

# THE DIGNITY OF EQUALITY LEGISLATION

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## INTRODUCTION

In *Congressional Power to Effect Sex Equality*, Patricia Seith argues that legal and social science commentary on the ratification failure of the Equal Rights Amendment (“ERA”) does not properly account for the legislative gains achieved by the Economic Equity Act (“Equity Act”).<sup>1</sup> In drawing attention to the Equity Act, Seith’s account challenges common explanations of the source of women’s equality gains, particularly the narratives offered by legal commentators who typically focus on the role of the Constitution and the courts.<sup>2</sup> As Seith points out, the conventional account in legal history focuses on the effectuation of a “de facto ERA,” a series of Supreme Court decisions interpreting the Equal Protection Clause, which some claim achieved much of what was sought by the ERA.<sup>3</sup> Without diminishing the gains of the “de facto ERA” or revisiting the failed ERA itself, Seith’s narrative shifts attention to the legislative gains achieved by the Equity Act.<sup>4</sup>

My aim in this response is to connect Seith’s account to a broader discussion about the role of statutes and legislatures in advancing equity and to locate the Equity Act in relation to other civil rights statutes. Seith offers at least three important insights into the capacity of legislative lawmaking to further equity goals. First, Seith’s account shows how Congress can serve as a key site for advancing constitutional norms. As I discuss below, Seith’s insight can be extended further to other civil rights contexts. Civil rights statutes like the Equity Act, the Civil Rights Act of 1964,<sup>5</sup> and the Fair

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\* Professor of Law, Columbia Law School. My title invokes Jeremy Waldron’s defense of legislative lawmaking, *THE DIGNITY OF LEGISLATION* (1999). I am grateful to Chade Severin for excellent research assistance. This response piece is one of three responses written in anticipation of a colloquium on the Economic Equity Act to be held at Harvard Law School on February 21, 2013. The other responses can be read at [www.harvardjlg.com](http://www.harvardjlg.com).

<sup>1</sup> See Patricia A. Seith, *Congressional Power to Effect Sex Equality*, 36 *HARV. J. L. & GENDER* 1 (2012).

<sup>2</sup> *Id.* at 5–6.

<sup>3</sup> See *id.* at 7 (citing CLAUDIA GOLDIN, *UNDERSTANDING THE GENDER GAP: AN ECONOMIC HISTORY OF AMERICAN WOMEN* (1990); ALICE KESSLER-HARRIS, *IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH-CENTURY AMERICA* (2003)) (noting that the conventional narrative understands the “de facto ERA” as one of the key “linchpins of women’s contemporary equality”).

<sup>4</sup> *Id.*

<sup>5</sup> See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (prohibiting discrimination in a range of public and private programs) (codified as amended at 42 U.S.C. § 2000a to 2000h-6 (2010)).

Housing Act of 1968<sup>6</sup> have the potential to advance a more capacious and affirmative conception of equity than can be attained merely through a constitutional lens.<sup>7</sup> The equity norms advanced by these statutes are connected in crucial respects to constitutional norms but are more expansive.

Second, Seith's account allows us to consider the limitations of the antidiscrimination conception in advancing equity. Seith crucially notes that the provisions of the Equity Act sought economic equity and substantive equality, rather than "equality in theory."<sup>8</sup> I show that the Equity Act is not unique among civil rights statutes in moving beyond prohibitions of antidiscrimination to advance equity. As I discuss below, other civil rights statutes—both the paradigmatic civil rights statutes of the 1960s and a newer wave of statutes—do more than prohibit discrimination; they adopt a broader set of tools for advancing inclusion.<sup>9</sup>

Third, Seith reveals differences between the Equity Act and the typical civil rights statute: the Equity Act does not centrally engage courts, and it is not framed in the language of rights. Indeed, the Equity Act may be marginalized in legal commentary for these reasons.<sup>10</sup> I argue that more generally, legal commentary should provide greater discussion of civil rights statutes that do not depend on court enforcement. I point to statutory and regulatory interventions that do not rely on private enforcement in courts, but rather on implementation through legislative and administrative bodies.<sup>11</sup> Seith's account of the Equity Act should encourage legal commentators to expand our conception of law to encompass the full range of legal interventions in courts and in legislatures that seek to promote equality.

In this Article, I discuss these three key points, bringing in examples of both longstanding civil rights statutes and some more recent enactments. The majority of my examples come from efforts to address racial and ethnic equality, but the models extend beyond these examples. Finally, I argue that Seith's account of the Equity Act raises important questions for future exploration by scholars of civil rights law. To best promote equity one must understand the relationship between various modes of societal change: constitutionalism and legislative change; antidiscrimination and substantive equality; and litigation and nonlitigation strategies. These explorations should prove valuable not simply to academic commentators but also to those seeking to effect change in society.

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<sup>6</sup> See Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 81 (codified as amended at 42 U.S.C. § 3604 (2010)) (prohibiting discrimination related to housing).

<sup>7</sup> See *infra* notes 20–28 and accompanying text (discussing these statutes and providing additional examples).

<sup>8</sup> Seith, *supra* note 1, at 7.

<sup>9</sup> See *infra* notes 69–77 and accompanying text (providing examples of such statutes at the federal and state levels).

<sup>10</sup> See Seith, *supra* note 1, at 5 (noting that the Equity Act "has gone virtually unnoticed in legal scholarship and is remarkably absent from contemporary sex equality narratives").

<sup>11</sup> See *infra* notes 87–90 and accompanying text (providing examples).

## LEGISLATING EQUITY

A. *Why Civil Rights Statutes Are Superior*

Seith casts the Equity Act as a realization, at least in part, of the constitutional change sought by the ERA.<sup>12</sup> During the same session in which Congress voted to adopt the ERA, supporters introduced the Women's Equality Act—an earlier version of what would become the Equity Act.<sup>13</sup> Seith frames the Equity Act as accomplishing many of the goals of the ERA's enforcement clause, which would have given Congress the "power to enforce, by appropriate legislation" the equality guarantees of the amendment.<sup>14</sup> Though the ERA was unrealized, through Seith's account one imagines the Equity Act as a kind of *de facto* enforcement of the failed amendment.<sup>15</sup> With this lens Seith situates the Equity Act as an exercise of "popular constitutionalism"—the notion that constitutional guarantees are realized not only by judges and in courts, but also through the claims elected officials and the public make on the Constitution.<sup>16</sup> In my view, however, the Equity's Act chief lesson is not about the power of constitutionalism. Though styled as an implementation of the Constitution, the Equity Act—like other civil rights legislation—shows that legislation can embed a meaning of equality that goes well beyond what the Constitution (at least as implemented by courts) allows. In that sense, the Equity Act may be less an instance of "popular constitutionalism" than an indication of the distinct advantages of legislation.

In this vein, recent work by William Eskridge and John Ferejohn has emphasized the extent to which we live in a "republic of statutes" in which "normative commitments are announced and entrenched *not* through a process of Constitutional amendment or Supreme Court pronouncements but instead through the more gradual process of legislation, administrative implementation, public feedback, and legislative reaffirmation and elaboration."<sup>17</sup> Eskridge and Ferejohn laud the power of "superstatutes," statutes that rival the Constitution in their capacity to shift society and entrench prin-

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<sup>12</sup> See Seith, *supra* note 1, at 12 (stating that the "ERA and the Women's Equality Act were intended to go hand-in-hand").

<sup>13</sup> See *id.* at 12–13 (providing an overview of introduction of the Women's Equality Act).

<sup>14</sup> See H.R.J. Res. 208, 92d Cong., 86 Stat. 1523 (1972); Seith, *supra* note 1, at 11–13 (describing the ERA).

<sup>15</sup> Seith tells us that this was the conception often put forward by supporters of the Act who, upon introducing the Act, cast it as "implementing legislation for the Equal Rights Amendment." Seith, *supra* note 1 at 5, 22, 60 (quoting Rep. Geraldine Ferraro).

<sup>16</sup> See *id.* at 61 & nn.363–64 (citing Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 299 (2001), who describes "popular constitutionalism").

<sup>17</sup> See WILLIAM N. ESKRIDGE JR. & JOHN FEREOHNS, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 14 (2010).

ciples such as nondiscrimination.<sup>18</sup> The Equity Act may not be a “superstatute” on the level of the watershed Civil Rights Act of 1964—a central focus of Eskridge and Ferejohn’s account. As Seith points out, the legislative provisions that constituted the Equity Act are not well known, and unlike the Civil Rights Act of 1964, the Equity Act was actually a set of discrete and often small provisions enacted over a period of fifteen years.<sup>19</sup> Even so, the affirmative changes that the Equity Act made to social and economic laws altered the state’s role with regard to women and family status<sup>20</sup> and promoted women’s citizenship and inclusion far beyond what the Constitution (or any sought constitutional amendment) by its terms might require.<sup>21</sup>

Constitutional provisions like the Equal Protection Clause make generalized commitments to goals of equality. As is extensively discussed in legal commentary, these generalized constitutional commitments are realized by Supreme Court decisions but in narrow terms—advancing a minimalist notion of equality in a Constitution generally averse to affirmative commitments.<sup>22</sup> Legislatures, however, are not limited to courts’ minimalist view of equality and can put forward a thicker notion of equality that responds to specific barriers facing groups in our society. For instance, the Supreme Court held in *Geduldig v. Aiello* that a state’s failure to include pregnancy in its disability program did not constitute intentional discrimination in violation of the Constitution’s Equal Protection clause.<sup>23</sup> Yet Congress enacted the Pregnancy Discrimination Act (“PDA”) of 1978, creating a statutory prohibition against pregnancy discrimination in employment.<sup>24</sup> Similarly, the Supreme Court has interpreted the Constitution to prohibit only actions motivated by intentional discrimination, disallowing claims based solely on a policy’s or practice’s disparate impact on a particular racial group or gen-

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<sup>18</sup> See *id.* at 7 (introducing the notion of “superstatutes” and using the Civil Rights Act of 1964 as an example).

<sup>19</sup> See Seith, *supra* note 1, at 6 (suggesting that the Act was “[l]ikely overlooked because of the Act’s omnibus nature”).

<sup>20</sup> See *id.* (describing the Act as a “fifteen-year span of lawmaking activity in the name of women’s equality”).

<sup>21</sup> See *id.* at 3 (arguing that “even if the ERA had passed, its mandate, as borne out in equal protection doctrine, could not have compelled the proactive revision to law and reconstruction of the legal order that a substantive vision of sex equality ultimately demands”).

<sup>22</sup> See ESKRIDGE & FEREJOHN, *supra* note 17, at 40 (describing the Constitution as generally aimed at securing the right of the individual to live free of government intervention).

<sup>23</sup> See *Geduldig v. Aiello*, 417 U.S. 484, 496–97 (1974).

<sup>24</sup> The Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k)) (amending Title VII of the 1964 Civil Rights Act to forbid sex discrimination on the basis of pregnancy). The PDA responded to the Supreme Court’s decision in *General Electric Co. v. Gilbert* that Title VII’s prohibition of discrimination “on the basis” of sex did not include discrimination on the basis of pregnancy. 429 U.S. 125, 136–38 (1976) (relying on the reasoning of *Geduldig*).

der.<sup>25</sup> In addition, the Court has set a high standard for proving that an action is motivated by intent.<sup>26</sup> And yet, the congressionally enacted Title VII—affirmed by the Supreme Court<sup>27</sup> and expanded by Congress<sup>28</sup>—permits litigants to bring claims for racial and gender discrimination caused by unjustified disparate impacts.<sup>29</sup>

More than expanding our conception of prohibited discrimination, legislation can also require affirmative and proactive measures to promote equality—a counter to our Constitution of essentially negative liberties. One example is the Americans with Disabilities Act, which requires employers and certain government actors not simply to refrain from discrimination, but also to make reasonable accommodations for persons with disabilities.<sup>30</sup> A less familiar example which I have highlighted in my recent work is Title VIII of the Fair Housing Act. The Fair Housing Act (“FHA”) prohibits discrimination related to the provision of housing.<sup>31</sup> But the FHA goes beyond these prohibitions to place positive duties on government actors. Specifically, the FHA requires federal actors and recipients of federal funds to take affirmative measures to promote fair housing in the operation of their programs and activities.<sup>32</sup> One virtue of legislation then, is that as long as the

<sup>25</sup> See *Washington v. Davis*, 426 U.S. 229, 242 (1976) (holding in a case involving claims of racial impact that “[d]isproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution”).

<sup>26</sup> See *Pers. Admin. of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (requiring that to prove intentional discrimination in a gender discrimination case, a decisionmaker must have pursued a “particular course of action at least in part ‘because of’ not merely ‘in spite of,’ its adverse effects upon an identifiable group”).

<sup>27</sup> See *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971) (finding that Title VII prohibits employment practices with a discriminatory effect “unless they are demonstrably a reasonable measure of job performance”).

<sup>28</sup> After the Supreme Court’s decision in *Wards Cove Packing* weakened the disparate impact standard, Congress delineated the appropriate standard of proof in disparate impact cases in the Civil Rights Act of 1991. See Civil Rights Act of 1991, Pub. L. No. 102-166, § 3, 105 Stat. 1071, 1071 (codified at 42 U.S.C. § 2000e-2(k)) (referencing *Wards Cove Packing*); *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 655 (1989) (holding that “a comparison between the percentage of [unskilled] workers who are nonwhite and the percentage of [skilled] workers who are nonwhite” does not make out a prima facie case of disparate impact).

<sup>29</sup> See 42 U.S.C. § 2000e-2(k) (2010) (specifying burden of proof in disparate impact Title VII cases).

<sup>30</sup> See, e.g., Americans with Disabilities Act, Pub. L. No. 101-336, § 102, 104 Stat. 327, 331–32 (codified at 42 U.S.C. § 12112 (2010)) (including “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability” within the definition of “discrimination”).

<sup>31</sup> See Fair Housing Act, Pub. L. No. 90-284, § 804, 82 Stat. 73, 81 (codified as amended at 42 U.S.C. § 3604 (2010)) (prohibiting discrimination on the basis of “race, color, religion, sex, familial status, or national origin” in the sale and rental of housing).

<sup>32</sup> See *id.* at § 808 (codified as amended at 42 U.S.C. § 3608(e)(5) (2010)) (requiring the Secretary of Housing and Urban Development and executive departments and agencies to administer their “programs and activities relating to housing and urban development in a manner affirmatively to further the policies of [fair housing]”). For a discussion of the “affirmatively furthering” requirement, see Olatunde C. A. Johnson, *Beyond the Private Attorney General: Equality Directives in American Law*, 87 N.Y.U. L. REV. 1339, 1387–89 (2012) [hereinafter *Equality Directives*].

Constitution provides Congress the general power to legislate in an area,<sup>33</sup> Congress can go beyond the Constitution's narrow confines to place a more expansive set of equality-promoting duties on government or private actors.

While the Constitution is difficult to amend,<sup>34</sup> legislative solutions can respond flexibly to emerging and discrete barriers to inclusion and equity, including gaps that arise in existing legislative remedies. For instance, over the last several decades, states and localities have responded to a problem not adequately addressed by the Fair Housing Act of 1968: the problem of discrimination against housing applicants based on their source of income.<sup>35</sup> A key source of rental income for housing recipients is housing voucher programs like the federal Section 8 program, which allows applicants to rent housing for a fixed percentage of their income (the local Public Housing Authority pays the difference between 30 percent of the tenant's income and the rent).<sup>36</sup> Voucher programs serve as an important source of housing income for poor families, and vouchers are also a crucial mechanism for promoting racial and economic desegregation because, in theory, they allow recipients to secure housing in low-poverty, integrated neighborhoods.<sup>37</sup>

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<sup>33</sup> The powers necessary to the enactment of provisions of the Equity Act as well as other civil rights statutes include Congress's power to spend and tax, its powers under the Commerce and Necessary and Proper clauses, and its enforcement power under Section 5 of the Fourteenth Amendment, which have been interpreted to allow Congress to enact "prophylactic legislation that proscribes facially constitutional conduct . . ." *Ne. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 727–28 (2003).

<sup>34</sup> See SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG* 21 (2006) (noting that the "U.S. Constitution is the most difficult to amend of any constitution existing in the world today") (citing Donald Lutz, *Toward a Formal Theory of Constitutional Amendment*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 237, 261 (Sanford Levinson ed., 1995); ESKRIDGE & FERREJOHN, *supra* note 17, at 48 (characterizing the U.S. Constitution as "old, short, and hard to amend").

<sup>35</sup> The Fair Housing Act does not explicitly prohibit source-of-income discrimination. See Kinara Flagg, *Mending the Safety Net Through Source of Income Protections: The Nexus Between Antidiscrimination and Social Welfare Law*, 20 COLUM. J. GENDER & L. 201, 216 (2011) ("The FHA does not yet contain a prohibition on [source-of-income] discrimination.").

<sup>36</sup> See 42 U.S.C. § 1437f (2010) (delineating purposes and procedures of low-income housing assistance); 24 C.F.R. § 982.201(a)–(b) (2008) (providing income requirements for Section 8 eligibility); *Section 8 Rental Certificate Program*, U.S. DEP'T HOUS. & URB. DEV., <http://portal.hud.gov/hudportal/HUD?src=/Programdescription/cert8> (last visited Dec. 4, 2012) (describing the contours of the Section 8 program and its eligibility requirements).

<sup>37</sup> See LANCE FREEMAN, *THE IMPACT OF SOURCE OF INCOME LAWS ON VOUCHER UTILIZATION AND LOCATIONAL OUTCOMES I* (2011) (finding "a near consensus . . . on the superiority of vouchers over production subsidies as a means of meeting the nation's affordable housing needs"), available at [http://www.huduser.org/portal/publications/pubasst/freeman\\_impact.html](http://www.huduser.org/portal/publications/pubasst/freeman_impact.html); Margery Austin Turner & Dolores Acevedo-Garcia, *The Benefits of Housing Mobility: A Review of the Research Evidence*, in *KEEPING THE PROMISE: PRESERVING AND ENHANCING HOUSING MOBILITY IN THE SECTION 8 HOUSING CHOICE VOUCHER PROGRAM*, CONFERENCE REPORT OF THE THIRD NATIONAL CONFERENCE ON HOUSING MOBILITY 9, 9 (Philip Tegeler, Mary Cunningham, Margery Austin Turner, eds., 2005) (noting emergence of federal policy that emphasizes housing mobility, through the use of vouchers, to help low-income families "move from poor and predomi-

When landlords refuse to take these vouchers, the project of promoting integration and increasing housing access is frustrated. As a response, thirteen states and the District of Columbia now prohibit discrimination based on an applicant's source of income.<sup>38</sup>

Even more recently, states have begun to respond to two employment practices that may operate to unfairly limit opportunities for qualified workers: employer inquiries into the criminal history of a job applicant and employer use of credit checks. Whether inquiring about criminal conviction violates Title VII of the 1964 Civil Rights Act is not crystal clear; the Equal Employment Opportunity Commission ("EEOC") (the agency charged with implementing Title VII) has issued guidance noting that in some cases employer reliance on criminal history *may* violate Title VII and has recommended a set of best practices for employers.<sup>39</sup> Despite the ambiguity in current Title VII law, several localities have recently adopted provisions limiting inquiry into an individual's criminal history for public employment programs and deferring background checks until later in the hiring process.<sup>40</sup> A number of cities and counties have adopted similar restrictions for private employers and government contractors.<sup>41</sup> Similarly, many states and localities have sought to end the employer practice of conducting credit checks on new hires, a practice that opponents claim can operate to exclude qualified applicants, limit employment of those suffering financial setbacks, invade privacy, and have a disparate impact on minority groups.<sup>42</sup> Here again,

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nantly minority neighborhoods to more affluent and racially integrated communities.”), available at <http://www.prrac.org/pdf/KeepingPromise.pdf>.

<sup>38</sup> See POVERTY AND RACE RESOURCE ACTION COUNCIL, KEEPING THE PROMISE: PRESERVING AND ENHANCING HOUSING MOBILITY IN THE SECTION 8 HOUSING CHOICE VOUCHER PROGRAM app. B (2011), available at [www.prrac.org/pdf/AppendixB.pdf](http://www.prrac.org/pdf/AppendixB.pdf) (listing thirteen states and more than thirty-five localities that ban source of income discrimination).

<sup>39</sup> See U.S. EQUAL EMP'T OPPORTUNITY COMM'N, No. 915.002, ENFORCEMENT GUIDANCE: CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (2012), available at [www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm) (finding that an “employer’s use of an individual’s criminal history in making employment decisions may, in some instances, violate the prohibition against employment discrimination under Title VII” and recommending “best practices for employers who are considering criminal record information when making employment decisions”).

<sup>40</sup> See NAT'L EMP'T L. PROJ., BAN THE BOX: MAJOR U.S. CITIES AND COUNTIES ADOPT FAIR HIRING POLICIES TO REMOVE UNFAIR BARRIERS TO EMPLOYMENT OF PEOPLE WITH CRIMINAL RECORDS (2012), available at <http://www.nelp.org/page/-/SCLP/2011/CityandCountyHiringInitiatives.pdf?nocdn=1> (listing more than forty cities and counties that have “banned the box”).

<sup>41</sup> See *id.* at 30–31 (listing localities that have adopted restrictions on private employers or contractors).

<sup>42</sup> See Ben Peck, *Employment Credit Checks: The Case for Requiring Employers to Use More Accurate and Fair Assessments*, DEMOS, Nov. 5, 2012, <http://www.demos.org/publication/employment-credit-checks-case-requiring-employers-use-more-accurate-and-fair-assessments> (noting, additionally, that “[n]o evidence connects credit problems to greater propensity to commit financial crimes on the job”).

whether the practice is forbidden by Title VII is unclear,<sup>43</sup> and Congress has yet to adopt legislation banning the practice.<sup>44</sup> Yet several states have adopted legislation to restrict the use of credit reports in employment.<sup>45</sup>

By allowing innovation to address emergent problems, and in placing affirmative duties on government actors, civil rights statutes may in many respects be “superior” to the Constitution. Yet one need not claim that seeking constitutional change—what reformers sought in pursuing the ERA—is an unnecessary strategy.<sup>46</sup> While a full discussion of the relative virtues of constitutional law and legislation is beyond the scope of this piece, there is no doubt a complex relationship between constitutional and statutory change. As Eskridge and Ferejohn have noted, the Supreme Court’s interpretations of the Constitution can help “jump-start the political process,” prompting political actors to regulate to promote constitutional goals.<sup>47</sup> The 1964 Civil Rights Act, for instance, implemented much of the constitutional vision ushered in by *Brown v. Board of Education*.<sup>48</sup> Certain provisions—most notably Title VI of the Act, which forbids discrimination by entities that receive federal government funds<sup>49</sup>—were enacted specifically to address the constraints of the courts in implementing school desegregation orders.<sup>50</sup>

This interaction between constitutional and statutory change suggests that even the “failed” ERA likely contributed to the passage of the provisions that constituted the Equity Act. The mobilization effort—the motivated legislators and the informed and active public constituency<sup>51</sup>—that produced the ERA no doubt helped sustain the multi-year process needed to put the Equity Act in place. Seith tells us that the Equity Act tied together multiple

<sup>43</sup> See *Prohibited Practices: Pre-Employment Inquiries and Credit Rating or Economic Status*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, [www.eeoc.gov/laws/practices/inquiries\\_credit.cfm](http://www.eeoc.gov/laws/practices/inquiries_credit.cfm) (providing that “[i]nquiry into an applicant’s current or past assets, liabilities, or credit rating . . . generally should be avoided because they tend to impact more adversely on minorities and females” but noting that “[e]xceptions exist if the employer can show that such information is essential to the particular job in question.”).

<sup>44</sup> See The Equal Employment for All Act, H.R. 321, 112th Cong. (2011).

<sup>45</sup> See Amy Traub, *Ending Unjust Employment Credit Checks*, DEMOS, Feb. 7, 2012, <http://www.demos.org/publication/ending-unjust-employment-credit-checks> (reporting that seven states—Washington, Connecticut, Hawaii, Illinois, California, Maryland, and Oregon—have passed laws prohibiting credit checks in employment).

<sup>46</sup> As to the failure of some Equity Act proposals, Seith notes that “[i]t is impossible to know whether the Equity Act as a whole would have been more successful if the ERA had passed.” Seith, *supra* note 1, at 66.

<sup>47</sup> ESKRIDGE & FEREJOHN, *supra* note 17, at 54.

<sup>48</sup> 347 U.S. 483 (1954).

<sup>49</sup> See Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VI § 601, 78 Stat. 241, 252 (codified at 42 U.S.C. § 2000d (2010)) (prohibiting discrimination based on race, color, or national origin in any “program or activity” receiving “[f]ederal financial assistance”).

<sup>50</sup> See STEPHEN C. HALPERN, ON THE LIMITS OF THE LAW: THE IRONIC LEGACY OF TITLE VI OF THE 1964 CIVIL RIGHTS ACT 5 (1995) (explaining that Title VI was a response to the failure of states and localities to comply with court desegregation orders).

<sup>51</sup> See Seith, *supra* note 1, at 64–69 (describing lawmaking process that led to the adoption of provisions of the Equity Act and the role of constituents).



pieces of legislation. This involved many different committees and subcommittees of Congress and required amendments to multiple provisions of the United States Code—a legislative effort that entailed concerted effort by legislators and stakeholders over a substantial period of time.<sup>52</sup> One might imagine that the rights consciousness and the actual organizing infrastructure gained from the effort to ratify the ERA helped propel and maintain organizing efforts.

In the end, my argument is that even as we recognize the existence of a dialogic relationship between constitutional and legislative change, legislative strategies should be seen as coequal, rather than second-best, routes to equality. Notions of equality will remain thin if only realized in the constitutional context. Seith's account of the Equity Act thus contributes to recent scholarship which urges legal commentators interested in expanding equity and other inclusionary norms to pay heed to statutes and regulations and abandon their predominant focus on constitutionalism.<sup>53</sup>

### B. *From Antidiscrimination to Equity*

A second important point that emerges from Seith's account is the insufficiency of the antidiscrimination route to equity. The standard conception of civil rights legislation is that it promotes equity by advancing a nondiscrimination goal. For instance, the Civil Rights Act of 1964 prohibits discrimination on the basis of race and other categories in public accommodations, federally funded programs, and the employment sector.<sup>54</sup> Similarly, the Equal Pay Act of 1963 prohibits sex-based wage discrimination.<sup>55</sup> The core provisions of the Fair Housing Act of 1968 prohibit discrimination on the basis of race, gender, and other categories in housing.<sup>56</sup> However, the provisions of the Equity Act do not promote equity in this typical sense of nondiscrimination. Rather, the Equity Act sought to reform social insurance, employment, inheritance, pay, leave, and other laws that constrained women's economic status.<sup>57</sup>

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<sup>52</sup> See *id.* at Table 2 (listing major provisions of the Equity Act introduced from the 97th through the 104th Congresses).

<sup>53</sup> See, e.g., ESKRIDGE & FEREJOHN, *supra* note 17, at 10 (arguing that it is “the republic of statutes, implemented by agencies and not the Constitution, implemented by judges, that carries out this deepest role of government”); Johnson, *Equality Directives*, *supra* note 32, at 1374–75 (showing how statutes and their implementing regulations go beyond the constraints of constitutional law in advancing inclusion).

<sup>54</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a to 2000h-6 (2010)).

<sup>55</sup> Equal Pay Act of 1963, Pub. L. No. 88-38, § 3, 77 Stat. 56, 56–57 (codified as amended at 29 U.S.C. § 206(d) (2006)).

<sup>56</sup> See, e.g., Fair Housing Act of 1968, Pub. L. No. 90-284, § 804, 82 Stat. 73, 83 (codified as amended at 42 U.S.C. § 3604 (2010)) (prohibiting, *inter alia*, discrimination in the sale or rental of housing).

<sup>57</sup> See Seith, *supra* note 1, at 24–25 (detailing how the Equity Act was targeted at the multiple economic barriers federal laws and programs placed on women).

Seith frames this distinction between standard civil rights laws and the Equity Act as one of “equality in theory” versus “equality in fact.”<sup>58</sup> But this distinction seems to only partially capture the difference between the approaches. The nondiscrimination provisions of civil rights statutes also aimed to achieve equal results, or “equality in fact.” For example, Title VII of the 1964 Civil Rights Act sought to remedy “the plight of the Negro in our economy”<sup>59</sup> and “open employment opportunities for Negroes in occupations which have been traditionally closed to them.”<sup>60</sup> The Fair Housing Act of 1968 prohibits discrimination with the aim of eliminating ghettos and promoting integration.<sup>61</sup> In addition, the prohibitions against discrimination in our classic civil rights statutes have arguably contributed to equality of results through lawsuits and aggressive administrative enforcement. After the passage of Title VII, for instance, the EEOC interpreted the statute’s broad language to prohibit discriminatory effects and pursued a strategy of targeted enforcement of Title VII to open up particular industries to black workers.<sup>62</sup> Researchers have associated federal enforcement of antidiscrimination law, including Title VII, with improvements in black socio-economic status.<sup>63</sup>

If the Equity Act seems to differ from these other civil rights statutes, it is that the Act implicitly recognizes the limitations of the antidiscrimination approach in achieving equal results. A similar move away from antidiscrimination policies towards broader social policy interventions occurred with regard to race. In the late 1960s, after the passage of major civil rights statutes like the Civil Rights Act of 1964 and the Voting Rights Act of 1965, government actors and advocates promoted a new set of efforts to advance the economic and social status of African Americans. These included affirmative action in government contracting and efforts to battle poverty, fund

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<sup>58</sup> *Id.* at 7.

<sup>59</sup> 110 CONG. REC. 6490 (1964) (remarks of Sen. Humphrey, a sponsor of the Act).

<sup>60</sup> *Id.*

<sup>61</sup> *See, e.g.*, 114 CONG. REC. 3419 (1968) (statement of sponsor Sen. Mondale that the goal of the Fair Housing Act was to promote “an integrated society, a stable society free of the conditions which spawn riots, free of riots themselves”); 114 CONG. REC. 9527 (1968) (statement of Congressman Celler that the Fair Housing Act would eliminate segregated housing and ghettos).

<sup>62</sup> *See* HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 193–97*, 244–47 (1990) (detailing the debate surrounding the EEOC’s use of data collection and reporting to identify and target sectors that underemployed black workers); *id.* at 249–50 (describing how the EEOC, working with civil rights attorneys, developed the “effects test” for Title VII).

<sup>63</sup> *See* John Donohue III & James Heckman, *Continuous Versus Episodic Change: The Impact of Affirmative Action & Civil Rights Policy on the Economic Status of Blacks*, 29 J. ECON. LITERATURE 1603, 1641 (1991) (suggesting that enforcement of federal civil rights law, including Title VII, “was the major contributor to the sustained improvement in black economic status that began in 1965”); *id.* at 1637–38 (noting that “much of the black improvement in the decade following enactment of Title VII of the 1964 Civil Rights Act came in the South” and detailing the role of federal Title VII enforcement activity along with other federal efforts to combat discrimination and promote integration).

urban schools, and invest in urban areas.<sup>64</sup> President Lyndon B. Johnson, in announcing efforts in 1965 to put affirmative action policies in place, famously noted the limitations of simply prohibiting discrimination. To ensure more than “equality as a right and a theory, but equality as a fact and as a result,”<sup>65</sup> Johnson argued, would require addressing the complex web of historical and contemporary conditions that impeded social mobility for blacks.<sup>66</sup> President Johnson’s statements implicitly challenged the liberal presumption that equality is possible without affirmative steps to redress past harm and efforts to design new policies that are inclusive of previously excluded groups.

The move towards affirmative interventions is manifest in the Equity Act, which directly addressed the limitations of New Deal programs in promoting race and gender equity. As many accounts have shown, the New Deal ushered in new responsibilities for the state in ensuring economic security for its citizens, but its purported universalism operated in key respects to the disadvantage of women and African Americans.<sup>67</sup> New Deal programs wrought this harm through explicit exclusions of African Americans and women and by failing to take affirmative steps to remedy existing patterns of inequality.<sup>68</sup> Against this backdrop an antidiscrimination remedy is necessarily limited; the state’s failure to affirmatively attend to inequality risks deepening inequality.

The provisions of the Fair Housing Act of 1968 requiring the federal government to promote housing integration and inclusion in the operation of federal programs reflect this understanding of the limitations of the antidiscrimination remedy.<sup>69</sup> Title VI and prior executive orders prohibited discrimination in federally funded housing programs, but provisions of the Fair Housing Act went further by placing affirmative requirements on federal

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<sup>64</sup> See GRAHAM, *supra* note 62, at 456–57 (describing the shift away from antidiscrimination enforcement towards affirmative action); U. S. COMM’N ON CIVIL RIGHTS, CIVIL RIGHTS: A NATIONAL, NOT A SPECIAL INTEREST 24–28 (June 25, 1981) [hereinafter CIVIL RIGHTS] (recounting how President Lyndon B. Johnson, recognizing the limitations of civil rights law, convened in 1966 a White House Conference on Civil Rights which urged federal efforts to address housing, school and poverty inequities in addition to strengthening civil rights legislation).

<sup>65</sup> President Lyndon B. Johnson, To Fulfill These Rights, Address at Howard University Commencement (June 4, 1965).

<sup>66</sup> *Id.*

<sup>67</sup> See *Seith*, *supra* note 1, at 19–20; IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN AMERICA 43 (2005) (recounting Social Security’s initial exclusion of agricultural and domestic workers and its effect on blacks who disproportionately occupied that sector).

<sup>68</sup> See Olatunde C. A. Johnson, *Stimulus and Civil Rights*, 111 COLUM. L. REV. 154, 162–65 (2011) (revealing the capacity of federal spending programs to create “new programmatic and funding structures that help sustain existing patterns of racial inequality” and showing how such mechanisms operated in federally funded housing and income security programs).

<sup>69</sup> See 42 U.S.C. § 3608(d); 42 U.S.C. § 3608(e)(5).

agencies and grantees.<sup>70</sup> Significantly, these provisions were put into place because drafters recognized that Title VI was limited by failing to require positive action. And drafters sought to engage the federal government in remedying its past complicity in promoting housing segregation in New Deal and post-New Deal programs.<sup>71</sup>

Even as I underscore the limitations of the antidiscrimination paradigm, it is worth probing the connections between antidiscrimination statutes and a broader set of equity-promoting statutes—like the Equity Act—which seek to directly change the very structure of social and economic programs. These connections are manifest in at least two ways. First, antidiscrimination statutes can pave the way for the inclusionary statutes that follow. In the race context, a first wave of antidiscrimination statutes served as a crucial base for securing more affirmative legislation. Title VI of the 1964 Civil Rights Act, which forbids discrimination in federally funded programs, provides an example. The enactment of Title VI was a critical step in the subsequent enactment of the Elementary and Secondary Education Act (“ESEA”), which provided federal funding for schools serving poor children.<sup>72</sup> Specifically, some legislators opposed efforts to give federal funding to schools until the enactment of the Civil Rights Act of 1964’s provisions requiring nondiscrimination in the use of federal funds.<sup>73</sup> The transition from the 1964 Act to the 1965 ESEA also shows an evolution in the ambition of conditioned federal funding. The nondiscrimination provisions of Title VI were a tool crucial in encouraging school districts in the South to desegregate.<sup>74</sup> But ESEA’s model, adopted the subsequent year, placed affirmative requirements on federal funds, granting aid to poor schools to help them fund programs to address the educational problems faced by low-income, disadvantaged children.<sup>75</sup> The ESEA in turn paved the way for federal involvement in promoting education reform through efforts such as the 2002

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<sup>70</sup> See Johnson, *Stimulus and Civil Rights*, *supra* note 68, at 193 & n.192 (recounting how civil rights advocates argued that Title VI and prior executive orders were insufficient in remedying housing discrimination and segregation).

<sup>71</sup> See *id.* at 193–94 (detailing that “drafters of Title VIII sought to correct federal responsibility for creating residential segregation patterns”).

<sup>72</sup> See Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27, 27 (1965) (codified as amended at 20 U.S.C. § 6301 et seq.) (announcing the Act’s purpose “to strengthen and improve educational quality and educational opportunities in the Nation’s elementary and secondary schools”).

<sup>73</sup> See STEPHEN K. BAILEY & EDITH K. MOSHER, *ESEA: THE OFFICE OF EDUCATION ADMINISTERS A LAW* 31(1968) (arguing that the Civil Rights Act of 1964 removed “the race issue . . . from the political calculus of those supporting or attacking increased Federal aid to education”).

<sup>74</sup> GARY ORFIELD, *THE RECONSTRUCTION OF SOUTHERN EDUCATION* 101 (1969) (finding that Title VI and its implementing guidelines “provided the standard operating principles that were to enable a small group of men to desegregate, in four months time, far more districts than the Federal courts had reached in 10 years”).

<sup>75</sup> See BAILEY & MOSHER, *supra* note 73, at 3 (“Title I of ESEA dictated the use of massive Federal funds for the general purpose of upgrading the education of children who were culturally and economically disadvantaged.”); CIVIL RIGHTS, *supra* note 64, at 52–58 (detailing legislative purpose of the ESEA to equalize educational opportunity and

No Child Left Behind Act, which harnessed Title I funding to prompt states to increase achievement of a range of groups including low-income students and students of color.<sup>76</sup> No Child Left Behind's emphasis on conditioned spending as a tool for education reform in turn helped usher in President Obama's 2009 "Race to the Top" program, a competitive grant program to encourage states to engage in educational reform in specific areas.<sup>77</sup>

Second, the antidiscrimination rubric—and its accompanying notions of rights and fairness—has powerful rhetorical force. Notably, organizers of the Equity Act harnessed the rhetoric of "equality" even though the Act's provisions moved beyond constitutional conceptions of equality.<sup>78</sup> Similarly, when Lyndon B. Johnson spoke of the need to secure meaningful opportunity for blacks in 1965, he spoke of the goal of fulfilling "rights."<sup>79</sup> Even as advocates sought to move beyond "rights" in the constitutional sense, these invocations of "equality" and "rights" point to the political and cultural salience of rights discourse. Accordingly, today's advocates interested in notions of equity that extend beyond antidiscrimination would do well to develop a language and framing of equality-related goals that has as much resonance and weight as the language of antidiscrimination and rights. Some commentators advance "citizenship" as a key organizing frame.<sup>80</sup> Susan Sturm in particular has argued for replacing the antidiscrimination frame-

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diminish the underachievement of low-income children who were disproportionately minority).

<sup>76</sup> See Pub. L. No. 107-110, 115 Stat. 1425 (codified as amended in scattered sections of 20 U.S.C.). No Child Left Behind reauthorized Title I of the ESEA and required states to improve student achievement as measured by particular assessments. See *id.* at § 1001(3) (codified at 20 U.S.C. § 6301) (describing Act's goal of "closing the achievement gap between high- and low-performing students, especially the achievement gaps between minority and nonminority students, and between disadvantaged children and their more advantaged peers").

<sup>77</sup> "Race to the Top" is a program established initially as part of the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (279-86) (ARRA, commonly known as the Recovery Act). States must adopt innovative programs and show reforms in "increasing teacher effectiveness and addressing inequities in the distribution of highly qualified teachers; establishing and using a system to track student progress; making progress toward establishing college- and career-ready standards and high quality assessments, and supporting interventions for improving and restructuring failing schools." Johnson, *supra* note 68, at 178; see also ARRA § 14006, 123 Stat. at 283-84; U.S. DEP'T OF EDUC., RACE TO THE TOP PROGRAM EXECUTIVE SUMMARY (2009), available at [www2.ed.gov/programs/racetothetop/executive-summary.pdf](http://www2.ed.gov/programs/racetothetop/executive-summary.pdf).

<sup>78</sup> See, e.g., Seith, *supra* note 1, at 34 (recounting that legislators cast the Economic Equity Act as "critical if we wish[ed] to guarantee equal rights for women under the U.S. Constitution" and as the "instrument by which we will write the next chapter of equality").

<sup>79</sup> Johnson, *supra* note 65.

<sup>80</sup> See Susan Sturm, *The Architecture of Inclusion: Advancing Workplace Equity in Higher Education*, 29 HARV. J.L. & GENDER 247, 249-50 (2006) (arguing that "institutional citizenship" rather than diversity or antidiscrimination should serve as the framework for promoting workplace equity); R.A. Lenhardt, *Understanding the Mark: Race, Stigma and Equality in Context*, 79 N.Y.U. L. REV. 803, 844 (2004) (locating racial harm as harm to "citizenship"—"participation in one's community and government processes").

work with “institutional citizenship” which emphasizes normative goals of structural inclusion, participation, and “creating the conditions enabling people of all races and genders to realize their capabilit[ies] as they understand them.”<sup>81</sup> I have offered a similar conception, arguing that the prohibition of bias is too narrow a goal for equity law and policy.<sup>82</sup> Instead, I suggest that the goals of equity policy should include prohibitions on bias, sharing of public funds, promotion of integration, and furthering inclusion in policymaking and programs. With the goals thus broadened, the language of “full citizenship” and “inclusion” might prove the best candidates for supplanting, or at minimum supplementing, the traditional concept of antidiscrimination.

### C. Implementing Equity

A third point emerges from Seith’s account—one which distinguishes the Equity Act from the standard civil rights statute. The Equity Act constituted a set of direct, legislative changes, rather than creating a cause of action for litigants in court or an enforcement regime for federal agencies. The prototypical civil rights statute prohibits discrimination and allows either private enforcement by litigants or public enforcement by administrative agencies. This is the essential model of the Civil Rights Act of 1964: its most storied provision, Title VII, permits private enforcement by individuals after exhaustion of an administrative complaint process.<sup>83</sup> As another example, the Equal Pay Act of 1963 allows private enforcement in courts or by the Department of Labor.<sup>84</sup> The decision to rely on private and public enforcement reflects legislative choices about how best to implement a statute’s goal.

As recent commentary tells us, the congressional choice most often made in the civil rights context is private litigation—for instance, giving litigants the right to sue under Title VII in order to achieve a workplace free of discrimination.<sup>85</sup> This form of regulation can be effective in achieving a statute’s goals. Litigation to enforce Title VII is credited with increased hir-

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<sup>81</sup> Sturm, *supra* note 80, at 250 (introducing the notion of “institutional citizenship as a justification and goal for diversity initiatives”).

<sup>82</sup> Johnson, *Stimulus and Civil Rights*, *supra* note 68, at 202–03 (discussing notions of citizenship and inclusion in the context of federal spending programs).

<sup>83</sup> See 42 U.S.C. § 2000e-5(f)(1) (2010) (granting individuals the right to bring suit after exhausting claims with the EEOC).

<sup>84</sup> See 29 U.S.C. § 216(b)-(c) (2010).

<sup>85</sup> See SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* 3 (2010) (offering that Congress makes a legislative choice to rely on private enforcement). Farhang’s account is intended to explain how the private plaintiff-driven model became the dominant model for enforcement of federal regulation in the U.S., particularly in the civil rights context, and to argue that this form of enforcement constitutes a species of state regulation. See *id.* at 10–13 (introducing “private statutory enforcement litigation as an important form of state capacity” crucial to understanding “the reach and strength of the American regulatory state”).

ing and promotion of women and racial minorities.<sup>86</sup> And there is evidence to suggest that the threat of litigation leads firms and government organizations to adopt policies that promote employment of women and racial minorities.<sup>87</sup>

Whatever the benefits of a private litigation regime, the Equity Act regulates equity differently—by changing the institutional structures that produce and reproduce inequality. The provisions of the Equity Act do not provide a private right of action for court enforcement, damages, or any remedial scheme. Yet Seith's account allows us to understand these provisions as part of a regime for implementing equity—one no less important than our statutes that implement social change through private litigation.

I am sympathetic to any effort to draw scholarly and advocacy attention to equity-promoting statutes that do not require litigation. In earlier work, I have advocated for a more expansive notion of civil rights that includes statutes, often overlooked, that do not depend on private litigation.<sup>88</sup> For instance, I have written about a statute in the juvenile justice context, known as the Disproportionate Minority Contact (“DMC”) statute, which requires states receiving juvenile justice funds to take steps to reduce disparities in the rates at which minorities come into contact with the juvenile justice system.<sup>89</sup> The statute creates incentives for the juvenile justice system to address racial disparities, promotes federal oversight and technical assistance, and engages private and public stakeholders in devising solutions and best practices.<sup>90</sup> More recently, similar approaches to curb minority overrepresentation in the criminal justice system have been launched at the state level. Several states have adopted legislation requiring state legislatures or agen-

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<sup>86</sup> See Alexandra Kalev & Frank Dobbin, *Enforcement of Civil Rights Law in Private Workplaces: The Effects of Compliance Reviews and Lawsuits Over Time*, 31 LAW & SOC. INQUIRY 855, 883 (2006) (exploring the effect of affirmative action compliance reviews and discrimination lawsuits on the entrance of women and minorities into management positions between 1971 and 2002 and finding that “[b]oth lawsuits and compliance reviews had significant positive effects on the subsequent share of white women, black women and black men in management”).

<sup>87</sup> See FARHANG, *supra* note 85, at 204 (reporting earlier findings that “independent of the effects of actually being sued, the rate of job discrimination litigation in the geographic areas in which organizations do business is a significant factor driving their adoption of policies calculated to increase employment opportunities for women and racial minorities”).

<sup>88</sup> See Olatunde C. A. Johnson, *Disparity Rules*, 107 COLUM. L. REV. 374, 378–79 (2007) (discussing federal juvenile justice statute that conditions federal funds on states taking steps to address racial disparities in the juvenile justice system); Johnson, *Equality Directives*, *supra* note 32, at 1343 (arguing that American civil rights law operates not simply through the private attorney general, but through statutes that “plac[e] positive duties on state actors to promote equality and inclusion”).

<sup>89</sup> See 42 U.S.C. § 5633(a)(22) (2010). For an account of the history of the statute and how it functions, see Johnson, *Disparity Rules*, *supra* note 88, at 407–10.

<sup>90</sup> See Johnson, *Disparity Rules*, *supra* note 88 at 409–16 (describing statute’s goals and requirements).

cies to evaluate the racial impact of pending legislation or sentencing measures and consider race-neutral alternatives.<sup>91</sup>

Much like Seith's account of the Equity Act, these statutes reveal that United States law contains a range of approaches beyond private enforcement for implementing and promoting equity. Legal commentators will benefit from paying attention to these multiple regimes. Acknowledging these multiple regimes allows for a more complete descriptive account of the legal mechanisms that promote equity and ensures that legal and policy stakeholders use a full set of tools to advance important inclusionary goals.

#### CONCLUSION

In sum, Seith contributes to recent scholarly accounts of the capacity of legislation to promote gender, race, and other forms of equality. While Seith's account is fundamentally a recovery of history, the profound normative and forward-looking implications are inescapable. The Constitution, antidiscrimination law, and litigation cannot alone fulfill the goals of the equity project. The men and women who drafted the Equity Act were fully aware of the partial nature of those standard tools. The challenge for all of us, particularly those seeking to promote equity, is to continue to develop legislation that effectively responds to emerging equity problems, and to ensure that we use a broad range of advocacy strategies, including legislative advocacy, to achieve greater inclusion.

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<sup>91</sup> See, e.g., Substitute H.B. 5933, 2008 Gen. Assemb., Reg. Sess. (Conn. 2008), (codified at CONN. GEN. STAT. ANN. § 2-24b (West 2012) (effective June 5, 2008)), available at <http://www.cga.ct.gov/2008/ACT/PA/2008PA-00143-R00HB-05933-PA.htm> (requiring racial impact assessments of proposed legislation concerning criminal justice and sentencing).