servs., Educ. & Related Agencies, U.S. House of Reps., et al. 1-2 (Feb. 14, 2024), https://perma.cc/8HZD-2V7X (urging Congress to double OCR's funding for fiscal year 2025 because prior levels were insufficient to protect the civil rights of all students).

136. *See* Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, § 6(B)(IV), (H)(III), (L)(II), 136 Stat. 4459, 4552, 4896, 5166 (2022) (appropriating $86.4 million for fair housing, $455 million for the EEOC, and $140 million for the OCR).

137. *See* David Freeman Engstrom & Jonah B. Gelbach, *Legal Tech, Civil Procedure, and the Future of Adversarialism*, 169 U. PA. L. REV. 1001, 1047 (2021). *But cf.* 28 U.S.C. § 1915 (waiving costs for certain indigent litigants).

138. *See* Adoption of Recommendations, 81 Fed. Reg. 94312, 94314-15 (Dec. 23, 2016) (describing administrative adjudications as spanning from the "highly adversarial" to

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as HUD administrative hearings before an administrative law judge, typically involve the agency carrying much, if not most, of the burden for the complainant.[139] The practical consequence is that, from the absence of filing fees to the relative informality of agency processes,[140] it is far cheaper and more accessible to press a civil rights claim before an agency than before a court.[141]

The most consequential resources are almost surely those devoted to investigation itself. Charles Hamilton Houston, architect of the NAACP's mid-twentieth-century desegregation campaign, once praised how easily he could draw a state entity into court and use discovery to pry open its records.[142] According to Houston, $10—the cost of a filing fee—was all it took to inspect the entire archive of a state agency.[143] Hamilton, however, was describing a

the "inquisitorial"); Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CALIF. L. REV. 141, 148-57 (2019) (describing "the modern landscape of agency adjudication" that "is much more substantively and procedurally diverse" and contrasting it with "classic formal APA adjudication").

139. *See, e.g.*, Recommendations of the Administrative Conference Regarding Administrative Practice and Procedure, 1 C.F.R. § 305.92-3 (1993) (describing FHA enforcement and noting options for adjudication before an administrative law judge or removal to federal court, which both involve the government itself prosecuting the potential violation).

140. For example, filing a complaint electronically or by phone costs little to nothing to the complainant. *See Learn About FHEO's Process to Report and Investigate Housing Discrimination*, U.S. DEP'T HOUS. & URB. DEV., https://perma.cc/6899-N8L3 (archived Apr. 8, 2026) ("When the government brings a legal action, it does not charge any fees or costs to individuals who are alleging discrimination."); *Report Housing Discrimination*, U.S. DEP'T HOUS. & URB. DEV., https://perma.cc/9CCX-GJEB (archived Apr. 8, 2026) (allowing complaint filing online, by phone, or by mail); *File a Complaint*, U.S. DEP'T EDUC., https://perma.cc/4H67-XUMP (archived Apr. 8, 2026) (offering online and downloadable filing forms); *see also How to File a Complaint*, U.S. EEOC, https://perma.cc/VP5R-TCVH (archived Apr. 8, 2026) (allowing complaint filing by mail or in person).

141. There is, of course, a distinction between resources on paper and resources in practice. We have found no empirical data, for instance, that considers the prevalence of representation before administrative agencies, let alone the effect that legal representation has on civil-rights-related administrative complaints. It would not be surprising to learn that here, too, having a lawyer can yield significant benefits, and that the results vary agency-by-agency—depending, possibly, on the formality of adjudication. *Cf.* Laura Beth Nielsen, Robert L. Nelson & Ryon Lancaster, *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUD. 175, 188 (2010) ("One in five plaintiffs acts as his or her own lawyer [in employment litigation], operating pro se over the course of the lawsuit, and they are almost three times more likely to have their cases dismissed, are less likely to gain early settlement, and are twice as likely to lose on summary judgment.").

142. GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS 136, 218 (1983).

143. *Id.* at 136.

situation in which a highly sophisticated entity (the NAACP with its Legal Defense Fund) was suing the state in a limited number of cases.[144] The story is different today for the mine-run civil rights claimant who may have limited or no representation. Civil rights cases tend to have high degrees of "informational asymmetry" between parties, in which a defendant—especially a governmental defendant—has access to information about a plaintiff's claims that the plaintiff does not.[145] It is increasingly difficult for plaintiffs or prospective plaintiffs to access the information defendants hold: Empirical studies have, for instance, demonstrated increases in dismissals of civil rights cases since the Supreme Court articulated heightened pleading standards in *Bell Atlantic Corp v. Twombly*[146] and *Ashcroft v. Iqbal*.[147]

By contrast, having a federal agency conduct its own investigation[148] using dedicated personnel and specialized tools[149] can dramatically reduce those costs for claimants and lower the barriers to fact gathering. Resources are central to the subsidy function: Even in cases that ultimately proceed to court, the agency's investigative capacity makes rights enforcement more accessible than private litigation alone could.[150]

The federal government's upfront investment in investigation can create additional resources. If a parent complains to OCR about a discriminatory school policy, the agency can provide more than just investigators to assemble the factual record needed to assess the policy.[151] It can also access privileged

144. *Id.* at 218.

145. *See* Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119, 123 (2011).

146. 550 U.S. 544 (2007).

147. 556 U.S. 662 (2009); *see, e.g.*, Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117, 2120, 2122 (2015) ("[D]ismissals of employment discrimination and civil rights cases have risen significantly in the wake of *Iqbal*."); Jonah B. Gelbach, Note, *Locking the Doors to Discovery? Assessing the Effects of* Twombly *and* Iqbal *on Access to Discovery*, 121 YALE L.J. 2270, 2277-78 (2012).

148. For a category description of agency investigations and a critical take on the possible lack of legal guardrails constraining those investigations, see Aram A. Gavoor & Steven A. Platt, *Administrative Investigations*, 97 IND. L.J. 421, 428-34 (2022).

149. *See, e.g.*, 29 U.S.C. § 161 (granting investigatory powers to the NLRB); 42 U.S.C. § 2000e-9 (applying the NLRB's investigatory powers to the EEOC); EEOC v. Kronis Inc., 620 F.3d 287, 299 (3d Cir. 2010) ("[T]he EEOC's investigatory power is broader than the four corners of [a] charge . . . . Thus, the EEOC need not cabin its investigation to a literal reading of the allegations in the charge."); *see also* Johnson, *supra* note 90, at 1359 (discussing the HUD enforcement regime and noting HUD's "power to conduct tests" and "bring claims . . . even without the presence of an actual victim").

150. *See, e.g.*, Johnson, *supra* note 90, at 1359 (describing the greater capacity of the Department of Justice and HUD to bring systemic claims as compared to private litigants).

151. *How the Office for Civil Rights Handles Complaints*, U.S. DEP'T EDUC., https://perma.cc/F2ZS-22RB (last reviewed Apr. 28, 2025) ("OCR may use a variety of fact-finding

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contextual information—such as datasets from other schools—that private claimants could not readily obtain.[152] And agencies bring technical expertise to evaluate those facts against the relevant legal and policy context.[153] Together, these advantages amplify the subsidy: Agencies not only shoulder the fact-finding burden but also supply the contextual knowledge and professional judgment necessary to translate those facts into legally cognizable claims.[154]

In principle, the availability of these resources provides the greatest benefits to complainants with limited resources or with claims that are especially complex or fact intensive. These claims and parties may involve a potential mismatch between a complainant's capacity—such as the absence of legal representation or the burdens of developing a fact-intensive record—and the underlying value of the claim.[155] An employee alleging a hostile work environment who is represented by counsel may seek to litigate the claim in court, while an unrepresented employee may rely heavily on the EEOC's investigatory process, mediation opportunities, and, in some instances, its independent capacity to litigate.[156] Parents of a child with a disability who fear that the child is being unnecessarily isolated at school may depend on the Department of Education's investigative powers because seeking injunctive

techniques in its investigation of a complaint. These techniques may include reviewing documentary evidence . . . , conducting interviews . . . , and/or site visits.").

152. *See, e.g.*, *Frequently Asked Questions*, OFF. FOR C.R.: C.R. DATA COLLECTION, https://perma.cc/57HJ-BSDF (last updated June 18, 2025) ("The restricted-use data file is the analysis and investigative file primarily used internally by OCR. This file is the basis for enforcement activity, as well as for internal program and policy analysis.").

153. Versions of the benefits of economies of scale may arise from the agencies' investigation of tens of thousands of complaints, coupled with the particular powers granted to administrative agencies. *Cf.* Engstrom, *supra* note 119, at 631-32 (discussing the "relative cost of competing enforcement modes" but noting that, in certain circumstances, "private enforcement [may be] vastly cheaper than public").

154. *See, e.g.*, OFF. FOR C.R., U.S. DEP'T OF EDUC., CASE PROCESSING MANUAL 15 (2025), https://perma.cc/5KWQ-GMJX (describing how OCR case planning reflects legal standards and contributes to investigations).

155. Of course, the claim's value often has little to do with the quantum of harm at issue and everything to do with external factors that determine the measure of the harm, including the definiteness of the substantive law and availability of damages. Employment discrimination claims are not more valuable than education discrimination claims because they involve remunerative employment and labor; they're more valuable because of the relationships between the probability of success and available damages. *See, e.g.*, Huang, *supra* note 121, at 1944, 1947-50 (noting that "a fundamental question in civil rights practice is how to encourage attorneys to accept meritorious cases" and describing how factors like attorney's fees multipliers affect which cases are brought).

156. *See* Kim, *supra* note 82, at 1134-35 (examining the EEOC's authority to bring systemic and individual suits, including its litigation prerogatives beyond those of private counsel).

relief on their own would be prohibitively difficult, time-consuming, and uncertain. The cost of retaining counsel, securing expert evaluations, and navigating complex evidentiary requirements[157] would put litigation out of reach for many families. By contrast, an OCR investigation can mobilize specialized staff,[158] access school records,[159] and apply technical legal knowledge to assess whether other violations have occurred as well.[160]

In this way, the agency's intervention does not simply make the process more affordable; it transforms what might otherwise be an unattainable or pyrrhic remedy into a realistic opportunity for parents to secure timely, meaningful relief for their child. A similar dynamic arises when a community seeks to challenge the discriminatory siting of a road or highway[161]: Absent the investigatory resources of an agency like the Department of Transportation, such a claim may never be brought at all, both because the community is unlikely to have access to the environmental, demographic, and health data needed to prove disparate impact[162] and because assembling expert testimony and conducting discovery against well-resourced defendants is prohibitively

157. For example, the need for statistical evidence early in a lawsuit. *Cf.* Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 543 (2015) ("A plaintiff [under the FHA] who fails to allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection cannot make out a prima facie case of disparate impact.").

158. *See How the Office for Civil Rights Handles Complaints*, *supra* note 151 (describing OCR's factfinding techniques and staff involvement); OFF. FOR C.R., *supra* note 154, at 15.

159. *See, e.g.*, OFF. FOR C.R., *supra* note 154, at 27 ("OCR has the right of access during a recipient's regular business hours to the recipient's facilities and to information maintained by the recipient that is necessary to determine compliance status on those issues under investigation.").

160. *Id.* at 15 ("When during the course of the investigation of a complaint, OCR identifies compliance concerns and/or violations involving issues that were not raised in the complaint, OCR may . . . provide technical assistance or consider the compliance concerns for a possible compliance review or directed investigation.").

161. *See Public Complaint Process*, U.S. DEP'T TRANSP., https://perma.cc/TB2T-4UUA (last updated Jan. 20, 2026) (explaining how to file a complaint about a civil rights violation with the Department of Transportation and each Operating Administration); *see also Formal Complaint Stage*, U.S. DEP'T TRANSP., https://perma.cc/SGX2-6ZJ3 (last updated Jan. 24, 2025) (explaining the Department's 360-day complaint timeline and that investigations will be conducted by the respondent transportation agency).

162. *See* Daniel Delgado & Frank LoMonte, *Access to Data: The "Under-the-Radar" Environmental Justice Issue*, HUM. RTS., Oct. 2024, at 6, 8 ("The story of the environmental justice movement is a story about the accessibility of data. Indeed, the failure to make information accessible to afflicted communities has itself been regarded as an environmental justice issue."); *Inclusive Cmtys.*, 576 U.S. at 527-28, 540 (discussing requirements for statistical demographic evidence in disparate impact claims under the FHA).

expensive.[163] In these contexts, the agency's capacity to gather non-public information, commission studies, and frame violations in civil rights terms transforms a community's invisible grievance into a cognizable civil rights claim, even if it is recognized solely within the agency.

But although federal agencies provide little data showing how, specifically, they exercise their jurisdiction over civil rights claims,[164] logic and plenty of circumstantial evidence suggest that agencies don't use their resources solely to optimally subsidize claims. Civil rights adjudicators and investigators, like prosecutors or other resource-constrained bureaucrats,[165] need to triage. One central component of that triage is mediation. The EEOC requires pre-filing conciliation efforts, which help to sort cases upfront and provide more informal mediation opportunities.[166] Approximately 10% of all EEOC cases successfully settled through these dispute resolution processes in 2024.[167] If mediation helps to channel claims into different paths of resolution, agencies like the EEOC and Department of Education also sort claims on their own, based on the number of people a violation affects, the gravity of the violation,

163. *See, e.g.*, LAWS.' COMM. FOR C.R. UNDER L., TOWARD A MORE JUST JUSTICE SYSTEM: HOW OPEN ARE THE COURTS TO SOCIAL JUSTICE LITIGATION? 33-34 (2016), https://perma.cc/W6PL-FXRT (describing a norm of tens of thousands of dollars in expert costs and one class action discrimination case whose expert analyses have cost approximately $1 million); *see also* Ruth Marcus, *Court Rules Civil Rights Litigants Must Pay Own Expert Witness Fees*, WASH. POST (Mar. 20, 1991), https://perma.cc/XW2K-2J6Z ("Civil rights lawyers, noting that the cost of expert witnesses easily can exceed $100,000 and that their testimony can be a critical element in winning a complicated case, said the ruling represents a major inroad on their financial capacity to mount such litigation.").

164. *Cf.* LEADERSHIP CONF. EDUC. FUND, INFORMATION NATION: THE NEED FOR IMPROVED FEDERAL CIVIL RIGHTS DATA COLLECTION 5-7 (2022), https://perma.cc/Z7YY-VPZA (arguing that federal agencies do not consistently collect or publish data on civil rights issues, especially for marginalized and underserved communities). *But see* U.S. GOV'T ACCOUNTABILITY OFF., GAO-24-107661, HIGHER EDUCATION: OPPORTUNITIES EXIST TO IMPROVE FEDERAL OVERSIGHT OF ALLEGED EMPLOYMENT DISCRIMINATION AT COLLEGES AND UNIVERSITIES 10, 12-13 (2024), https://perma.cc/YPJ2-ZDLH (describing a delayed process to respond to employment discrimination complaints, resulting in missing records and inconsistent EEOC protocol to consistently track and account for complaint referrals).

165. *See, e.g.*, William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 23-24 (1997) (describing the interaction between law, resources, and prosecutors' selection of cases).

166. *See What You Should Know: The EEOC, Conciliation, and Litigation*, U.S. EEOC (Jan. 21, 2015), https://perma.cc/QA82-GFBE ("The EEOC is required by Title VII to attempt to resolve findings of discrimination on charges through conciliation."). *See generally* Stephanie Greene & Christine Neylon O'Brien, *Judicial Review of the EEOC's Duty to Conciliate*, 119 PENN. ST. L. REV. 837 (2015) (reviewing the EEOC's pre-suit obligations, including conciliation).

167. *See* 2024 EEOC ANN. PERFORMANCE REP. 37-38 (2025), https://perma.cc/568E-TV5F (counting 88,531 charges filed and 11,998 mediations conducted, resolving 8,543 charges or 9.6% of total charges filed).

or whatever metric the agency uses to define impact.[168] Although most agencies have surrendered full prosecutorial discretion in this context by requiring staff to investigate claims that state a prima facie case of discrimination,[169] they also tend to be explicit about prioritizing their resources for more significant claims that affect more people.[170]

Finally, lengthy waits at agencies like the Department of Education, which can take years to resolve a civil rights complaint,[171] suggest another classic triage strategy: attrition. To note that agencies subsidize civil rights claims is not to suggest that every claim actually receives a meaningful benefit: For

168. *See, e.g.*, U.S. EEOC, EEOC STRATEGIC ENFORCEMENT PLAN, 2024-2028, at 7 (2023), https://perma.cc/X89L-YR5U ("To maximize the EEOC's effectiveness as a national law enforcement agency, the Commission must focus on those activities that have the greatest strategic impact . . . . Relevant factors in determining strategic impact include the significance of a particular issue, the potential outcome, the number of individuals or employers affected, and the opportunity to prevent or deter future violations and to have broad and lasting impact in advancing equal employment opportunity.").

169. *See, e.g.*, 34 C.F.R. § 100.7(c) (2024) (requiring agency investigations of civil rights complaints under Title VI or the Department's regulations); *CM-604 Theories of Discrimination*, U.S. EEOC (Aug. 1, 1988), https://perma.cc/78CW-W87B (requiring the charging party to "establish a prima facie case" but giving staff "the responsibility of seeking evidence . . . independent of that submitted by the charging party"); *see also* Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance, 59 Fed. Reg. 11448, 11448 (Mar. 10, 1994) (describing the test for a racial discrimination charge); OFF. FOR C.R., *supra* note 154, at 4-6, 9-12 (describing how OCR determines jurisdiction and whether to proceed with investigation or dismiss complaints). By contrast, the Department of Justice maintains full discretion over its docket. *See Justice Manual,* U.S. DEP'T JUST. § 8-2.140 (updated July 2023), https://perma.cc/9BQZ-NT57 (describing the Attorney General's discretionary authority to intervene in various civil rights lawsuits). Of course, even agencies that bind themselves to investigate every case that makes out a prima facie case of discrimination can reduce their caseload by raising the standard for that showing, either formally or through informal shifts that are harder to measure.

170. *See, e.g.*, U.S. EEOC, *supra* note 168, at 7.

171. The Department of Education, HUD, and EEOC offer limited data on how long it takes each agency to resolve a complaint. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFF., GAO-22-104341, K-12 EDUCATION: STUDENTS' EXPERIENCES WITH BULLYING, HATE SPEECH, HATE CRIMES, AND VICTIMIZATION IN SCHOOLS 41, 44 (2021), https://perma.cc/QDF6-4LPT (documenting decreased delays for resolution of some complaints but noting that the favorable resolution—"closure with change"—took nearly a year on average between 2010 and 2020); OFF. OF INSPECTOR GEN., U.S. DEP'T OF HOUS. & URB. DEV., AUDIT REP. NO. 2024-BO-0005, FHEO FACES CHALLENGES IN COMPLETING INVESTIGATIONS WITHIN 100 DAYS 1 (2024), https://perma.cc/V7ZJ-JLU4 (noting that in 2022, 75% of fair housing complaints were not resolved in the statutorily required 100-day period); *see also* 2023 EEOC ANN. PERFORMANCE REP. 44, 46 (2024), https://perma.cc/3E5V-QM22 (noting 2,207 federal sector appeals over 450 days old and a continued inventory of 51,100 pending charges at the end of fiscal year 2023); Sunlen Serfaty, *"It's a Black Hole": Civil Rights Office at Department of Education Veers from Original Mission*, CNN (Dec. 12, 2025), https://perma.cc/FUH2-H9NW (documenting a growing backlog of complaints at OCR).

instance, many of the complaints filed with, or even accepted by, the Department of Education may never receive any subsidy whatsoever.[172] Perhaps unsurprisingly, the limited available empirical evidence suggests that forms of power, such as representation status, determine which claims agencies focus their limited resources on.[173] In other words, the combination of resource constraints and a focus on impact, however inevitable and desirable, may push resources away from the administrative state's subsidy function and toward its experimental or power functions.

Money and the reduced cost of processing a claim can incentivize complaints seeking to benefit from all three functions we have described. In part, this is by design—all employment discrimination claims, for instance, must pass through the EEOC, which lowers barriers for some potential complainants but also affects even those with the resources (or the claims) to litigate regardless of EEOC involvement.[174] But the types of claims agency resources incentivize is also the byproduct of how agencies prioritize and triage their dockets. The more an agency emphasizes high-impact cases, the more attractive the agency becomes to complainants who could, in theory, litigate independently but who see value in leveraging agency resources to offset costs and amplify visibility. Much depends on how the agency defines impact. For one agency, it may mean pursuing a systemic challenge with broad remedial potential; for another, it may involve testing the boundaries of doctrine through a novel discrimination claim. Either way, the interaction of

172. For instance, the Department may try and fail to pass the claim on to the EEOC. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 164, at 12-13.

173. Lindsey Gailmard, Daniel E. Ho & Mark S. Krass, Feature, *Congressional Intervention in Agency Adjudication: The Case of Veterans' Appeals*, 134 YALE L.J. 2461, 2515, 2521 (2025) (finding that interventions by congresspersons significantly affect Board of Veterans' Appeals cases, benefitting represented, older, and male appellants).

174. *See Filing a Charge of Discrimination*, U.S. EEOC, https://perma.cc/DHG3-GCQ3 (archived Apr. 9, 2026) ("All of the laws enforced by EEOC, except for the Equal Pay Act, require you to file a Charge of Discrimination with us before you can file a job discrimination lawsuit against your employer."); *see also* 42 U.S.C. § 2000e-5(f)(1) (explaining that if the Commission chooses not to sue, it must notify the complainant and that "within ninety days after the giving of such notice a civil action may be brought" by the complainant). So long as the agency does not reject a claim out of hand, its resources might facilitate the claim, regardless of whether it is a prospective class action alleging a hostile workplace seeking over a million dollars in damages or an individual complaint seeking far less in damages for being fired after a heart attack. *Compare* Consent Decree, EEOC v. Whiting-Turner Contracting Company, No. 21-cv-00753 (M.D. Tenn. May 3, 2023), 2023 WL 3383216, ECF No. 323 (ordering a $1.2 million settlement and injunctive relief for a class of Black former workers claiming employment discrimination), *with Maximum Security to Pay $22,500 to Settle EEOC Age and Disability Discrimination Lawsuit*, U.S. EEOC (May 13, 2024), https://perma.cc/8V26-DPTK (discussing a $22,500 damages award for a 57-year-old security employee who was repeatedly told to retire, then fired, after a heart attack).

cost-lowering subsidies with agency agenda-setting power shapes not only who files claims but also what kinds of claims gain traction.

2. Enforcement possibilities and power

Civil rights agencies are not confined to investigating or adjudicating the same claims in the same ways as private litigants. Both the substantive law they apply and the remedial tools they wield differ in meaningful respects. On the substantive side, agencies can advance interpretations of civil rights statutes through guidance documents or regulations that broaden the scope of protections beyond what courts might recognize at a given moment.[175] For example, the Department of Education has construed Title IX to impose affirmative duties on universities to prevent sexual harassment[176]—an obligation not easily replicated through private litigation alone. On the remedial side, agencies often enjoy enforcement options unavailable to private actors: They can negotiate systemic settlements,[177] withdraw federal funding,[178] or impose structural reforms that go beyond the individualized relief typically available in court.[179] Not simply duplicating private enforcement, agencies instead shape the content and reach of civil rights law

175. *See, e.g.*, 42 U.S.C. § 2000d-1 (empowering each federal agency distributing federal financial assistance to issue regulations ensuring that no person is subjected to discrimination based on race, color, or national origin); *id.* § 2000e-16(b) (authorizing the EEOC to issue rules, regulations, orders, and instructions as necessary and appropriate to carry out its equal employment opportunity responsibilities for those employed by the federal government).

176. *See, e.g.*, Gersen & Suk, *supra* note 13, at 900-01 (describing how administrative interpretations of Title IX created new requirements for universities); OFF. FOR C.R., U.S. DEP'T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES, at iii (2001), https://perma.cc/XJY7-6YRF ("A critical issue under Title IX is whether the school recognized that sexual harassment has occurred and took prompt and effective action calculated to end the harassment, prevent its recurrence, and, as appropriate, remedy its effects."). *But see* Letter from Kimberly M. Richey, Acting Assistant Sec'y for C.R., U.S. Dep't of Educ., to Educators and Stakeholders 1-2 (Aug. 26, 2020), https://perma.cc/8EX4-N2GU (withdrawing the Department's 2001 Guidance).

177. *See, e.g.*, Rutgers Univ., Nos. 02-24-2122, 02-24-2386 & 02-24-2431 (U.S. Dep't of Educ. Off. for C.R. Dec. 20, 2024) (resolution agreement), https://perma.cc/UJK9-JUHC (describing actionable, institution-wide settlement policy and procedural changes); Victor Valley Union High Sch. Dist., No. 09-14-5003, at 7, 11, 15-16 (U.S. Dep't of Educ. Off. for C.R. Aug. 15, 2022) (resolution agreement), https://perma.cc/9XFP-U74W (establishing system-wide reforms and monitoring and reporting requirements).

178. *See* Johnson, *supra* note 1, at 1297-98.

179. *See, e.g.*, Ann Arbor Pub. Schs., No. 15-24-1184 (U.S. Dep't of Educ. Off. for C.R. Sep. 19, 2024) (resolution agreement), https://perma.cc/ZLG5-KH2J (including "[s]ystemic [r]emedies" such as climate assessments and institutional policy reforms).

through a distinctive set of remedies that can reconfigure institutional practices as well as redress individual harms.[180]

In a variety of circumstances, agencies can investigate and adjudicate civil rights claims that private litigants cannot bring to court. Title VI disparate impact liability is the most prominent example: As *Alexander v. Sandoval* established, agencies cannot create a private right of action for disparate impact liability;[181] they can, however, generally still enforce and adjudicate disparate impact claims on their own.[182] But the same dynamic surrounding agency flexibility runs deeper, as the ability to redefine—to an extent—a rights-creating statute through regulation offers agencies a consistent opportunity to explore the outer bounds of a statute's scope.[183] And agencies' ability to shape the substance of a substantive rights provision through the broader remedial scheme of agency adjudication—and to choose which cases to try fully to enforce and which to settle—may mean that the agency's interpretation need not (necessarily) be tested in court.[184]

The remedial possibilities afforded to agencies are perhaps especially distinct from those a private litigant enjoys outside of the agency context. To start, private litigants, acting on their own, generally have more limited coercive power. They have the value of their specific claims, which might

180. Our focus is a few of the expansionary possibilities, but there are also a variety of situations in which administrative enforcement may be more limited than private litigation. *See, e.g.*, 42 U.S.C. § 2000h-2 (authorizing the government to intervene in equal protection lawsuits when "the Attorney General certifies that the case is of general public importance").

181. 532 U.S. 275, 291 (2001) ("Language in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not.").

182. *See* Johnson, *supra* note 1, at 1309-10. *But see* Louisiana v. U.S. EPA, No. 23-cv-00692, 2024 WL 3904868, at *3 (W.D. La. Aug. 22, 2024) (enjoining the Department of Justice and the EPA from "[e]nforcing Title VI's disparate impact requirements . . . against any entity in . . . Louisiana"); Exec. Order No. 14281, 90 Fed. Reg. 17537, 17537-38 (ordering executive branch agencies to stop enforcing disparate impact liability). As others have noted, however, some of the second Trump Administration's efforts have drawn on disparate impact liability theories. *See, e.g.*, Ralph Richard Banks, *Reassessing Disparate Impact*, STAN. L. SCH.: STAN. CTR. FOR RACIAL JUST. (Oct. 2, 2025), https://perma.cc/MP3M-DUNK ("More recently, the Trump administration has (perhaps unintentionally) invoked the disparate impact approach itself. The administration has done so in furtherance of its suspicion that America's elite universities are discriminating against conservatives in the admission of students and the hiring of faculty.").

183. For an argument that agencies should enjoy greater power in this domain, see Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 139-43 (2005).

184. *See* Johnson, *supra* note 90, at 1369 ("Title VI and Title VIII use administrative, programmatic, and regulatory power to promote civil rights.").

include the possibility of injunctive relief (if the claims are prospective) or punitive damages (if the claims involve potentially egregious violations).[185] But agencies can reach beyond a particular claim. They can, for instance, cut off entire funding streams for a federal funding recipient, using a power the second Trump Administration has wielded particularly dramatically (and almost certainly unlawfully).[186] Sometimes agencies reach beyond specific claims with congressional authorization, as in the context of HUD's potential enforcement of the FHA "even without the presence of an actual victim";[187] other times, their status as repeat players—or funders—offers a de facto means of expanding a sanction or otherwise changing the costs associated with redressing a civil rights violation.[188] The obvious effect is to decouple the value of a claim to the agency from the damages that claim might produce.

Agencies can also incentivize compliance by making it less costly for defendants to remedy a civil rights violation than it would be if the dispute were pursued by private litigants. The inquisitorial character of administrative proceedings often extends through resolution, with agencies working collaboratively with regulated entities to address the underlying problem. Consider, for instance, civil rights violations caused by distributive neglect, such as a city consistently underfunding predominantly Black neighborhoods or a school reducing resources for a disability-related program.[189] In such cases,

185. *See, e.g.*, *Section IX—Private Right of Action & Individual Relief Through Agency Action*, C.R. DIV., U.S. DEP'T JUST.: TITLE VI LEGAL MANUAL, https://perma.cc/VL9M-2VRV ("The most common form of relief sought and obtained through a Title VI private right of action is an injunction ordering a recipient to do or to stop doing something."); *see also* 42 U.S.C. § 1981a (stating that a complainant may recover compensatory and punitive damages in a civil action alleging damages in cases of intentional discrimination in employment).

186. *See, e.g.*, *DOJ, HHS, ED, and GSA Announce Initial Cancelation of Grants and Contracts to Columbia University Worth $400 Million*, U.S. DEP'T EDUC. (Mar. 7, 2025), https://perma.cc/PE6B-XX2G; Starr & Lakier, *supra* note 99, at 18-19; *cf.* City & County of San Francisco v. Trump, 897 F.3d 1225, 1231 (9th Cir. 2018) (holding that "the Executive Branch may not refuse to disperse" federal grants to sanctuary cities and counties "without congressional authorization").

187. Johnson, *supra* note 90, at 1359.

188. *See* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97-103, 139-40 (1974) (introducing the concept of "repeat players" who, due to their frequent interactions and superior resources, have the incentive and ability to "play for rules," and discussing ways in which an "activist agency" might counter otherwise entrenched party advantages, like wealth or knowledge).

189. *See, e.g.*, Letter from Melanie Velez, Reg'l Dir., U.S. Dep't of Educ., to Chris Henson, Interim Dir. of Schs., Metro. Nashville Pub. Schs. (July 13, 2014), https://perma.cc/4BGB-JYPW (summarizing findings that a district's student assignment plans for three counties discriminated against African American students and could result in resegregation); *see also* Letter from Sterling R. Thomas, Reg'l Dir., U.S. Dep't of Educ., to Tim Forson, Superintendent of Schs., St. Johns Cnty. Sch. Dist. (Oct. 21, 2024),
footnote continued on next page

the Department of Education or HUD can pair enforcement with resources like technical assistance that guide the school or city toward what the agency deems compliant under Title VI, the Fair Housing Act, or a disability-related statute.[190] By contrast, in a private lawsuit, the defendant would generally bear the full costs of developing remedial programs on its own.[191] The agency's ability to combine enforcement authority with supportive resources thus both lowers compliance costs and increases the likelihood of meaningful reform.[192]

The scope of administrative agencies' enforcement powers most directly expands the experimental and power functions of enforcement. In both, agency involvement magnifies claims that might otherwise stall: Experimental claims benefit from agencies' capacity to develop new interpretations of civil rights statutes and extend protections into untested domains,[193] while claims based on the agencies' power function depend on the symbolic authority and sanctioning leverage that only the executive branch can provide. By contrast, the subsidy function turns less on how much power an agency has than on the mere fact that it offers a venue with resources for a claimant. Someone who cannot afford to bring a claim in court—whether because of the costs of litigation, the absence of counsel, or the complexity of proof—will turn to HUD or the Department of Education regardless of whether those agencies wield broader investigatory or remedial authority (although they, too, may benefit from the scope of these powers). For these complainants, the agency may function as a last or only refuge.

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https://perma.cc/3KW9-D29R (summarizing findings regarding the unlawful use of restraint and seclusion involving students with disabilities).

190. *See, e.g.*, OFF. FOR C.R., U.S. DEP'T OF EDUC., ENSURING EQUAL ACCESS TO HIGH-QUALITY EDUCATION 8 (rev. 2011), https://perma.cc/W766-KX6N ("OCR provides assistance to enable institutions to come into compliance during the complaint resolution process or during a compliance review."); *see also* U.S. Dep't of Hous. & Urb. Dev., Respondent Obligations in Fair Housing Investigations 3, https://perma.cc/84W7-BZLR ("During the process, the investigator will talk to you about the complainant's request for relief to settle the complaint."). *See generally Office of Technical Assistance (OTA)*, HUD USER, https://perma.cc/WAW7-L3DW (archived Apr. 9, 2026) (describing some of HUD's technical assistance funding).

191. *See, e.g.*, Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 51-52 (2009) (arguing that the Department of Justice should use technical assistance to help "lower[] the costs of adopting reforms" necessary to reduce civil rights violations by local police departments).

192. *See, e.g.*, City of Richmond, FHEO Case Nos. 03-15-0493-6/9/8 et al. 5-13 (Dep't of Hous. & Urb. Dev. July 21, 2016) (conciliation and voluntary compliance agreement) (on file with author) (specifying a variety of remedies, including monitoring to ensure compliance).

193. *See, e.g.*, Kim, *supra* note 82, at 1134-35, 1142 (arguing that the EEOC is better positioned to pursue systemic claims and, despite lacking rulemaking power, can push forward interpretations of antidiscrimination law in contexts in which private claimants might not be able to).

III. The Ends of Civil Rights: Where Claims Belong

Which claims belong where? Thinking in terms of the subsidy, experimental, and power functions that we have described helps to reveal the strengths and weaknesses of different institutional locations for civil rights enforcement and forces us to confront the tradeoffs of executive involvement.

The current Administration's recent cuts to federal civil rights authority[194] appear to hollow out the subsidy function of enforcement but have a lesser effect on experimental efforts and perhaps no effect on power-based ones. To put a fine point on it, the Administration is wielding the administrative power that remains to bring federal agencies and universities to heel on a relatively narrow set of issues, while limiting the overall number of claims administrative agencies address.[195] To the extent we are concerned with unchecked executive authority, then the answer is not to hollow out the administrative state's capacity across the board. Some of the most valuable contributions of agency enforcement lie precisely in the subsidy and experimental functions—providing access to justice for claimants who would otherwise be shut out of courts altogether and offering fora where new meanings of equality can be tested and refined.[196] To dismantle those capacities while leaving intact the executive's ability to exert unilateral power risks producing the worst of all possible worlds: diminished access to justice, stunted innovation, and undiminished potential for abuse.

The power model raises the most serious concerns. Scholars have warned about vesting too much enforcement power in the executive branch.[197] The very same investigatory authority and sanctioning leverage that can help dismantle discrimination can also be repurposed to target vulnerable groups, suppress claims, or redirect enforcement priorities in ways that might undermine equality.[198] Moreover, the necessity of the power model is not what

194. *See* Serfaty, *supra* note 171; *Fact Sheet: President Donald J. Trump Reduces the Federal Bureaucracy*, *supra* note 109.

195. *See, e.g.*, sources cited *supra* note 186; Exec. Order No. 14281, 90 Fed. Reg. 17537 (Apr. 28, 2025) (purporting to end disparate impact liability enforcement).

196. *See supra* Part I.A.2 (discussing how the buildout of HUD's civil rights enforcement arm gave people new ways to assert their rights); *see also* U.S. EEOC, *supra* note 168, at 3-4 ("[This Strategic Enforcement Plan] expands the vulnerable and underserved worker priority . . . and [p]reserves access to the legal system . . . .").

197. *See, e.g.*, Reinert et al., *supra* note 10, at 747-49.

198. *See, e.g.*, Memorandum from U.S. Att'y Gen. to All Federal Agencies 4-8 (July 29, 2025), https://perma.cc/B5AB-WA6N (broadly defining possibly unlawful "DEI" efforts); *Justice Department Establishes Civil Rights Fraud Initiative*, U.S. DEP'T JUST.: OFF. PUB. AFF. (May 19, 2025), https://perma.cc/L9JJ-G96S ("Institutions that take federal money only to allow anti-Semitism and promote divisive DEI policies are putting their access to federal funds at risk." (quoting Pamela Bondi, U.S. Att'y Gen.)).

it once was. National and state-level civil rights organizations have become more sophisticated, and they are capable of mounting systemic challenges to widespread rights violations.[199] Civil rights law has always relied on a plurality of enforcers[200]—individual plaintiffs, nonprofit organizations, state attorneys general, and the federal government. If anything, placing too much weight on the federal executive narrows opportunities for contestation rather than multiplying them. The danger is not only overreach but also overcentralization.[201]

By contrast, aspects of the experimental model should be nurtured, not curtailed. Agencies have long served as laboratories for legal innovation.[202] These efforts expand the civil rights imagination by creating additional fora for advocates to press their claims and articulate new theories of discrimination. Crucially, agency experiments are rarely the last word[203] and remain subject to public participation and judicial review.[204] That contestability tempers the risks of executive innovation, especially if the innovation isn't coupled with draconian possible remedies, while preserving its value. Still, the experimental model is one of the few mechanisms through which civil rights law continues to evolve in an era of judicial retrenchment.[205] When courts narrow available remedies or constrict doctrinal pathways, agencies remain able to test new interpretations of statutes, extend protections into unanticipated contexts, and generate alternative enforcement strategies.[206] This experimental capacity preserves a

199. *See, e.g.*, Nielsen & Albiston, *supra* note 17, at 1605-10 (describing the growth of public interest organizations at the end of the twentieth century); Stacy M. Brown, *Civil Rights Organizations Unite in Response to Government Retaliation*, WASH. INFORMER (Apr. 22, 2025), https://perma.cc/DUB7-CXRL (describing a "declaration of mutual support among dozens of major nonprofit organizations representing millions of people nationwide" to challenge certain forms of possible governmental overreach).

200. *See, e.g.*, Rutherglen, *supra* note 21, at 750 ("[P]rivate and public enforcement have co-existed from the beginning of civil rights law.").

201. *See* Bagenstos & Katz, *supra* note 8, at 19-20.

202. Colleen V. Chien, Essay, *Rigorous Policy Pilots: Experimentation in the Administration of the Law*, 104 IOWA L. REV. 2313, 2334-35 (2019) (describing courts' approval of administrative policy experimentation and how agencies engage in such experimentation).

203. *But see* Gersen & Suk, *supra* note 13, at 908 (describing administrative efforts to enforce Title IX requirements almost entirely outside the courts); Gersen & Gersen, *supra* note 13, at 1-2, 11-12 (same).

204. *See* Chien, *supra* note 202, at 2329-30 (noting that agency policy pilots are subject to judicial review and explaining when they must go through the notice-and-comment process).

205. *See supra* notes 99-100, 126-29, 175-84 and accompanying text.

206. Sometimes these experiments are validated by subsequent judicial decisions. *See, e.g.*, Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65-67 (1986) (discussing EEOC guidelines
footnote continued on next page

measure of dynamism in civil rights law and provides advocates with an institutional forum to press claims that might otherwise be foreclosed, ensuring that the meaning of equality is not necessarily frozen at the limits imposed by the judiciary.

The subsidy model remains perhaps the most indispensable. Subsidization lowers the barriers of cost, expertise, and information that prevent most civil rights claims from ever being filed. By enabling more people to raise civil rights claims, it provides one source of "alarm bells" of the civil rights system, helping to ensure that violations are surfaced in the first place. And unlike in the power model, subsidies need not be concentrated directly within the federal executive. They can be extended through state-level entities or through programs like the Protection and Advocacy for Individuals with Mental Illness program or the Legal Services Corporation.[207] The decline of federal funding for civil legal services in recent decades makes this point all the more urgent.[208] A renewed commitment by legislators and civil rights advocates to subsidization would not only fill that gap but also strengthen civil rights enforcement in a way that enhances efficiency without raising concerns of overreach.

It is also critical to acknowledge what we do not yet know. Despite the centrality of administrative enforcement, there is a striking lack of empirical data about how agencies process civil rights claims, what kinds of cases they

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defining sexual harassment as a form of sex discrimination and concluding that those guidelines "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance" (quoting Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 142 (1976))).

207. *See, e.g.*, *Protection & Advocacy for Individuals with Mental Illness (PAIMI) Program*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., https://perma.cc/UV4B-N44R (last updated Apr. 11, 2024) ("The PAIMI grant program is intended to protect and advocate for the rights of adults with Significant (Serious) Mental Illness (SMI) and children with Significant (Serious) Impairment or Emotional Disturbances (SED) through activities to ensure the enforcement of the Constitution, and Federal and State statutes."); *Civil Legal Aid Funding*, NAT'L LEGAL AID & DEF. ASS'N, https://perma.cc/A44N-XSFG (archived Apr. 9, 2026) ("[The Legal Services Corporation (LSC)] offer[s] grants to organizations that provide legal assistance in non-criminal matters to low-income individuals.").

208. *See* CONG. RSCH. SERV., RL34016, LEGAL SERVICES CORPORATION: BACKGROUND AND FUNDING 5 (2016), https://perma.cc/W9SY-SSTP ("According to data in the LSC's FY2017 budget request, LSC's basic field funding per eligible person, adjusted for inflation, decreased from $7.54 in 2007 to $5.85 in 2016."); *see also* Maria Duvuvei, *White House Budget Proposes Eliminating LSC, Defunding Civil Legal Aid for Millions of Low-Income Americans*, LEGAL SERVS. CORP. (May 30, 2025), https://perma.cc/AS8T-S7JC ("President Trump's budget, released Friday, proposes the elimination of the Legal Services Corporation . . . . If this budget is approved, LSC-funded aid would disappear for everyday Americans facing urgent civil legal problems like evictions, foreclosures, domestic violence, fraud, consumer scams, and predatory or medical debt.").

prioritize, how often they succeed in resolving them, and where they fall short.[209] Without better data, scholars and policymakers are left to speculate about effectiveness. The absence of evidence itself should be alarming: In a system that purports to enforce rights, we should be able to measure success.

Ultimately, not all claims belong in the same place. Power-based enforcement may be better left to civil society and the courts, where adversarial processes and dispersed authority help to facilitate greater accountability. But subsidization and experimentation are areas where the federal government may actually maintain a comparative advantage, and where its involvement might make the greatest difference without necessarily inviting the risks of an overly powerful executive enforcer. Dating back to the Freedmen's Bureau, each of these functions has historically been a key part—to varying degrees—of the administrative state's efforts to enforce civil rights obligations. These functions expand access, broaden the meaning of rights, and keep alive the possibility of progress even in an era of judicial retrenchment. The challenge, then, is not whether to involve the administrative state in civil rights enforcement, but how to do so in a way that enhances equality, fosters innovation, and remains democratically accountable.

Conclusion

Civil rights enforcement has always been a story of institutional pluralism. Courts, legislatures, agencies, and communities have each, in their own ways, shaped the meaning of equality. This multiplicity of enforcers has been essential to the vitality of civil rights by ensuring that no single branch or institution has a monopoly on defining what equality requires. There is pluralism within the institutions, too; none is monolithic, either at a point in time or across time. As we have described, the administrative state is home to different enforcement functions. These functions prioritize different versions of civil rights possibilities. They meter who can access adjudication, set the breadth of executive power, and centralize civil rights enforcement and adjudication in their investigations and resolutions.

Pluralism is not simply a descriptive reality of civil rights enforcement—it is a democratic necessity. By dispersing power across institutions and embedding multiple avenues of redress, we preserve the adaptability, accessibility, and resilience of civil rights protections. At a moment when some pathways are narrowing or under attack, the challenge is not to retreat into a single model of enforcement, but to build new, overlapping, and durable structures capable of advancing justice even in the face of retrenchment.

209. *See supra* note 164 and accompanying text.